**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

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| Case Number | 23WC033047 |
| Case Name | Kyle Cruz v.<br>City of Peoria |
| Consolidated Cases | |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 24IWCC0579 |
| Number of Pages of Decision | 12 |
| Decision Issued By | Carolyn Doherty, Commissioner |

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|---|---|
| Petitioner Attorney | Stephen Kelly |
| Respondent Attorney | Adam Casson |

DATE FILED: 12/2/2024

/s/Carolyn Doherty,Commissioner

Signature

23 WC 33047

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KYLE CRUZ,
Petitioner,

vs. NO: 23 WC 33047

CITY OF PEORIA,
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 issue of 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 an award of 5% loss of use of the left leg and 5 weeks of disfigurement for the right leg. On review, the Commission views the evidence differently and after an analysis of the five factors, increases the permanent partial disability award to 8% loss of use of the left leg and 5% loss of use of the right leg.

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 significant weight on this factor, noting Petitioner testified that his job as a police office is heavy and physical in nature.

Regarding factor (iii), Age, the Commission places significant weight on this factor, noting Petitioner was 27 years old at the time of his injury. As such, the Commission finds Petitioner has a substantial portion of his work-life expectancy ahead of him, during which time he will have to live and work with the pain and discomfort caused by the bullet fragments remaining in his left and right lower legs.

Regarding factor (iv), Earning Capacity, the Commission places nominal weight on this factor, finding Petitioner was able to return to his full duties as a police officer and did not provide any evidence of a loss in earning capacity as a result of the work injury.

Regarding factor (v), Disability, the Commission assigns substantial weight to this factor based on the medical records and Petitioner's testimony.

Regarding the left leg, x-rays showed a larger bullet fragment in the left leg, as well as other bullet shards. The Commission notes that Dr. Kinzinger did not recommend surgery so as to avoid causing additional internal damage to the left lower leg. The Commission also relies on Petitioner's testimony that he currently experiences a burning and poking sensation in the left leg when he works out or runs. Petitioner also testified that it is more difficult to perform daily and work activities because of his left leg injury. Given that the bullet fragments cannot be removed, Petitioner will continue to have ongoing pain in the left leg, making activities and exercise difficult for the rest of his work-life expectancy. Therefore, the Commission finds Petitioner sustained 8% loss of use of the left leg pursuant to Section 8(e)(12).

The Commission finds that the trial award of only disfigurement to the right leg overlooks the medical evidence that the emergency room x-ray confirmed bullet fragments in the right lower leg. Petitioner also testified that he currently experiences an itchy, achy pain where the fragments are located. While Petitioner's left lower leg injury was more significant, the medical evidence and Petitioner's testimony support a finding that Petitioner sustained permanent partial disability to the right leg. Accordingly, the Commission vacates the award of disfigurement and awards permanent partial disability in the amount of 5% loss of use of the right leg pursuant to Section 8(e)(12).

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 concludes Petitioner sustained injuries resulting in 5% loss of use of the right leg and 8% loss of use of the left leg, totaling 27.95 weeks at a PPD rate of $774.33.

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 July 15,2024, 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 $774.33/week for a total of 27.95 weeks

representing 8% loss of use of the left leg and 5% loss of use of the right leg pursuant to Section 8(e)(12) 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.

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

**December 2, 2024**

d: 11/21/24
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 | 23WC033047 |
| Case Name | Kyle Cruz v.<br>City of Peoria |
| Consolidated Cases | |
| Proceeding Type | |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 8 |
| Decision Issued By | Kurt Carlson, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Stephen Kelly |
| Respondent Attorney | Adam Casson |

DATE FILED: 7/15/2024

/s/Kurt Carlson, Arbitrator

Signature

**THE INTEREST RATE FOR THE WEEK OF JULY 9, 2024 5.08%**

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**

**Kyle Cruz** Case # **23** WC **033047**
Employee/Petitioner/ skelly@stephenkellylaw.com

v.

**City of Peoria**
Employer/Respondent/ <ACasson@hgsuw.com

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Peoria**, on **June 20, 2024**. By stipulation, the parties agree:

On the date of accident, **December 10, 2023**, 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 $**67,108.46**, and the average weekly wage was $**1,290.55**.

At the time of injury, Petitioner was **27** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**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 **$774.33**/week for a further period of **10.75** weeks, as provided in Section **8(e)(12)** of the Act, because the injuries sustained caused **5% loss of use of the left leg**.

Respondent shall pay Petitioner the sum of **$774.33**/week for a further period of **5 weeks**, because the injuries alleged by Petitioner caused **5 weeks of disfigurement to the right leg** in accordance with Section **8(c)** of the Illinois Workers' Compensation Act.

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.

*Kurt A. Carlson*
Arbitrator

**July 15, 2024**

**BEFORE THE WORKERS' COMPENSATION COMMISSION OF THE STATE OF ILLINOIS**

| | | |
|---|---|---|
| KYLE CRUZ, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | Case No: 23 WC 033047 |
| | ) | |
| CITY OF PEORIA, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

**DECISION OF THE ARBITRATOR**

**FINDINGS OF FACT**

**I. Alleged Accident and Claim for Compensation**

In December of 2023, Petitioner, Kyle Cruz, was a twenty-seven (27) year-old police officer for Respondent, City of Peoria. (Arb. Tr. p. 7-8). On December 10, 2023, Petitioner was working as a patrol officer with Officer Harr and responded to a call regarding a female having trouble with her husband. (Arb. Tr. p. 9-10). While investigating the scene, a dog ran after Petitioner, and Officer Harr shot the dog two (2) times, resulting in Petitioner sustaining bullet fragment wounds to each leg. (Arb. Tr. p. 10). A tourniquet was placed on Petitioner's left leg and he was immediately taken to OSF Emergency Room via police vehicle. (Arb. Tr. p. 12).

Petitioner filed an Application for Adjustment of Claim on December 14, 2023 alleging injuries to his right and left legs as a result of the December 10, 2023 work accident. (Pet. Ex. 1).

**II. Issues in Dispute at Arbitration**

On February 28, 2024, 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. 4).

**III. Petitioner's Medical Treatment**

On December 10, 2023, Petitioner was seen at OSF St. Francis Medical Center Emergency Department by Dr. Jonathan J. Losen. (Pet. Ex. 2, p. 27). Petitioner reported his left lower leg was hit by a bullet, and he reported a scrape on his right calf as well. *Id.* Petitioner moved all extremities without difficulty, denied any

numbness or tingling, and had normal sensation to all four extremities. (Pet. Ex. 2, p. 28). The tourniquet was removed and no hard signs of bleeding were appreciated. (Pet. Ex. 2, p. 50). Petitioner was found to have two lower leg wounds. (Pet. Ex. 2, p. 55). Slight tenderness was noted on the right leg wound. *Id.* Swelling and tenderness was noted to the medial aspect of the left lower leg. *Id.* Petitioner rated the pain in his right lower leg at one out of ten (1/10) and four out of ten (4/10) in his left lower leg. *Id.* X-rays were performed on Petitioner's lower legs which revealed no acute displaced fracture with an impression of scattered metallic foreign bodies in both lower legs. (Pet. Ex. 2, p. 69). Petitioner was discharged on December 10, 2023 with crutches (Pet. Ex. 2, p. 122, 128).

Petitioner followed up with APRN Casey Kimler at OSF Center on December 13, 2023. At that time, Petitioner reported left lower extremity pain and swelling. An ultrasound was performed on Petitioner's left leg which found no acute DVT in the left lower extremity. Petitioner was advised to begin bearing weight as tolerated on the leg. Petitioner was recommended to try to return to work the following week on light duty. (Pet. Ex. 2, p. 15-16).

Petitioner followed up with Dr. Kinzinger at OSF Orthopedics on January 15, 2024 for an orthopedic evaluation of his left leg injury. Petitioner stated his right leg does not bother him anymore but his left leg is still bothering him a little bit. Dr. Kinzinger placed Petitioner on restricted work activity for six weeks and Petitioner is to follow up as needed. (Pet. Ex. 3, p. 138). Dr. Kinzinger noted Petitioner can weight bear as tolerated, but he still cannot fully run, jump or sprint. (Pet. Ex. 3, p. 138-139, p. 143). Petitioner noted improved function in the left leg. Repeat X-rays of the left tibia and fibula showed a retained bullet fragment, possibly jacketing in the posterior calf in the midline as well as other tiny fragments. (Pet. Ex. 3, p. 140). Dr. Kinzinger did not recommend removal of the bullet and did not believe it should cause Petitioner any trouble since it is not in his joint. (Pet. Ex. 3, p. 138). Petitioner was advised by Dr. Kinzinger to return for a follow up if symptoms worsen or fail to improve. (Pet. Ex. 3, p. 141).

Petitioner had a follow up with OSF Occupational Health on February 26, 2024 and was released to work regular duty without restrictions at that time.

## IV. Petitioner's Testimony at Arbitration

At arbitration, Petitioner testified he is employed as a police officer for the City of Peoria Police Department. (Arb. Tr. p. 7). He was hired by the Respondent approximately two-and-a-half (2 ½) years prior to arbitration. (Arb. Tr. p. 8). Petitioner's current job title is a police officer on patrol. *Id.* Petitioner testified his duties as a patrol officer include responding to several different calls including thefts and murders, and also conducting traffic stops. *Id.* Petitioner testified there is required running at times as part of his job, as well as lifting bodies, jumping fences, climbing slopes and running through different terrain. (Arb. Tr. p. 8-9).

On December 10, 2023, Petitioner was working for the City of Peoria as a patrol officer with Officer Harr and responded to a call involving a female having trouble with her husband. (Arb. Tr. p. 9-10). During the investigation by Petitioner and Officer Harr, the complainant's pit bull came running after Petitioner. (Arb. Tr. p. 10). Petitioner attempted to run away from the dog when Officer Harr shot the dog two times, resulting in Petitioner sustaining two bullet fragment wounds to each calf. *Id.* Petitioner testified one bullet fragment went into his left calf in the front and never exited the back. (Arb. Tr. p. 11). The other fragment went directly in the front of his right leg. *Id.*

After the injury, Petitioner testified he noticed his left leg was in an extreme amount of pain when he attempted to walk, and his left leg was bleeding. (Arb. Tr. p. 11). A tourniquet was placed on Petitioner's left

leg due the amount of blood coming out of his leg. (Arb. Tr. p. 12). He was immediately transported to OSF Emergency Room via police vehicle. *Id.* The tourniquet was removed at the hospital, an examination was performed, and x-rays of both the right and left leg were taken. (Arb. Tr. p. 13). At that time, it was noted that Petitioner had noticeable swelling to the left leg. *Id.* Petitioner testified that, at that time, medical personnel at OSF Emergency Room took him off work. *Id.* Petitioner testified that after he left the hospital, he couldn't use his left leg at all. He couldn't move his foot up or down and he was on crutches for several days. (Arb. Tr. p. 13-14).

Petitioner testified he was off work for approximately one week as a result of his injuries. (Arb. Tr. p. 14-15). Petitioner then went to a light duty position after a visit to OSF Occupational Health on December 14, 2023. (Abr. Tr. p. 15). He returned to OSF Occupational Health on December 18, 2023 when the doctor referred the Petitioner to Dr. Kinzinger at OSF Orthopedics. (Arb. Tr. p. 16).

Petitioner testified he saw Dr. Kinzinger on January 15, 2024. (Arb. Tr. p. 16). At that appointment, Petitioner stated he was still using a cane and he was still on light duty. (Arb. Tr. p. 17). Petitioner testified that Dr. Kinzinger did not recommend any type of surgery to either the right or left leg at that time and told him to come back if he was having any more pain in the legs. *Id.* Petitioner testified there are still multiple bullet fragments in his left lower leg towards the back of the calf and fragments in his right leg. (Arb. Tr. p. 17-18). Petitioner testified Dr. Kinzinger indicated if Petitioner was having any more major pain, Dr. Kinzinger would take another look at his left leg. (Arb. Tr. p. 18).

Petitioner testified he had a follow up appointment at OSF Occupational Health on February 26, 2024 and returned to unrestricted duty at that time. (Arb. Tr. p. 19-20). Petitioner was released to return to work with no restrictions on February 26, 2024 and has been able to do his full unrestricted duties as a police officer since that time. (Arb. Tr. p. 20). Petitioner testified he has not been back to a doctor for these injuries since his return to full duty. (Arb. Tr. p. 21).

At the date of arbitration, Petitioner testified his right lower leg still hurts a little bit and it feels like an itchy and achy pain where the injury occurred. (Arb. Tr. p. 22). Petitioner further testified the injury to his right leg has not restricted him and he is still able do his work. *Id.* When his right leg was examined at arbitration, the arbitrator noted a scar approximately the size of a cigarette burn just below the right knee cap. (Arb. Tr. p. 22-23). When Petitioner's left leg was examined, the arbitrator noted a scar on the medial side of the lower left calf approximately the size of a pencil eraser. (Arb. Tr. p. 23-24). When asked what he notices about his left leg at arbitration, Petitioner testified he has more of a straining and aching feeling in his left leg than his right leg, and feels it more specifically when he is running and exercising. (Arb. Tr. p. 25). Petitioner acknowledged he has no further doctor's appointments scheduled and he has been able to perform his normal police work. (Arb. Tr. p. 25-26).

On cross examination, Petitioner testified that his right leg still hurts a little bit when he is doing activities and described the pain as having an itchy or achy feel to it. (Arb. Tr. p. 27). Petitioner confirmed treatment at OSF Occupational Health on December 14, 2023. (Arb. Tr. p. 27-28). Petitioner further acknowledged at his follow up appointment on December 14, 2023, he denied any pain in his right leg or his lower left leg. (Arb. Tr. p. 28). Petitioner testified he had full weight-bearing on his left leg with some residual pain and swelling at his January 15, 2024 appointment with Dr. Kinzinger. (Arb. Tr. p. 29). At that time, Petitioner reported his right leg did not bother him anymore and he had improved function in his left leg. (Arb. Tr. p. 29-30).

On cross examination, Petitioner acknowledged he has been able to perform his full unrestricted job duties since February 26, 2024. (Arb. Tr. p. 31). He further acknowledged that being able to perform his full unrestricted job duties benefits himself, his fellow officers and for the general public. (Arb. Tr. p. 31-32). Petitioner acknowledged if the pain in his right or left leg impacted his ability to perform his job duties, he would report it. (Arb. Tr. p. 32). Petitioner has not had any further instances of more pain in his left or right leg that have impacted his ability to perform his job duties since February 26, 2024. *Id.*

When asked how his left calf feels while exercising, Petitioner testified he notices a burning or poking sensation, and has stopped exercising to not push the sensation any further. (Arb. Tr. p. 35).

## 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 December 10, 2023 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 twenty-seven (27) at the time of the December 10, 2023 accident. The Arbitrator places greater weight on this factor, with the understanding that injuries generally heal more completely when sustained at a younger age.

(iv) Fourth, with regard to Petitioner's future earning capacity, the Arbitrator notes to this factor there was no evidence of loss of future earning capacity. Accordingly, the Arbitrator gives no weight.

(v) Lastly, with regard to evidence of disability corroborated by the treating medical records, the Arbitrator notes the medical records in evidence establish Petitioner sustained bullet fragment wounds in both lower legs.

Petitioner was first seen at OSF St. Francis Medical Center Emergency Department by Dr. Jonathan J. Losen on December 10, 2023. (Pet. Ex. 2, p. 27). Petitioner reported his left lower leg was hit by a bullet, and he reported a scrape on his right calf as well. (Pet Ex. 2, p. 55). Petitioner rated the pain in his right lower leg at one out of ten (1/10) and four out of ten (4/10) in his left lower leg. *Id.* X-rays were performed on Petitioner's lower legs which revealed no acute displaced fracture with an impression of scattered metallic foreign bodies in both lower legs. (Pet. Ex. 2, p. 69). Petitioner was discharged on December 10, 2023 with crutches (Pet. Ex. 2, p. 122, 128).

Petitioner had a follow up appointment with APRN Casey Kimler at OSF Center on December 13, 2023. At that time, Petitioner reported left lower extremity pain and swelling. An ultrasound was performed on Petitioner's left leg which found no acute DVT in the left lower extremity. Petitioner was advised to begin bearing weight as tolerated on the leg. Petitioner was recommended to try to return to work the following week on light duty. (Pet. Ex. 2, p. 15-16).

Petitioner testified he had follow up appointments at OSF Occupational Health on December 14, 2023 and December 18, 2023. (Arb. Tr. p. 15). At his appointment on December 14, 2023, Petitioner denied any pain in his right leg or his lower left leg. (Arb. Tr. p. 28).

Petitioner followed up with Dr. Kinzinger at OSF Orthopedics on January 15, 2024. Petitioner stated his right leg does not bother him anymore but his left leg is still bothering him a little bit. Dr. Kinzinger placed Petitioner on restricted work activity for six weeks and Petitioner is to follow up as needed. (Pet. Ex. 3, p. 138). Dr. Kinzinger noted Petitioner can weight bear as tolerated, but he still cannot fully run, jump or sprint. (Pet. Ex. 3, p. 138-139, p. 143). Petitioner noted improved function in the left leg. *Id.* Dr. Kinzinger did not recommend removal of the bullet and did not believe it should cause Petitioner any trouble since it is not in his joint. (Pet. Ex. 3, p. 138). Petitioner was advised by Dr. Kinzinger to return for a follow up if symptoms worsen or fail to improve. (Pet. Ex. 3, p. 141).

Petitioner had a follow up with OSF Occupational Health on February 26, 2024. (Arb. Tr. p. 20). At that time, he was released to work regular duty without restrictions. *Id.*

The Arbitrator finds it significant Petitioner returned to full unrestricted duty, and testified he has been able to perform his full job duties and had not returned for any further treatment since February 26, 2024. (Arb. Tr. p. 32).

Based on the above factors, and the record taken as a whole, the Arbitrator finds Petitioner sustained permanent partial disability to the extent of 5% loss of use of the left leg, pursuant to §8(e)(12) of the Act. Respondent shall pay Petitioner the sum of $774.33 per week for a further period of 10.75 weeks, totaling $8,324.05.

Based on the foregoing, the Arbitrator finds Petitioner did not sustain permanent partial disability to the right leg in accordance with Section 8.1b factors. However, based on the evaluation of the scar below the right knee cap on Petitioner's right leg, the Arbitrator finds Petitioner is entitled to 5 weeks of disfigurement.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 20WC003160 |
| Case Name | Sharine Davis v.<br>Cornerstone, Inc. |
| Consolidated Cases | |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 24IWCC0580 |
| Number of Pages of Decision | 17 |
| Decision Issued By | Raychel Wesley, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Susan Fransen |
| Respondent Attorney | Lloyd McCumber |

DATE FILED: 12/3/2024

/s/Raychel Wesley,Commissioner

Signature

STATE OF ILLINOIS )
) SS.
COUNTY OF WILL )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SHARINE DAVIS,

Petitioner,

vs. NO: 20 WC 03160

CORNERSTONE, 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 whether Petitioner's low back, right knee, and right ankle conditions are causally related to her January 28, 2020 work accident, entitlement to Temporary Total Disability benefits, entitlement to medical expenses, and the nature and extent of any permanent disability, and being advised of the facts and law, amends the Decision of the Arbitrator as stated below, but otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

CONCLUSIONS OF LAW

I. Temporary Total Disability

The Arbitrator awarded Temporary Total Disability ("TTD") benefits from January 29, 2020 through January 17, 2022. The Commission reaches the same conclusion. We write separately to address Respondent's argument regarding Petitioner's catering earnings.

On the Request for Hearing, Petitioner alleged she is entitled to TTD benefits as of January 29, 2020. ArbX2. The Commission observes this corresponds to the off work authorization provided at Respondent's company clinic, MedWorks, on the date of accident. PX1. The next day, January 29, 2020, Petitioner was evaluated by Dr. Eugene Lipov through Illinois Orthopedic

Network ("ION"); Dr. Lipov ordered further diagnostic workup, placed Petitioner in a walking boot, prescribed medications as well as physical therapy, and directed Petitioner to remain off work. PX5. Petitioner thereafter remained under the care of Dr. Lipov as well as Russell Wudel, PA-C, and Dr. Thomas Poepping through ION; the record reflects Petitioner's treating physicians continued to either authorize her off work or impose work restrictions. PX5. Petitioner testified she provided the restrictions to Respondent and was advised no accommodated work was available. T. 31. Petitioner did not return to full-time regular employment until January 18, 2022, when she started at Trinity Services. T. 40.

The Commission's review of Respondent's TTD payment ledger reveals it was not until March 2, 2020 that Respondent initiated TTD payments; on that date, Respondent issued a check for $655.98 covering January 29, 2020 through February 11, 2020. RX5. An additional two checks were issued on March 18, 2020, and Petitioner's TTD benefits were ultimately brought current on March 24, 2020. RX5. The ledger reflects TTD benefits were paid on a bi-weekly basis until June 19, 2020; following the June 19, 2020 benefit check, there is a nearly four-week gap until Respondent issued the next check on July 16, 2020. RX5. The ledger reflects bi-weekly payments until September 10, 2020, when Respondent terminated Petitioner's workers' compensation benefits based on Dr. Hythem Shadid's §12 report. RX5.

Petitioner testified the non-payment of her TTD benefits in summer 2020 caused significant financial stress such that she decided to start a catering business. T. 69. Petitioner explained she had cooked for friends' gatherings as a hobby in the past; given her lack of TTD income, she felt catering could ease her financial difficulties: "Seeing that I had no income, it was a way you could generate income selling food." T. 70. Petitioner filed an LLC for the catering business on July 22, 2020 but explained it was not an immediate income generator: "It takes a while to get going. I am still not generating income necessarily from the food business but my name is getting out there and I am getting more recommendations." T. 42. Petitioner did not have her first booking until August 8, 2020. T. 74.

On Review, Respondent argues Petitioner's catering earnings either negate her entitlement to TTD benefits entirely or should be credited against Respondent's TTD liability. We disagree. The Commission emphasizes it is well established that earning occasional wages does not defeat a TTD claim. *See Freeman United Coal Mining Co. v. Industrial Commission*, 318 Ill. App. 3d 170, 179 (5th Dist. 2000). Our review of the evidence reveals Petitioner's catering sales were intermittent and inconsistent and therefore meet the definition of occasional wages. Petitioner offered into evidence three pages of receipts from her catering business. PX17. These receipts, which are poor-quality copies of entries that are, for the most part, undated, demonstrate Petitioner had only 12 sales. Petitioner's tax returns[1] further demonstrate her catering business generated only occasional sales and, notably, in 2021, the costs and expenses for the catering business exceeded her gross sales by nearly $12,350. PX18, RX6.

[1] The Commission observes protected personal identity information is unredacted from both Petitioner's Exhibit 18 and Respondent's Exhibit 6. The Commission cautions Counsel to adhere to Supreme Court Rule 138. *Ill. S. Ct. R. 138* (eff. Jan. 1, 2018).

The Commission concludes Petitioner's sporadic catering earnings do not affect her entitlement to TTD benefits. The Commission finds Petitioner entitled to TTD benefits from January 29, 2020 through January 17, 2022.

II. Correction

The Commission corrects the Order to reflect Petitioner's permanent partial disability benefit rate is $295.20.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 1, 2023, as amended above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $328.00 per week for a period of 102 3/7 weeks, representing January 29, 2020 through January 17, 2022, 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 $27,992.02 for medical expenses as provided in §8(a), subject to §8.2 of the Act. Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in §8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $295.20 per week for a period of 25 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 5% loss of use of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $295.20 per week for a period of 10.75 weeks, as provided in §8(e)12 of the Act, for the reason that the injuries sustained caused the 5% loss of use of the right leg.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $295.20 per week for a period of 8.35 weeks, as provided in §8(e)11 of the Act, for the reason that the injuries sustained caused the 5% loss of use of the right foot.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $65,200.00. 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.

**December 3, 2024**

/s/ *Raychel A. Wesley*

RAW/mck

O: 10/9/24

43

/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 20WC003160 |
| Case Name | Sharine Davis v. Cornerstone, Inc. |
| Consolidated Cases | |
| Proceeding Type | |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 12 |
| Decision Issued By | Jessica Hegarty, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Susan Fransen |
| Respondent Attorney | Lloyd McCumber |

DATE FILED: 12/1/2023

**THE INTEREST RATE FOR THE WEEK OF NOVEMBER 28, 2023 5.24%**

/s/ Jessica Hegarty, Arbitrator

Signature

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

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

**ILLINOIS WORKERS' COMPENSATION COMMISSION**
**ARBITRATION DECISION**

**Sharine Davis**
Employee/Petitioner

v.

**Cornerstone, Inc.**
Employer/Respondent

Case # **20** WC **003160**

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 **Jessica Hegarty**, Arbitrator of the Commission, in the city of **Kankakee and Joliet**, on **September 1, 2023 and October 5, 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 **January 28, 2020**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**25,584.00**; the average weekly wage was $**492.00**.

On the date of accident, Petitioner was **37** 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 $**10,542.60** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**10,542.60**.

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

**ORDER**

***Medical Benefits -*** Respondent is liable for reasonable and necessary medical bills in the amount of **$27,992.02**, pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given credit for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers regarding the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

**TTD** - Respondent shall pay Petitioner temporary total disability benefits of $328.00 per week for **102 and 3/7 weeks** commencing 1/29/2020 through 1/17/2022, as provided in Section 8(b) of the Act.

***Permanency:***
***Back:*** Respondent shall pay Petitioner permanent partial disability benefits of $**295.20/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

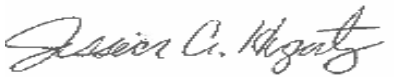
**Knee/ Leg**: Respondent shall pay Petitioner permanent partial disability benefits of **$292.20/week for 10.75 weeks**, because the injuries sustained caused the **5% loss of the right knee/leg**, as provided in Section 8(e) of the Act.

**Foot/Ankle**: Respondent shall pay Petitioner permanent partial disability benefits **of $292.20/week for 8.35 weeks,** because the injuries sustained caused the **5% loss of the right foot/ankle**, as provided in Section 8(e) of the Act.

***Penalties***
The Arbitrator declines to award penalties in this case.

**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 1, 2023

Signature of Arbitrator

## ADDENDUM TO THE DECISION OF THE ARBITRATOR

On January 28, 2020, Petitioner was employed by Respondent as a caregiver for adults with special needs and cognitive disorders. Petitioner had obtained certificates in "ADA" therapy and safety care prior to being hired by Respondent.

Petitioner testified that on the accident date she was in good physical condition with no problems related to her knees, right foot, right ankle, or back. She acknowledged a prior work-related injury to her back at her previous job while helping to lift a 300-pound patient. Her treatment consisted of one visit to the hospital where a shot was administered to her back and a prescription for pain medication was administered before she was released to full-duty work.

Regarding her accident on January 28, 2020, Petitioner was escorting a group of clients to the cafeteria when she slipped on a substance on the floor and fell. According to her testimony, Petitioner fell in a "James Brown" position, one leg went out, one leg went down, her back went into a back bend, and she smacked her head on the floor. She landed on her right knee/foot/ankle and kind of blacked out. Petitioner felt pain and swelling in her knees and a headache immediately following her accident.

Petitioner presented to Medworks Occupational Health (herein, "Medworks") with a history of a slip and fall accident on a wet floor at work earlier that day. (Petitioner's Exhibit, "PX" 1 at 5-6). Petitioner reportedly fell backward down on her right knee "in a split" and struck the left side of her back. She complained of injuries to her back, buttocks, right knee, and ankle. (Id.). Petitioner was diagnosed with a right knee sprain, lower back pain, left upper back pain, and right ankle pain. She was instructed to wear a knee brace and was taken off work until her follow-up appointment in two days. (Id.)

On January 29, 2020, Petitioner presented to Illinois Orthopedic Network (herein "ION") where Dr. Eugene Lipov noted a history of a work-related slip and fall accident the day before when Petitioner fell backward landing on her back, hitting the back of her head. (PX 5). Petitioner reportedly felt immediate pain in her right ankle, right knee, lower back, mid-back, and the back of her head. X-rays of her left knee were unremarkable and x-rays of the right ankle were inconclusive. Dr. Lipov ordered a right ankle MRI, placed Petitioner in a walking boot for her right ankle, and recommended a course of physical therapy. Petitioner was instructed to avoid bright lights, loud sounds, and remain off of work. Dr. Lipov issued prescriptions for Celebrex, Cyclobenzaprine, Lidopril pain patches, and told Petitioner to follow up with her primary care provider regarding her elevated blood pressure. (Id.)

On February 6, 2020, Petitioner underwent an MRI of her right ankle which demonstrated tendinosis, peri-tendinitis, a plantar calcaneal spur, and tibiotalar and subtalar mild synovial effusion. (Id.).

On February 12, 2020, Petitioner presented to the Pain & Spine Institute where a physician's assistant ("PA") Russel Wudel, noted her ongoing complaints of lower back pain that radiated down Petitioner's bilateral buttock. Petitioner was instructed to continue physical therapy and remain off work. Petitioner had a tele visit with Russell Wudel on May 13, 2020, due to COVID-19, at which time she reported severe pain in her right knee. An MRI was ordered. (Id.).

On May 26, 2020, Petitioner underwent a right knee MRI which demonstrated mild synovial effusion, degenerative derangement of the posterior horn of the medial meniscus, Grade 1 chondromalacia patellae of the patellar articular facets, osteochondral injury at the femoral intercondylar sulcus, and tendinosis. (PX 9). On June 10, 2020, Petitioner followed up with PA Wudel via a tele visit, at which time she reported improvement in her right ankle and lower back pain although her right knee symptoms persisted. PA Wudel noted the recent right knee MRI showed mild degenerative changes. Petitioner was kept off of work and instructed to continue with physical therapy. A right knee injection was ordered. Return to work was discussed although Petitioner reported there was no light-duty work available. (Id.).

On August 17, 2020, Petitioner returned to ION where Dr. Thomas Poepping noted an accident history consistent with Petitioner's testimony. Petitioner reported bilateral anterior knee pain. Exam of the right and left knee showed tenderness over the patellar tendon and anterolateral trochlea. Dr. Poepping diagnosed Petitioner with right knee chondromalacia and right knee patellar tendinosis. An injection was again discussed pending the upcoming IME. Petitioner was returned to light duty work. (Id.).

On September 1, 2020, Dr. Poepping noted Petitioner developed acute bilateral knee pain due to her work-related accident. The doctor noted she underwent conservative treatment and was not experiencing pain that day. Dr. Poepping noted that Petitioner was not interested in cortisone injections. He recommended that she return to work, full duty, on a trial basis and could return for treatment on an as-needed basis. (Id.)

On September 9, 2020, Petitioner underwent an independent medical exam at Respondent's request with Dr. Hythem Shadid. (RX 1). Dr. Shadid conducted a records review and examined Petitioner. The doctor opined that Petitioner sustained temporary injuries to her right knee, right ankle, and lower back which had resolved. (Id.) Dr. Shadid found no injuries to Petitoner's right knee or the lower back. He further stated that Petitioner's ankle was pain-free.

Petitioner underwent a course of physical therapy, consisting of 24 sessions between February 4, 2020, and July 21, 2020, at Relive Physical Therapy. (PX 3). The therapy focused on Petitioner's lower back, right knee, right ankle, and initially her bilateral trapezius region. (Id.).

On December 2, 2020, Dr. Larry Najera from Physicians Plus-Joliet, noted that Petitioner presented with complaints of low back pain that radiated down both legs, following a work accident on January 28, 2020. (PX 11). After examination and review of all diagnostic testing, Petitioner was diagnosed with a lumbar sprain, lumbar spondylosis, and lumbosacral intervertebral disc degeneration. An MRI was ordered as well as therapy with Dr. Cohen. Cyclobenzaprine, Tramadol, and Lidopro topical cream were prescribed. Dr. Najera opined that Petitioner's current conditions were caused or aggravated by the work accident of January 28, 2020. (Id.).

On January 6, 2021, Petitioner followed up with Dr. Najera and reported her therapy, home exercises, and medications were helping somewhat although she still had considerable back pain that radiated to her lower extremities. (Id.). Dr. Najera reviewed the MRI of Petitioner's right knee noting degeneration of the medial meniscus and chondromalacia patella. He also reviewed MRI of the right ankle which showed Achilles tendinosis, no tears. Lastly, the doctor reviewed MRI of Petitioner's lumbar spine noting multilevel spondylosis and a 2 mm herniation with an annular fissure at L5-S1 causing bilateral neuroforaminal stenosis. The doctor noted the lumbar MRI findings may be contributing to Petitioner's ongoing symptoms and if so, may be causally related to and/or exacerbated by the work accident. He recommended an EMG of Petitioner's bilateral lower extremities. (Id.).

On January 20, 2021, Dr. Najera performed EMG testing of Petitioner's bilateral lower extremities that showed bilateral L5-S1 radiculopathy. Dr. Najera recommended an L5-S1 steroid injection. (Id.).

On March 17, 2021, Dr. Najera noted the L5-S1 injections had yet to be authorized. (Id.) Petitioner complained of persistent back pain at a 7 out of 10 with intermittent radiating pain down both legs which increased with bending, lifting, standing, and traversing stairs. The doctor reiterated that the lumbar MRI he reviewed showed multilevel spondylosis and a 2 mm herniation and annular fissure at L5-S1causing bilateral foraminal stenosis. Further, Dr. Najera noted the MRI of Petitioner's right knee showed degeneration of the medial meniscus, and chondromalacia patella while the MRI of the right ankle showed Achilles tendinosis. The doctor noted the following diagnoses: lumbar sprain, lumbar spondylosis, lumbosacral intervertebral disc degeneration, lumbar disc herniation, lumbar radiculopathy, and lumbar disc annular tear. (Id.)

Petitioner never underwent injections to her right knee or lumbar spine as these were never approved.

On May 20, 2021, Petitioner underwent an IME at Respondent's request with Dr. Kern Singh at Midwest Orthopedics at Rush. (RX 2). Petitioner complained of low back pain at a 9/10 and bilateral knee pain. Dr. Singh noted a history of injury to multiple body parts after a work-related slip and fall when she reportedly did the splits. (Id.). The doctor reviewed radiographic studies noting MRI of the lumbar spine from December 14, 2020, showed decreased disk signal intensity at L5-S1 without height loss along with minimal stenosis. (Id.). The lumbar spine x-rays from February 20, 2020, showed decreased disk space collapse at L5-S1. The doctor reviewed the EMG from January 29, 2021, noting normal findings and no radiculopathy. Dr. Singh opined that Petitioner sustained soft tissue muscular strain of the lumbar spine, which has resolved and is causally connected to the January 28, 2020, work accident. (Id.). Dr. Singh noted Petitioner presented with normal neurological findings, no significant stenosis on MRI, and a negative EMG of the bilateral lower extremities. (Id.) The doctor opined that Petitioner was at maximum medical improvement and could return to work with no restrictions. (Id.)

On August 12, 2021, Petitioner presented to Aunt Martha's Health Center (herein "AMHC") where she reported a history of bilateral knee pain and lumbar stenosis. Petitioner followed up at AMHC on September 21, 2021, when she reported pain down her right side following a fall. (PX 15). Petitioner reported a history of back and right knee pain and requested a prescription for a knee brace. (Id.)

According to her testimony, Petitioner also started having migraines, confusion, and memory issues after her work accident. She was prescribed Tramadol and after a couple of weeks, her migraines subsided. According to her testimony, she continues to experience confusion. (TX at 25-27).

Petitioner further testified that after her benefits were terminated, her right ankle and knee started to feel better although swelling in her right foot/ankle/knee persisted necessitating continued use of her knee brace. Petitioner wore the Cam boot on her right foot for approximately 6-8 weeks following the accident. (Id., 35-36).

While there were improvements to Petitioner's knee, foot, and ankle following the IME, Petitioner testified her back remained symptomatic. Her migraines and confusion also improved. (Id., 37).

Petitioner testified she was never released back to full-duty work by Dr. Najera and underwent no further treatment after March 2021. (Id., 38-39). Petitioner did not resume work until January 18, 2022, when she was hired at Trinity Services as a receptionist and transitioned later to the position of an independent living coach. (Id., 40).

On July 22, 2020, Petitioner started her own catering business, Sides by Shay Shamar, in an effort to generate income. She also started a midnight bingo business. When Petitioner stopped receiving TTD from the Respondent. Petitioner stipulated that if there were records of income, she would abide by the documents. (TX at 41). Petitioner stopped arranging the bingo games in 2020 and had a hard time generating any income from Sides by Shay Shamar. (Id., 42-43).

Petitioner testified that prior to this accident, she enjoyed pursuing her hobbies such as dancing and cooking, unencumbered by pain or symptoms related to her back or right lower extremity. Petitioner testified she cannot pursue her hobbies in the same manner due to her injuries, "I can't move like I used to nor can I stand for long periods of time. It's just I can't do the moves like I used to." According to Petitioner, she attempts to dance like she once did but her right ankle and right knee pain prevent her from doing some of her favorite dance moves, "There is no more stepping for me or the Cha Cha Slide, Cupid Shuffle. I can get up there and do it really slow but I take it easy".

Petitioner testified that the current condition of her right foot/ankle/knee and back affects her ability to cook and her ability to pursue her cooking side business, especially when it comes to catering larger events. She was offered a job at a club which she turned down because she cannot stand for long periods and cannot carry anything due to her back. Petitioner has difficulty food shopping due to difficulties lifting objects and her inability to stand for long periods.

Although the condition in her right foot and ankle has improved since the accident, Petitioner testified that she has an unsteady gait now that she attributes to the accident. Per her testimony, her balance is "not 100 percent" and she is afraid to bear weight on her right foot/ankle following her slip and fall injury. She further testified that she continues to experience swelling in her right foot and ankle that she did not experience prior to this accident. Petitioner continues to experience right knee swelling, locking, and problems going up and down stairs. According to her testimony, sometimes her right knee "just doesn't want to bend". Petitioner testified she experiences symptoms of right knee swelling, locking, and bending every day which necessitates continued use of a compression sleeve. Furthermore, Petitioner began experiencing problems bearing weight on her left knee due to overcompensation.

Petitioner testified she has not gained weight since her accident and has lost a few pounds although not due to diet or willpower. She attributes her weight loss to her "messed up leg and back" which makes visits to the kitchen less frequent than she would like.

Regarding the current condition of her back, Petitioner testified she experiences a "constant burning sensation" with intermittent radiating pain to her bilateral knees, more so in the right knee. According to Petitioner, "It's not always radiating. It's like sometimes I just have like these muscle spasms where it's uncontrolled. It's just like muscle spasms and I get Charley horses frequently".

Regarding her income since returning to full-time work, Petitioner testified that she received lower pay as a receptionist making $12 per hour than her hourly pay working for Respondent as an ADA paraprofessional making $20 - $30 an hour. Although she was promoted from receptionist to her current job as a health care worker, she still earns less, at $17.25 per hour, less than she did prior to her accident.

Petitioner works at Trinity Services and is now an independent living coach which involves minimal lifting. Her clients are high-functioning. She has not had any other accidents since this work accident, except on one occasion where she experienced a temporary exacerbation of pain.

On cross-examination, Petitioner testified that during physical therapy she would report improvement. Petitioner stated that Relive Physical Therapy closed in July 2020, after which she transitioned to another facility for treatment. She denied being noncompliant. Petitioner did not know if she had work restrictions as of September 1, 2020, and would defer to the medical records. She had Medicaid until approximately one month before the hearing in this matter.

Respondent asked questions regarding records produced by Petitioner. (TX 2 at 5-A). Petitioner formed the LLC for Sides by Shay Shamar in July 2020. Her Facebook page was created on June 19, 2020, and she was, to some extent, operating this business. (T2 at 6-A). Petitioner testified that initially she was not making money at all, but was doing it as a hobby. She then started to sell the dishes to make money and the business was started. During this time, Petitioner received TTD, but not regularly. She would get a check and then wait maybe a couple of weeks and then her attorney would need to get involved. She needed help. (T2 at 7-A – 8-A). Petitioner admitted the 2020, 2021 and 2022 tax records are the best records to show her earnings. Her son and nephew helped carry things for her, but they were not employees. Petitioner no longer operates Sides by Shay Shamar. (T2 at 8-A and 10-A).

On Redirect Examination Petitioner testified that there were long periods where she went without TTD. (T2 at 11-A – 12-A).

Petitioner is a high school graduate, holds an associate's degree from MacCormac College, and certifications in Nursing, DSP (direct support personnel – support for people with mental health illnesses), and for Food Safety. (T2 at 12-A – 13-A).

On Recross Examination it was stipulated that Petitioner's penalty petition is for unpaid medical bills and TTD from September 10, 2020, through January 17, 2022. (T2 at 15-A).

## CONCLUSIONS OF LAW

### Credibility of Petitioner

The Arbitrator found Petitioner to be a credible witness at the hearing. Petitioner's demeanor, the manner she presented herself during the hearing, gave the Arbitrator the impression that she was truthful and sincere. Petitioner testified without hesitation and appeared confident at the hearing. Petitioner's testimony is, for the most part, unrebutted and the Arbitrator found no credible allegations of malingering or secondary gain. The Arbitrator assigns significant weight to her testimony.

### Causal Connection

The Arbitrator finds that Petitioner has established that the current condition in her lower back, right ankle, and right knee are causally related to her work accident on January 28, 2020. The Arbitrator bases this decision on the credible testimony of Petitioner and the treating medical records which show that Petitioner was working her full-time job for Respondent on the accident date and was taken off work that day when she sought treatment at Respondent's occupational clinic. Petitioner's complaints of pain in her lower back, right ankle,

and right knee are reflected in her treating medical records following the accident. Petitioner underwent a course of conservative treatment, including 24 physical therapy sessions between February 4, 2020, and July 21, 2020, for her lower back, right knee, and right ankle. Petitioner was prescribed a knee brace for her right knee and wore a Cam Walking boot for approximately 6-8 weeks following the accident. While there were improvements to Petitioner's right knee, foot, and ankle following the IME with Dr. Singh, Petitioner testified her back remained symptomatic.

IME Dr. Sing opined in Petitioner's favor regarding a causal connection between her back injury and her work accident on January 28, 2020, but discounts her ongoing complaints and believes her back injury is soft tissue in nature. The Arbitrator finds the time duration between the accident and Dr. Singh's exam, nearly 16 months, does not support his opinions that Petitioner's injuries were merely to the lumbar soft tissue. The Arbitrator places more weight on the opinions of Dr. Nadera which are consistent with the diagnostic MRI, EMG, and Petitioner's clinical presentation.

**Medical Bills**

The Arbitrator has found a causal connection between Petitioner's current condition and her work accident on January 28, 2020. The Arbitrator has reviewed the disputed medical bills and finds they represent reasonable, necessary medical services causally related to Petitioner's work-related accident.

Respondent is liable for the following medical bills and shall pay Petitioner the following reasonable and necessary medical services, pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act:

| | |
|---|---|
| Illinois Orthopedic Network: | $830.09 (PX 4) |
| Midwest Specialty Pharmacy, LLC.: | $4,389.43 (PX 6) |
| Prescriptions Pharmacy: | $12, 970.41 (PX 7) |
| Molecular Imaging of Chicago: | $4,400.00 (PX 8) |
| Dr. Larry Najera: | $760.00 (PX 10) |
| Associated Medical Centers of Illinois: | $4,642.09 (PX 12) |
| | ---------- |
| | $27,993.67 |

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.

**TTD Benefits**

The Arbitrator finds that Petitioner was off work as a result of this accident and Respondent is liable for TTD benefits from January 29, 2020, through January 17, 2022, a period of 102 and 3/7 weeks, as provided in Section 8(b) of the Act.

**Nature and Extent of the Petitioner's injuries**

Pursuant to Section 8.1(b) of the Act for accidental injuries occurring after September 1, 2011, permanent partial disability shall be established using five enumerated criteria, with no single factor being the sole determinant of disability. 820 ILCS 305/8.1(b), sets forth the following criteria to be considered: (i) the reported level and impairment pursuant to Subsection (a)[AMA "Guidelines to the Valuation of Permanent Impairment"]

(ii); the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by treating medical records.

Regarding the first factor, neither party submitted an AMA rating. No weight will be attributed to this factor.

Regarding the second factor, Petitioner worked as a caregiver for adults with special needs. She was unable to resume this position or any position for Respondent as they were unable to accommodate her restrictions. Petitioner began working as a receptionist and now works as a life coach. The Arbitrator places significant weight on this factor as Petitioner was unable to resume her pre-accident job due to her post-accident restrictions.

Regarding the third factor, the age of the employee at the time of her injury, the Arbitrator notes that Petitioner was 37 years old at the time of her accident, which the Arbitrator considers younger, and will live and work for the rest of her life dealing with the pain and disability caused by her work-related accident on January 28, 2020. The Arbitrator places more weight on this factor.

Regarding the fourth factor, Petitioner's credible, unrebutted testimony is that she is earns less money today than she was earning before her accident. The Arbitrator gives some weight to this factor.

Regarding the fifth factor, the evidence of disability corroborated by the treating medical records, Petitioner testified that she has an unsteady gait and that her balance is "not 100%" following her accident. She is afraid to bear weight on her right foot/ankle following her slip and fall injury and continues to experience swelling in her right foot and ankle that she did not experience prior to this accident. Petitioner testified she continues to experience right knee swelling and locking and has problems going up and down stairs. According to her testimony, sometimes her right knee "just doesn't want to bend". Petitioner testified she experiences symptoms of right knee swelling, locking, and bending every day which necessitates continued use of a compression sleeve. The medical records indicate that on May 26, 2020, a right knee MRI demonstrated mild synovial effusion, degenerative derangement of the posterior horn of the medial meniscus, Grade 1 chondromalacia patellae of the patellar articular facets, osteochondral injury at the femoral intercondylar sulcus, and tendinosis. An injection to the right knee was recommended but never performed as Petitioner's benefits were terminated. Regarding her right ankle, the February 6, 2020, MRI of Petitioner's right ankle demonstrated tendinosis, peri-tendinitis, a plantar calcaneal spur, and tibiotalar and subtalar mild synovial effusion. Petitioner wore a CAM walking boot on her right foot for 6-8 weeks following her accident and continues to wear a compression sleeve on her right knee.

Regarding the current condition of her back, Petitioner testified she experiences a "constant burning sensation" with intermittent radiating pain to her bilateral knees, more so in the right knee. According to Petitioner, "It's not always radiating. It's like sometimes I just have like these muscle spasms where it's uncontrolled. It's just like muscle spasms and I get Charley horses frequently". The medical records in evidence indicate that MRI of Petitioner's lumbar spine, ordered by Dr. Najera, revealed multilevel spondylosis and a 2 mm herniation with an annular fissure at L5-S1 causing bilateral foraminal stenosis. An EMG of Petitioner's bilateral lower extremities in January 2021 was significant for the presence of bilateral L5-S1 radiculopathy in Petitioner's lower extremities. Dr. Najera recommended an L5-S1 steroid injection which Respondent denied. (Id.). The Arbitrator finds the treating medical records corroborate Petitioner's testimony regarding her current condition of ill-being. The Arbitrator places significant weight on this factor.

Based on the foregoing factors and after careful consideration, the Arbitrator finds that Petitioner has sustained a 5% loss of use of man as a whole, 5% loss of use of the right foot/ankle, 5% loss of use of the right knee/leg as provided in Section 8 of the Act.

**Penalties**

The Arbitrator declines to award penalties in this case and finds that Respondent's reliance on the opinions of their IME physicians in denying benefits was reasonable.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 15WC000825 |
| Case Name | Petar Arcic v.<br>Foka Logistics, Inc.<br>& IWBF |
| Consolidated Cases | |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 24IWCC0581 |
| Number of Pages of Decision | 19 |
| Decision Issued By | Christopher Harris, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Matt Walker |
| Respondent Attorney | Thomas Owen,<br>Randall Wolff |

DATE FILED: 12/3/2024

/s/Christopher Harris, Commissioner

Signature

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

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

PETAR ARCIC,

Petitioner,

vs. NO: 15 WC 825

FOKA LOGISTICS, INC., and ILLINOIS STATE TREASURER as EX-OFFICIO CUSTODIAN of the INJURED WORKERS' BENEFIT FUND,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by Respondents Foka Logistics, Inc., and the Injured Workers' Benefit Fund (IWBF), and notice given to all parties, the Commission, after considering the issues of employment, benefit rates, accident, accident date, notice, causal connection, medical benefits, 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 parties disputed the Arbitrator's finding that Petitioner's average weekly wage (AWW) in the year preceding his work injury was $1,007.69. By their Briefs, the parties agreed that the Arbitrator had erroneously included reimbursements for out-of-pocket expenses in computing the AWW. In *Swearingen v. Indus. Comm'n*, 298 Ill. App. 3d 666 (1998), the Appellate Court held that "payments designated as a 'reimbursement' for travel expenses should be included when calculating an employee's average weekly wage to the extent that such payments represent real economic gain rather than the actual [dollar-for-dollar] reimbursement for actual travel expenses." *Id.* at 671. Petitioner acknowledged that the "Deductions" noted in the wage statement (Petitioner's Exhibit 4) represented actual reimbursements for travel expenses and requested that the AWW be reduced to $884.88.

Based on the Commission's review of Petitioner's wage statement, the Commission finds that the AWW should be reduced to $884.88. The Commission notes that the last timesheet for January 5-6, 2015 does not allocate how many miles Petitioner drove for each date in order to calculate his earnings for each specific date. As such, the Commission's calculation incorporates

the net total of $15,043.11. This is the amount Petitioner earned after deductions. The parties further agreed that the net total should be divided by the 17 weeks Petitioner worked for Respondent Foka Logistics. The Commission therefore calculates Petitioner's AWW as follows: $15,043.11 / 17 = $884.88. Petitioner's benefits rates are also modified to conform with the AWW. Petitioner's TTD rate is $589.92 and his PPD rate is $530.93.

The Commission next modifies the Arbitrator's finding that Petitioner is entitled to TTD benefits from January 6, 2015 through April 13, 2015. As Petitioner worked on January 6, 2015, and thus not temporarily totally disabled from work on that date, the correct TTD period is January 7, 2015 through April 13, 2015. The Arbitrator's Decision is modified accordingly.

Finally, the Commission modifies the Arbitrator's analysis of the fourth factor (the employee's future earning capacity) under Section 8.1b of the Act. The Arbitrator mistakenly stated that Petitioner was earning less money than he was before the accident and gave greater weight to this factor. Petitioner testified, however, that he is now earning more post-accident. For this reason, the Commission reduces the weight afforded to the fourth factor and modifies the PPD rate to 30% loss of use of the left hand.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 11, 2024 is hereby modified as stated and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner temporary total disability benefits of $589.92 per week for 13 6/7 weeks, from January 7, 2015 through April 13, 2015, that being the period of temporary total incapacity for work under Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner permanent partial disability benefits of $530.93 per week for 61.5 weeks because the injuries sustained caused thirty-percent (30%) loss of use of the left hand pursuant to Section 8(e) of the Act.

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

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

IT IS FURTHER ORDERED BY THE COMMISSION that the Illinois State Treasurer, as *ex-officio* custodian of the Injured Workers' Benefit Fund, was named as a co-respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under Section 4(d) of this Act. In the event the Respondent/Employer/Owner/Officer fails to pay the benefits, the Injured Workers' Benefit Fund has the right to recover the benefits paid due and owing the Petitioner pursuant to Sections 5(b) and 4(d) of this Act. Respondent/Employer/Owner/Officer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of

Respondent/Employer/Owner/Officer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

Bond for the removal of this cause to the Circuit Court by Respondent Foka Logistics, Inc. is hereby fixed at the sum of $75,000.00. Pursuant to Section 19(f)(2)(1), Respondent Injured Workers' Benefit Fund is exempt from the bonding requirement. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in the Circuit Court.

**December 3, 2024**

CAH/pm
O: 11/21/24
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 | 15WC000825 |
| Case Name | Petar Arcic v. Foka Logistics, Inc. & State Treasurer ex officio-custodian of the IWBF |
| Consolidated Cases | |
| Proceeding Type | |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 15 |
| Decision Issued By | Frank Soto, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Matt Walker |
| Respondent Attorney | Thomas Owen |

DATE FILED: 1/11/2024

**THE INTEREST RATE FOR THE WEEK OF JANUARY 9, 2024 5.03%**

/s/Frank Soto, Arbitrator

Signature

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

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

**ILLINOIS WORKERS' COMPENSATION COMMISSION**
**ARBITRATION DECISION**

**Petar Arcic**
Employee/Petitioner

v.

**Foka Logistics, Inc. & State Treasurer ex officio-custodian of the IWBF**
Employer/Respondent

Case # **15** WC **000825**

Consolidated cases: **n/a**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Frank Soto**, Arbitrator of the Commission, in the city of **Wheaton, Illinois** , on **November 28, 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 **Liability of the Injured Workers' Benefit Fund, Notice of Hearing to Foka Logistics**

**FINDINGS**

On **January 6, 2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**17,130.71**; the average weekly wage was $**1007.69**.

On the date of accident, Petitioner was **46** 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 $**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**

**FOKA LOGISTICS, INC., AND/OR IWBF SHALL PAY PETITIONER TEMPORARY TOTAL DISABILITY BENEFITS OF $604.61 / WEEK FOR 13 6/7 WEEKS.**

**FOKA LOGISTICS, INC., AND/OR IWBF SHALL PAY REASONABLE AND NECESSARY MEDICAL SERVICES OF $94,830.29 CONSISTING OF $886.00 DUE LANCASETER GENERAL HOSPITAL, $456.80 DUE EMORY UNIVERSITY MIDTOWN HOSPITAL, AND 93,487.49 DUE GRADY HEALTH ORTHOPEDICS CLINIC, AS PROVIDED IN SECTIONS 8(A) AND 8.2 OF THE ACT.**

**FOKA LOGISTICS AND/OR IWBF SHALL PAY PETITIONER PERMANENT PARTIAL DISABILITY BENEFITS OF $671.79/WEEK FOR 71.75 WEEKS BECAUSE THE INJURIES CAUSED THE 35% LOSS OF THE LEFT HAND, AS PROVIDED IN SECTION 8(E) OF THE ACT.**

**The Illinois State Treasurer, ex-officio custodian of the Injured Workers' Benefit Fund, was named as a co-respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under Section 4(d) of this Act. In the event the Respondent/Employer/Owner/Officer fails to pay the benefits, the Injured Workers' Benefit Fund has the right to recover the benefits paid due and owing the Petitioner pursuant to Section 5(b) and 4(d) of this Act. Respondent/Employer/Owner/Officer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent/Employer/Owner/Officer that are paid to the Petitioner from the Injured Workers' Benefit Fund.**

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

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

By: /o/ *Frank J. Soto* **JANUARY 11, 2024**
Arbitrator

**BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION**

| | | |
|---|---|---|
| PETAR ARCIC, | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | **15 WC 000825** |
| | ) | |
| FOKA LOGISTICS, INC. & | ) | |
| STATE TREASURER EX OFFICIO-CUSTODIAN | ) | |
| OF THE INJURED WORKERS BENEFIT FUND | ) | |
| Respondent. | ) | |

## FINDING OF FACTS

Petar Arcic [hereinafter Petitioner] was born on November 6, 1968. (Transcript, p. 10). On January 6, 2015, the date of the accident, Petitioner was married, and did not have any children under 18 years of age. (Transcript, pp. 10-11).

Foka Logistics [hereinafter respondent] is a trucking company, engaged in the delivery of freight across the United States. (Transcript, p. 11). Respondent hired Petitioner to be a truck driver in August or September of 2014. (Transcript, p.11). Filip Trajkov of Foka Logistics hired Petitioner in Chicago, Illinois. (Transcript, p. 12). Petitioner worked exclusively for Respondent. (Transcript, p. 18).

Respondent provided Petitioner with a company owned truck. (Transcript, p. 14). Respondent's company name was emblazoned on the doors of the truck. (Id.). The truck ran on diesel fuel. (Transcript, p. 18). Respondent paid for the diesel fuel. (Id.). Respondent paid for insurance on the truck. (Id.). Respondent paid to have the truck parked in a secure area near Petitioner's home. (Transcript, p. 23).

Respondent required that Petitioner perform both pre-trip and post-trip inspections of his truck. (Transcript, p. 15). If any problems were discovered because of a truck inspection, Petitioner called Respondent, and Respondent would send road service to fix the problem. (Transcript, p. 16). Respondent paid for the road service. (Id.).

Respondent required Petitioner to keep a driver's log. (Transcript, p. 16). The driver's log is used to document driving time and sleeping time. (Id.). Respondent required Petitioner to turn his driver's log in to the Respondent. (Transcript, p. 16).

Respondent employed dispatchers that would direct Petitioner to pickup and delivery locations. (Transcript, p. 17). Respondent required that Petitioner provide it with copies of the bills of lading. (Transcript, p. 18).

Respondent instructed the petitioner on what to do if Petitioner was ever involved in a motor vehicle accident, which included calling Respondent to report the accident. (Transcript, p. 23).

Petitioner had to obtain permission from Respondent to take passengers in the company owned truck. (Transcript, p. 24). It was Petitioner's understanding that Respondent could fire him at any time and for any reason. (Id.).

Petitioner was paid by the mile. (Transcript, p. 19). Petitioner testified that his average weekly was $1007.69. (Transcript, p. 38).

*The Work Accident*

Petitioner was working for Foka Logistics on January 6, 2015. (Transcript, p. 24). He was delivering freight from Chicago, Illinois to a warehouse in Elizabethtown, Pennsylvania. (Transcript, pp. 24-25). He was driving a Volvo 670. (Transcript, p. 25). It was wintertime. (Transcript, p. 26). It was snowing. (Id.) The warehouse was under construction and Petitioner did not know how to find the receiving office. (Id.)

Petitioner got out of his truck to look for the receiving office and slipped on ice. (Transcript, p. 26). He fell on his left wrist. (Id.) Petitioner found a construction worker inside the warehouse. (Transcript, p. 27). The construction worker told Petitioner that his left wrist was broken and drove Petitioner to the emergency room. (Id.)

Petitioner called Respondent owner and reported the accident. (Transcript, p. 27).

*Medical Treatment*

Petitioner received care and treatment at the Lancaster General Hospital Emergency Room on January 6, 2015. (Petitioner's Exhibit #5). Dr. Christopher Fox recorded a history of "a 46 y.o. male who presents with chief complaint of wrist injury. Patient slipped, fell landing on outstretched arm. Deformity to the left wrist. Patient denies any other injury or complaint. He did not strike his head. Denies any neck or back pain." (Petitioner's Exhibit #5, p. 5).

X rays showed a comminuted displaced left wrist fracture. Petitioner was placed in a splint by staff and checked by Dr. Fox. Petitioner was given a sling for comfort and Vicodin for pain. Dr. Fox noted that Petitioner "is a truck driver from Georgia making delivery here when he slipped and fell. He is contacting his employer. A copy of his x-ray was given to patient." (Petitioner's Exhibit #5, p. 7).

Once Petitioner left the emergency room in Lancaster, he purchased an airplane ticket to fly home to Georgia. (Transcript, p. 28). Petitioner took a flight from Harrisburg

Pennsylvania to Atlanta, Georgia. (Transcript, p. 29). Petitioner's wife picked Petitioner up at the airport and they drove to the emergency room at Emory University Hospital in Atlanta. (Transcript, p. 29).

Petitioner was seen at the Emory University Hospital Emergency Room after landing in Atlanta. (Petitioner's Exhibit #6). Petitioner presented with left wrist pain, stating that he was a truck driver and fell on the ice while in Pennsylvania one day ago, was seen and treated at an emergency department in that city and was told that he would need to follow up with ortho for potential surgery. (Petitioner's Exhibit #6, p. 5). Petitioner was told to follow up with orthopedics. (Petitioner's Exhibit #6, p. 7).

On January 14, 2015, Dr. Laura Bellaire of Grady Health Orthopedic Clinic examined the petitioner. (Petitioner's Exhibit #7, p. 3). Dr. Bellaire charted a 46-year-old male s/p GLF after slipping on ice a little over a week ago. He was taken to the emergency room in Pennsylvania, where he was placed in a splint. (Id.). She diagnosed Petitioner with a displaced, closed left distal radius fracture, and recommended an open reduction internal fixation of the left distal radius. (Petitioner's Exhibit #7, p. 5).

Dr. Moore and Dr. McCarthy performed surgery on January 21, 2015. (Petitioner's Exhibit #7, p.7). The surgery consisted of an Open Reduction and Internal Fixation of radial and ulnar shaft fractures with volar plate.

Dr. Anuj Patel and Dr. Moore saw Petitioner on February 2, 2015. (Petitioner's Exhibit #7, p. 25). Petitioner was two weeks status post ORIF of the distal radius fracture with Dr. Moore. The pain was well controlled. Petitioner had been non-weightbearing in his splint and compliant with all instructions. Petitioner switched to a removable wrist splint and was to begin working on range of motion. He continued to be non-weightbearing for 4 more weeks. (Petitioner's Exhibit #7, p. 26).

Dr. Devon and Dr. Moore saw Petitioner on March 2, 2015. (Exhibit #7, p. 14). Petitioner was six weeks out from surgery and doing well. Imaging showed interval fracture healing, and the hardware was in good position. There was no evidence of fracture displacement or hardware failure. Petitioner was continued non-weight bearing with the left upper extremity.

Petitioner's last doctor's visit took place on April 13, 2015. (Petitioner's Exhibit #7, p. 23). Dr. Moore noted that Petitioner was relatively pain free. On the exam, there was evidence of healing of the distal radial and ulnar fractures. Dr. Moore imposed restrictions of no lifting greater than 20 pounds and asked the petitioner to return in a 2-month period for one last set of x-rays or sooner if he had any difficulties. Petitioner did not return to see Dr. Moore. (Transcript, p. 32).

*Petitioner's Current Condition*

Petitioner did not return to work for the respondent. (Transcript, p. 32). He returned only to pick up his personal items. (Transcript, p. 33). Petitioner began working again as a truck driver in June or July of 2015. (Transcript, p. 33). He is currently an owner / operator for MDS Trucking. (Transcript, p. 34). He is earning about $1500.00 per week.

Petitioner is right-handed. (Transcript, p. 34). His left wrist is uncomfortable, especially when the weather is cold. (Transcript, p. 35). Petitioner still has hardware in his left wrist due to the work accident. (Id.) Petitioner's left wrist is weaker than his right wrist. (Id.). His left wrist is now different than before he was injured. (Transcript, p. 36). Petitioner is no longer able to go to the baseball cage to swing a baseball bat. (Id.).

## CONCLUSIONS OF LAW

**Respondent Foka Logistics was operating under and subject to the Illinois Workers' Compensation Act**.

Petitioner was hired in Chicago, Illinois. (Transcript, p. 12). Respondent is based in Illinois. (See Petitioner's Exhibits 1-4).

The Illinois Workers' Compensation Act defines those businesses that are considered employers, and thus come under its jurisdiction. Under Section 3 of the Act, various types of businesses automatically come under the Act's jurisdiction due to their extra-hazardous activities including "[a]ny business in which electric, gasoline, or other power-driven equipment is used in the operation thereof" 820 ILCS 305/3.

The Illinois Workers' Compensation Act also applies automatically to any employer engaged in "[c]arriage by land, water or aerial service and loading or unloading in connection therewith, including the distribution of any commodity by horse drawn or motor vehicle where the employer employs more than 2 employees in the enterprise or business." 820 ILCS 305/3.

Petitioner gave credible, unrebutted testimony that Respondent's business involved the use of diesel driven trucks. (Transcript, p. 14). Those same trucks were used to engage in carriage by land. (Transcript, p. 11). Petitioner also testified that the respondent had in excess of two employees. (Transcript, p. 18).

The preponderance of the credible evidence supports a finding that Respondent, Foka Logistics, was operating under and subject to the Illinois Workers' Compensation Act at the time of the accident.

**There was an employer- employee relationship between Petitioner and Respondent, Foka Logistics**.

Whether an injured worker is classified as an independent contractor or an employee is crucial, because it is the employment status of a claimant which determines whether he is entitled to benefits under the Act. *Earley v. Industrial Commission,* 197 Ill.App.3d 309, 143 (1990). For the purposes of the Act, the term "employee" should be broadly construed. *Ware v. Industrial Commission,* 318 Ill.App.3d 1117 (2000).

The Illinois Supreme Court has identified several factors to assist in determining whether a person is an employee. *Esquinca v. Ill. Workers' Comp. Comm'n,* 401 Ill. Dec. 812, 822 (Ill. App. 2000) *citing Ware,* 318 Ill. App. 3d at 1122. Among those factors are:

- Whether the employer may control the way the person performs the work;
- Whether the employer dictates the person's schedule;
- Whether the employer compensates the person on an hourly basis;
- Whether the employer withholds income and social security taxes from the person's compensation;
- Whether the employer may discharge the person at will;
- Whether the employer supplies the person with materials and equipment.

Whether the purported employer has a right to control the actions of the employee is "[t]he single most important factor." *Ware,* 318 Ill.App.3d at 1122. The nature of the claimant's work in relation to the employer's business is also an important consideration. *Kirkwood v. Industrial Comm'n,* 84 Ill.2d 14 (1981).

No single factor is determinative, and the significance of these factors will change depending on the work involved. *Luby v. Industrial Commission,* 82 Ill.2d 353, 358-59 (1980).

Because the theory of [worker's] compensation legislation is that the cost of industrial accidents should be borne by the consumer as part of the cost of the product, this court has held that a worker whose services form a regular part of the cost of the product, and whose work does not constitute a separate business which allows a distinct channel through which the cost of an accident may flow, is presumptively within the area of intended protection of the compensation act. *Ragler Motor Sales v. Industrial Commission,* 93 Ill.2d 66, 71 (1982).

Petitioner worked exclusively for Respondent, Foka Logistics. (Transcript, p. 18). Respondent provided Petitioner with a company owned truck. (Transcript, p. 14).

Respondent's company name was emblazoned on the doors of the truck. (Id.). Respondent paid for fuel. (Transcript, p. 18). Respondent paid for insurance on the truck. (Id.). Respondent paid to have the truck parked in a secure area near Petitioner's home. (Transcript, p. 23).

Respondent required Petitioner to keep a driver's log. (Transcript, p. 16). Respondent required Petitioner to turn his driver's log in to Respondent. (Transcript, p. 16). Respondent employed dispatchers that would direct Petitioner to pickup and delivery locations. (Transcript, p. 17). Respondent required that the petitioner provide it with copies of the bills of lading. (Transcript, p. 18).

Respondent instructed the petitioner on what to do if Petitioner was ever involved in a motor vehicle accident, which included calling Respondent to report the accident. (Transcript, p. 23).

Petitioner had to obtain permission from Respondent to take passengers in the company owned truck. (Transcript, p. 24). It was Petitioner's understanding that Respondent could fire him at any time and for any reason. (Id.).

Respondent exercised control over how Petitioner performed his work as a truck driver. Respondent dictated Petitioner's schedule through its dispatchers. Petitioner was subject to termination at any time and for any reason. Respondent supplied Petitioner with high value materials and equipment, including a diesel driven company truck. Respondent paid for fuel and insurance. Respondent paid for secure parking for the truck. Respondent was responsible for maintenance and repair of the truck. The nature of Petitioner's work is a regular part Respondent's business, that being the delivery of freight throughout the United States.

The preponderance of the credible evidence supports a finding that there was an employer-employee relationship between Respondent and Petitioner at the time of the work accident.

**An accident occurred that arose out of and in the course of Petitioner's employment by Respondent, Foka Logistics.**

A traveling employee is one who is required to travel away from his employer's premises to perform his job. *Venture Newberg-Perini,* 2013 IL 115728, ¶ 17.

The determination of whether an injury to a traveling employee arose out of and in the course of employment is governed by different rules than are applicable to other employees. *Hoffman v. Industrial Comm'n,* 109 Ill.2d 194, 199 (1985). The test for determining whether an injury to a traveling employee arose out of and in the course of his

employment is the reasonableness of the conduct in which he was engaged and whether the conduct might normally be anticipated or foreseen by the employer. *Howell Tractor & Equipment Co. V. Industrial Comm'n*, 78 Ill.2d 567, 573-74 (1980). Under such an analysis, any act that a traveling employee can reasonably be expected to perform is considered to arise out of and in the course of employment. *Venture Newberg-Perini v. Illinois Worker's Compensation Comm'n,* 2013 IL 115728, ¶ 18.

Petitioner was a traveling employee at the time of the accident. (Transcript, pp. 24-26). The act of getting out of his truck to look for the receiving office upon arrival at his destination was both reasonable and foreseeable. Therefore, the preponderance of the evidence supports a finding that Petitioner's work accident arose out of and in the course of his employment by Respondent.

**The date of the accident is January 6, 2015**.

"When the accident is a discrete event, the date of the accident is easy to determine; it is, obviously, the date that the employee was injured. *Durand v. Industrial Commission*, 224 Ill.2d 53, 64 (2006).

Petitioner testified that his work accident occurred on January 6, 2015. (Transcript, pp. 24-26). The date of accident is also supported by the Lancaster General Hospital Emergency Room records. (Petitioner's Exhibit #5). The preponderance of the credible evidence supports an accident date of January 6, 2015.

**Petitioner provided timely notice of the accident to Respondent, Foka Logistics.**

The Supreme Court has held that the giving of the notice within 45 days of the accident is jurisdictional and a prerequisite of the right to maintain a proceeding under the Act. *See Ristow v. Industrial Commission* 39 Ill.2d 410, 413 (1968). Where some notice is given but a defect or inaccuracy exists, the employer must prove he is unduly prejudiced. See *McLean Trucking Co. v. Industrial Commission*, 72 Ill.2d 350, 354-55 (1978).

Petitioner testified that on January 6, 2015, the date of the accident, he called and reported the accident to the Respondent. (Transcript, p. 27). Notice is further supported by the Lancaster General Hospital Emergency Room records that confirm Petitioner was contacting his employer. (Petitioner's Exhibit #5, p. 7).

The preponderance of the credible evidence supports the finding that Petitioner provided timely notice of the accident to Respondent, Foka Logistics.

**Petitioner's current condition of ill-being is causally related to the January 6, 2015, work accident.**

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' 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 Workers' Compensation Act is a humane law of remedial nature, and wherever construction is permissible its language is to be liberally construed to affect the purpose of the Act. The purpose of the Act is that the burdens of caring for the casualties of industry should be borne by industry and not by the individuals whose misfortunes arise out of industry, nor by the public. Every injury sustained in the course of the employee's employment, which causes a loss to the employee, should be compensable. *Shell Oil v. Industrial Commission,* 2 Ill. 2d 590, 596 (1954).

Petitioner's work accident was a discrete event. On January 6, 2015, he slipped on ice, fell and broke his left wrist while in the course and scope of his employment with the respondent, Foka Logistics. Petitioner's testimony and the medical records demonstrate a previous condition of good health, and show that the January 6, 2015, work accident resulted in disability.

The preponderance of the credible evidence supports a finding that Petitioner's current condition of ill-being is causally related to the January 6, 2015, work accident.

**Petitioner's average weekly wage was $1007.69**.

Petitioner testified that his average weekly wage was $1007.69. (Transcript, p. 38). This is supported by Respondent's wage records that were provided pursuant to subpoena. (Petitioner's Exhibit #4).

**Petitioner was 46 years old at the time of the accident.**

The petitioner testified he was born on November 6, 1968. (Transcript, p. 10). On January 6, 2015, the petitioner was 46 years old.

**Petitioner was married at the time of the accident.**

The petitioner was married as of January 6, 2015. (Transcript, pp. 10-11). He did not have any dependents. (Id.).

**The medical services provided to Petitioner were reasonable and necessary.**

The medical services provided to Petitioner were reasonable and necessary. The treatment began on January 6, 2015, and ended on April 13, 2015. Petitioner's condition improved due to treatment to date is supported by both the records and Petitioner's testimony at the hearing.

The Arbitrator awards the following medical bills, to be paid in accordance with Sections 8 and 8.2 of the Act:

- Lancaster General Hospital: $886.00
- Emory University Midtown Hospital: $456.80
- Grady Health Orthopedic Clinic: $93,487.49

**Petitioner is entitled to TTD from January 6, 2015, through April 13, 2015, representing 13 6/7 weeks.**

"Temporary total disability is awarded for the period from the date on which the employee is incapacitated by injury to the date that [her] condition stabilizes or [she] has recovered as far as the character of the injury will permit." *Whitney Productions, Inc. v. Industrial Commission*, 274 Ill. App. 3d 28, 30 (1995). "To be entitled to TTD benefits, the claimant must prove not only that [she] did not work but that [she] was unable to work." *City of Granite City v. Industrial Commission*, 279 Ill. App. 3d at 1090 (1996). Section 8(b), which governs TTD awards, provides that weekly compensation shall be paid "as long as the total temporary incapacity lasts." 820 ILCS 305/ 8(b).

TTD is awarded for the period from the date of which the employee is incapacitated by injury to the date that his condition stabilizes, or he has recovered as far as the character of the injury will permit. *See Freeman United Coal Min. Co. v. Industrial Commission,* 318 Ill. App. 3d 170, 177 (2000). To be entitled to TTD benefits, the claimant must prove not only that he did not work but that he was unable to work. *Id.*

Petitioner was under the care of his physicians from January 6, 2015, through April 13, 2015. Petitioner underwent surgery on January 21, 2015, for radial and ulnar shaft fractures. He was taken off work by the emergency room at Emory University. Subsequently, he was

restricted from weightbearing with the left upper extremity until April 13, 2015, when he was cleared to return to work with no lifting greater than 20 pounds.

Petitioner did not return to work for the respondent, Foka Logistics. (Transcript, p. 32). He did not start working again until June or July of 2015. (Transcript, p. 33).

The preponderance of the credible evidence supports a finding that Petitioner is entitled to TTD from January 6, 2015, through April 13, 2015, for 13 6/7 weeks.

**The Arbitrator finds Petitioner has sustained 35% loss of use of the left hand as provided in Section 8(e)(9) of the Act**

The Illinois Workers' Compensation Act requires that the Arbitrator determine permanent partial disability based on the factors as put forth in 820 ILCS 305/8.1b(b). Those factors are:

- The reported level of impairment pursuant to subsection (a);
- The occupation of the injured employee;
- The age of the employee at the time of the injury;
- The employee's future earning capacity;
- 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.

The Arbitrator makes the following findings:

- *Reported Level of Impairment*

Regarding 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.

- *Occupation of the Injured Employee*

At the time of the work accident, Petitioner was employed as a truck driver at the time of the accident. Petitioner returned to work as a truck driver for a different employer after completing his medical treatment. Because Petitioner was able to return to the same line of work, the Arbitrator gives lesser weight to this factor.

*Age of the Employee at the Time of the Injury*

Petitioner was 46 years old at the time of the injury. Because the petitioner will be forced to continue working for many years with hardware and discomfort in his left wrist, the Arbitrator gives greater weight to this factor.

*The Employee's Future Earning Capacity*

Petitioner testified that he currently earns approximately $1500.00 per week, which is less than his average weekly wage on the date of the accident. Because Petitioner has had to take a job earning less money than he was earning in 2015, the Arbitrator gives greater weight to this factor.

- *Evidence of Disability Corroborated by the Treatment Medical Records*

The Arbitrator hereby incorporates by reference the medical treatment detailed in the Findings of Fact delineated above. The medical records reveal that Petitioner suffered a severe injury to his left wrist that required surgical intervention in the form of an open reduction and internal fixation to repair radial and ulnar shaft fractures.

Petitioner testified that he suffers discomfort in his left wrist. He still has hardware in his left wrist. His left wrist is weaker than his right wrist. His left wrist feels different now as opposed to before his work accident. He is no longer able to swing a baseball bat.

Because of the serious nature of the surgery and the ongoing sequelae as voiced by Petitioner at hearing, the Arbitrator gives more weight to this factor.

Taking into consideration all the factors put forth above, the Arbitrator finds that Petitioner has sustained 35% loss of use of the left hand as provided in Section 8(e)(9) of the Act.

**No credit is due to Respondents.**

There is no evidence that either Foka Logistics or the Injured Workers' Benefit Fund have made any payments. No credits are due.

**Liability rests with the Injured Workers' Benefit Fund.**

The Arbitrator, having found Petitioner has proven the disputed issues as put forth on the Illinois Workers Compensation Commission arbitration decision, finds that liability rests with the Illinois Workers Compensation Benefit Fund.

Petitioner filed an application for adjustment of claim naming both Foka Logistics and The Injured Workers' Benefit Fund as respondents. (Petitioner's Exhibit #1). Petitioner received a subpoena response from the National Council on Compensation Insurance certifying

that there is no workers compensation insurance policy for respondent Foka Logistics. (Petitioner's Exhibit #2).

The Illinois State Treasure as ex officio custodian of the IWBF was named as a party Respondent in this matter. Petitioner submitted sufficient credible evidence that the Respondent-employer was not insured at the time of the injury. (Petitioner's Exhibit #2). Such evidence consists of the National Council on Compensation Insurance Certificate. (Petitioner's Exhibit #2). Based on the above, the Arbitrator finds that Foka Logistics did not have workers compensation insurance on the date of the accident. Should Foka Logistics fail to pay this award, liability for the benefits listed in this decision rests with the Injured Workers' Benefit Fund (IWBF).

**Proper notice of the hearing was provided to Foka Logistics.**

The Arbitrator finds that notice was provided to the respondent Foka Logistics. Petitioner sent a notice of trial to the following organizations and individuals via special process server:

- Foka Logistics, Inc. 621 Plainfield Road, Unit 202D, Willowbrook, IL 60527 (See Petitioner's Exhibit #3).
- Foka Logistics, Inc., c/o Registered Agent Alexander Imbronjev, 205 Redding Court, Oswego, IL 60543 (See Petitioner's Exhibit #3).
- Filip Trajkov, 450 Village Center Drive, Unit 304, Burr Ridge, IL 60187 (See Petitioner's Exhibit #3).

Respondent, Injured Workers' Benefit Fund (IWBF), acknowledged that the Illinois Secretary of State detailed report showed "the address of the business and it does seem to match with the notices to respondent employer in this case." (Transcript, p. 88).

Petitioner also issued a subpoena for Filip Trajkov, the owner of Foka Logistics, requiring Mr. Trajkov to appear in person before the Arbitrator in Wheaton Illinois on November 28, 2023, at 9:00 a.m. (See Petitioner's Exhibit #3).

On the date of the hearing, Petitioner's attorney physically walked through the waiting area outside the hearing room in Wheaton, Illinois. Nobody was present for Foka Logistics. (Transcript, p. 7).

By: /o/ *Frank J. Soto* January 10, 2024
Arbitrator Date

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 23WC028336 |
| Case Name | INSURANCE COMPLIANCE v.<br>STONY HAND CAR WASH<br>D/B/A CAR WASH KI SAWAARI INC |
| Consolidated Cases | |
| Proceeding Type | Petition for Penalties |
| Decision Type | Commission Decision |
| Commission Decision Number | 24IWCC0582 [23INC00058] |
| Number of Pages of Decision | 8 |
| Decision Issued By | Kathryn Doerries, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Charlene Copeland |
| Respondent Attorney | |

DATE FILED: 12/4/2024

/s/Kathryn Doerries,Commissioner

Signature

STATE OF ILLINOIS )
)
COUNTY OF COOK )

**BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION**

State of Illinois, Illinois Department of Insurance[1],

Petitioner,

Case No. 23 WC 028336

vs.

Car Wash Ki Sawaari Inc. d/b/a Stony Hand
Car Wash and Vishal Patel, Ratna Patel,
Jatin Patel, Raheel Anward, Mihir Barot
Individually and as officers of
Car Wash Ki Sawaari Inc. d/b/a Stony Hand Car Wash,

Employers/Respondents.

## DECISION AND OPINION REGARDING INSURANCE COMPLIANCE

Petitioner, the State of Illinois, Department of Insurance, Insurance Compliance Division, brings this action by and through the Office of the Illinois Attorney General against Respondents, Car Wash Ki Sawaari Inc. d/b/a Stony Hand Car Wash and Vishal Patel, Ratna Patel, Jatin Patel, Raheel Anward, Mirhir Barot, individually and as officers of Car Wash Ki Sawaari Inc. d/b/a Stony Hand Car Wash, alleging violations of §4(a) of the Illinois Workers' Compensation Act ("Act") and §9100 of the Rules Governing Practice Before the Illinois Workers' Compensation Commission ("Rules") for failure to procure mandatory workers' compensation insurance. Petitioner alleges Respondents knowingly and willfully lacked workers' compensation insurance for 1,362 days from October 22, 2013 through January 5, 2014; February 28, 2016 through December 14, 2016; May 24, 2017 through December 14, 2017; and December 15, 2017 through February 16, 2020. Proper and timely notice was provided to Respondent and a hearing was held before Commissioner Kathryn Doerries in Chicago, Illinois on October 10, 2024. Petitioner was represented by the Office of the Illinois Attorney General. Respondents did not appear in person or through counsel.

Petitioner seeks the maximum fine allowed under the Act, $500.00 per day for each of the 1,362 days during the aforementioned periods, or $681,000.00. Additionally, Petitioner seeks reimbursement for the liability incurred by the Injured Workers' Benefit Fund in claim number 16 WC 037744 in the amount of $9,281.83. Petitioner seeks a total award of $690,281.83.

The Commission, after considering the record in its entirety and being advised of the applicable law, finds that Respondents knowingly and willfully violated §4(a) of the Act and §9100

[1] Formerly the Illinois Workers' Compensation Commission's Insurance Compliance Department

of the Rules from October 22, 2013 through January 5, 2014; February 28, 2016 through December 14, 2016; May 24, 2017 through December 14, 2017 and December 15, 2017 through February 16, 2020. The Commission also finds that Respondents were in default after proper and timely notice. Accordingly, Respondents shall be held liable for non-compliance with the Act; however, we assess a lower penalty in the amount of $300.00 per day and order Respondents to pay a penalty in accordance with §4(d) of the Act in the sum of $408,600.00 and reimburse the Injured Workers' Benefit Fund in the amount of $9,281.83, for a total amount of $417,881.80.

## I. Findings of Fact

The Department of Insurance, Insurance Compliance Division, initiated an insurance compliance investigation upon learning that the Injured Workers' Benefit Fund (IWBF) had been named as an additional party in the matter of *Michael Jackson vs. Stony Hand Wash, Car Wash Ki Sawaari, Inc. and the Illinois State Treasurer as ex officio Custodian of the IWBF*, No. 16 WC 0037744. The claimant in that case alleged a work-related accident arising out of and in the course of employment on November 9, 2016. The department's investigation determined that Respondents' business was subject to the Worker's Compensation Act by virtue of §3 of the Act and had failed to provide insurance coverage for its employees. The department further determined Respondents' business was not self-insured.

Regarding notice of the hearing on this matter, Ms. Carrie Kumiega, a law student certified under Supreme Court Rule 711, and participating under the supervision of Assistant Attorney General Drew Dierkes, stated on the record that notice of the October 10, 2024 insurance compliance hearing was sent to Car Wash Ki Sawaari Inc., d/b/a Stony Hand Car Wash, at 7215 S. Stoney Island Ave., Chicago IL 60549, on August 15, 2024 by regular mail and served through the Secretary of State. A copy of this notice was admitted into evidence. (PX1 at 2-3) Notice was also served via personal service to Vishal Patel, located at 9231 Natchez Ave., Morton Grove IL 60053, on September 16, 2024. (PX2 at 1-4) Respondents did not appear in person or through counsel.

George Sweeney, a supervisor at the Illinois Department of Insurance, testified that he had direct supervisory knowledge of the investigation of Respondents by the Illinois Department of Insurance. Mr. Sweeney testified that Respondents were required by the Act to provide workers' compensation insurance coverage for their employees, including the injured employee in the underlying claim, identified as Michael Jackson. The Department of Insurance introduced into evidence the arbitration decision of *Michael Jackson v. Stony Hand Wash, Car Wash Ki Sawaari, Inc. and Illinois State Treasurer and Ex-Officio Custodian of the Injured Workers' Benefit Fund,* Workers' Comp. Commission, No. 16 WC 037744. (PX10) In that decision, issued on March 23, 2023, the arbitrator found that an employer-employee relationship existed between the parties. (PX10) The arbitrator further found that Respondents' employees aided in Respondents' operation of a car wash business, which was sufficient to subject Respondents to the automatic coverage provisions of §3 of the Act. (PX10 at 5) On November 9, 2016, the claimant was "detailing" a car when he was struck by another vehicle being driven by a co-worker. (PX10) The arbitrator also found that Respondents were uninsured on the accident date of November 9, 2016. (PX10 at 10) An award for permanent partial disability benefits was entered on behalf of the Petitioner, Michael Jackson, and against *Car Wash Ki Sawaari, Inc*. (PX10 at 3) The award was also entered against

the Injured Workers' Benefit Fund to the extent permitted and allowed under §4(d) of the Act. (PX10)

On February 27, 2024, The Injured Workers' Benefit Fund issued a check to Michael Jackson in the amount of $9,281.83. (PX11) The check indicated the payment was full and final and satisfied its obligation to pay the award for case number 16 WC 037744.

Mr. Sweeney testified that the Department of Insurance requested insurance information from the National Council on Compensation Insurance (NCCI). Topaz Bertino certified that the NCCI is the agent designated by the Commission for the purpose of collecting proof of insurance coverage information on Illinois employers and that Respondents did not file policy information showing proof of workers' compensation insurance at any time from October 22, 2013 through January 5, 2014; February 28, 2016 through December 14, 2016; May 24, 2017 through December 14, 2017 and December 15, 2017 through February 16, 2020. (PX8)

According to Mr. Sweeney, the NCCI conducted an insurance coverage search for the period from October 22, 2013 through February 16, 2020. (T. 25) Mr. Sweeney further testified that the NCCI search did show time periods during which Respondents maintained workers' compensation insurance coverage. (T. 25) Mr. Sweeney testified that the NCCI response showed "policy information filed" and also included "cancellations and employer and state deletions." (T. 25) Mr. Sweeney noted that Respondents had a policy in effect from January 6, 2016 through January 6, 2017, with coverage cancelled on February 28, 2016. (T. 26) Another policy that was to be in effect from December 15, 2016 to December 15, 2017 was cancelled on May 24, 2017. (T. 26) A policy that was to be in effect from December 15, 2017 to December 15, 2018 was cancelled on December 15, 2017, the same day it was to take effect. (T. 26)

Mr. Sweeney further testified that the Department of Insurance conducted an inquiry into whether Respondents were self-insured by making a request to the Commission's Office of Self-Insurance Administration. A sworn certification by Maria Sarli-Dehlin of the Commission's Office of Self-Insurance Administration stated that no certificate of approval to self-insure was issued by the Commission to Stony Island Hand Car Wash, President: Vishal Patel, F.E.I.N. 463968000 from October 22, 2013 through January 5, 2014; February 28, 2016 through December 14, 2016; May 24, 2017 through December 14, 2017; and December 15, 2017 through February 16, 2020. (PX9)

The Department of Insurance also initiated a Business Entity Search through the Illinois Secretary of State. Records obtained from the Office of the Secretary of State indicated Car Wash Ki Sawaari Inc., was incorporated on October 22, 2013, with the initial registered agent and incorporator listed as "Vishal Patel." (PX5) The Secretary of State's records also included a printout which revealed that Car Wash Ki Sawaari Inc. was active and doing business under the assumed name of "Stony Hand Car Wash." (PX6)

The Department of Insurance also requested records from the Illinois Department of Revenue which certified that the Department of Revenue had processed Illinois corporation income and replacement tax returns for the years 2013 through 2020 but not thereafter. (PX12) Lastly, the Department of Insurance requested records from the Illinois Department of Employment Security. (PX13)

On June 8, 2023, a State of Illinois Notice of Non-Compliance was sent via certified mail to Respondents at 7215 S. Stoney Island Avenue, Chicago IL 60649 and at 9231 Natchez Avenue, Morton Grove, IL 60053. (PX3a) The Notice stated that according to Commission records, the Respondents were not in compliance with the requirements of §4(a) of the Act for the periods of October 22, 2013 through January 5, 2014; February 28, 2016 through December 14, 2016; May 24, 2017 through December 14, 2017; and December 15, 2017 through February 16, 2020. Additionally, Petitioner sent notice on June 8, 2023 to Respondent regarding an Insurance Compliance Informal Conference set for July 13, 2023 at 11:30 a.m. (PX4) To Mr. Sweeney's knowledge neither Respondent nor any proxy appeared on that date.

## I. Conclusions of Law

Jurisdiction and legislative authority to adjudicate insurance non-compliance cases are vested in the Commission by virtue of §4(d) the Act. Under §4 of the Act, all employers who come within the purview of the Act are required to provide workers' compensation insurance, whether this is done through being self-insured, through security, indemnity, or bond or through a purchased policy. Section 9100.90 of the Commission's Rules codifies the language of the Act, and additionally describes the notice of non-compliance required, as well as the procedures of the Insurance Compliance Division, and how hearings are to be conducted. Reasonable and proper notice of the proceedings, as noted above, was provided to Respondent.

The Commission first addresses whether Respondent is subject to the Act. Pursuant to §3 of the Act, certain employers and their employees are automatically subject to the provisions of the Act if they engage in specific types of businesses, including those "engaged in any department of the following enterprises or businesses which are declared to be extra hazardous, namely:

> 15. Any business or enterprise in which electric, gasoline or other power-driven equipment is used in the operation thereof." *820 ILCS 305/3(15)(West 2016).*

The Commission takes judicial notice of the findings by the Arbitrator in this regard as contained in the Decision rendered in *Michael Jackson vs. Stony Hand Wash, Car Wash Ki Sawaari, Inc. and the Illinois State Treasurer as ex officio Custodian of the IWBF*, No. 16 WC 0037744. (PX10 at 5) The claimant's testimony therein established that Respondents' employees aided in Respondents' operation of a car wash business, and that he was struck by a moving vehicle being operated by a co-worker. Accordingly, the Commission finds that Respondents engaged in a specific type of business that automatically brings it within the purview of the Act.

Pursuant to §4(a) of the Act, all employers who come within the provisions of the Act are required to provide workers' compensation insurance. 820 ILCS 305/4(a) (West 2016). Section 9100.90(a) of the Rules similarly provides that any employer subject to §3 of the Act shall insure payment of compensation required by §4 of the Act "by obtaining approval from the Commission to operate as a self-insurer or by insuring its entire liability to pay the compensation in some insurance carrier authorized, licensed or permitted to do such insurance business in Illinois." 50 Ill. Adm. Code 9100.90(a). The Rules also provide that a certification from a Commission employee "that an employer has not been certified as a self-insurer shall be deemed prima facie evidence of that fact." 50 Ill. Adm. Code 9100.90(d)(3)(E). Additionally, "A certification from an

employee of the National Council on Compensation Insurance stating that no policy information page has been filed in accordance with Section 9100.20 shall be deemed prima facie evidence of that fact." 50 Ill. Adm. Code 9100.90(d)(3)(D).

In this case, Petitioner submitted a certification from the Commission's Office of Self-Insurance which established that no certificate of approval to self-insure was issued by the Commission to Respondent, Car Wash Ki Sawaari Inc., for the periods of October 22, 2013 through January 5, 2014; February 28, 2016 through December 14, 2016; May 24, 2017 through December 14, 2017; and December 15, 2017 through February 16, 2020. Petitioner also submitted the NCCI certification establishing that Respondent did not file policy information showing proof of workers' compensation insurance at any time for the periods of October 22, 2013 through January 5, 2014; February 28, 2016 through December 14, 2016; May 24, 2017 through December 14, 2017; and December 15, 2017 through February 16, 2020. The Department of Insurance concluded that Respondents did not have workers' compensation insurance, nor was it self-insured during the time periods relevant hereto. Accordingly, the Commission concludes that Respondents failed to comply with the legal obligations imposed by §4(a) of the Act from October 22, 2013 through January 5, 2014; February 28, 2016 through December 14, 2016; May 24, 2017 through December 14, 2017; and December 15, 2017 through February 16, 2020.

The Commission further finds Respondents knowingly and willfully failed to comply with the Act for a significant period of time. The NCCI insurance coverage search revealed Respondents had insurance policies which were cancelled, thus demonstrating knowledge of their insurance obligation. As reflected in the arbitration decision for the underlying case, the claimant, Michael Jackson, filed his initial Application for Adjustment of Claim on December 13, 2016. (PX10 at 4) The records obtained from the Department of Revenue reflect corporate tax returns filed for "Car Wash Ki Sawaari, Inc." for tax years 2017, 2018, 2019, and 2020. (PX12 at 6, 14, 22, 29) Significantly, Respondent continued to operate without insurance during the periods of May 24, 2017 through December 14, 2017 and December 15, 2017 through February 16, 2020.

Regarding the issue of penalties for failure to maintain workers' compensation insurance coverage, Section 4(d) of the Act states in pertinent part:

> Upon a finding by the Commission, after reasonable notice and hearing, of the knowing and willful failure or refusal of an employer to comply with any of the provisions of paragraph (a) of this Section . . . the Commission may assess a civil penalty of up to $500 per day for each day of such failure or refusal after the effective date of this amendatory Act of 1989. The minimum penalty under this Section shall be the sum of $10,000. Each day of such failure or refusal shall constitute a separate offense. The Commission may assess the civil penalty personally and individually against the corporate officers and directors of a corporate employer, the partners of an employer partnership, and the members of an employer limited liability company, after a finding of a knowing and willful refusal or failure of each such named corporate officer, director, partner, or member to comply with this Section. The liability for the assessed penalty shall be against the named employer first, and if the named employer refuses to pay the penalty to the Commission within 30 days after the final order of the Commission, then the

> named corporate officers, directors, partners, or members who have been found to have knowingly and willfully refused or failed to comply with this Section shall be liable for the unpaid penalty or any unpaid portion of the penalty. *820 ILCS 305/4(d)(West 2016).*

Section 9100.90(b) of the Rules similarly provides that penalties may be assessed for non-compliance after a reasonable notice and hearing. 50 Ill. Adm. Code 9100.90(b) (1986). Section 9100.90(c) of the Rules describes the proper notice of non-compliance to be served upon the employer and provides that the employer may request an informal conference to resolve the matter. 50 Ill. Adm. Code 9100.90(c) (1986). Section 9100.90(d) of the Rules describes the manner of notice and service for an insurance compliance hearing and the procedure for conducting the hearing. 50 Ill. Adm. Code 9100.90(d) (1986). The Commission finds that Respondent failed to appear for the informal conference.

The Commission considers the following factors in assessing penalties against an uninsured employer: (1) the length of time the employer had been violating the Act; (2) the number of workers' compensation claims brought against the employer; (3) whether the employer had been made aware of his conduct in the past; (4) the number of employees working for the employer; (5) the employer's ability to secure and pay for workers' compensation coverage; (6) whether the employer had alleged mitigating circumstances; and (7) the employer's ability to pay the assessed amount. *See State of Illinois vs. Murphy Container Service*, 07 IWCC 1037; 2007 Ill. Wrk. Comp. LEXIS 1216. The Commission finds that the length of time that Respondents were in violation of the Act in failing to obtain workers' compensation insurance was significant. Respondents failed to have insurance for 1,362 days from October 22, 2013 through January 5, 2014; February 28, 2016 through December 14, 2016; May 24, 2017 through December 14, 2017 and December 15, 2017 through February 16, 2020. Regarding the second factor, it appears that the claim brought by Michael Jackson was the only claim brought against this employer. There is no evidence that Respondents had been made aware of their conduct in the past. As for the number of employees working for Respondents, the Arbitration decision in case number 16 WC 03744 did not address the number of employees. The Department of Employment Security shows that Car Wash Ki Sawaari Inc. reported it employed six employees for its quarterly wage report ending March 31, 2020. (PX13 at 3) For factor five (5), there is no evidence in the record before us regarding Respondents' ability or inability to secure and pay for insurance coverage. Regarding factor six (6), there is no evidence of any mitigating circumstances. Regarding the seventh factor (ability to pay assessed amounts), the corporate tax returns document relatively low earnings in the amounts of $29,290.00 in 2017; $36,950.00 in 2018; $6,557.00; and a loss of $24,701.00 in 2020. (PX12 at 6, 14, 22, 29-31) There were no tax returns filed for this corporate entity after 2020. The Commission finds that Respondent's ability to pay penalties and reimburse the IWBF is limited.

As Respondents failed to have workers' compensation insurance, the Injured Workers' Benefit Fund was found liable to the worker as a result of the injury, and the Fund has the right to recover benefits due and owing if the Respondents/Owners fail to pay those benefits. Based on the record before us, the Commission finds the appropriate penalty to be $300.00 per each day of noncompliance. The Commission assesses a penalty of $408,600.00 ($300.00 x 1,362 days) against Respondents Vishal Patel, Ratna Patel, Jatin Patel, Raheel Anward and Mihir Barot, individually and as officers of Car Wash Ki Sawaari Inc. d/b/a Stony Hand Car Wash. Pursuant to

Section 9100.85(a)(1) of the Rules, the Commission is also entitled to obtain reimbursement from Respondents in the amount of $9,281.83 representing the liability imposed on the Injured Workers' Benefit Fund in the case of *Michael Jackson vs. Stony Hand Wash, Car Wash Ki Sawaari, Inc. and the Illinois State Treasurer as ex officio Custodian of the IWBF*, No. 16 WC 0037744.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondents, Car Wash Ki Sawaari Inc. d/b/a Stony Hand Car Wash, and Vishal Patel, Ratna Patel, Jatin Patel, Raheel Anward and Mihir Barot, individually and as officers of Car Wash Ki Sawaari Inc. d/b/a Stony Hand Car Wash, pay to the Illinois Workers' Compensation Commission the sum of $417,881.83 pursuant to Section 4(d) of the Act and Section 9100.85(a)(1) of the Rules.

Pursuant to Commission Rule 9100.90(e), once the Commission assesses a penalty against an employer in accordance with Section 4(d) of the Act, payment shall be made according to the following procedure: 1) payment of the penalty shall be made by certified check or money order payable to the Illinois Workers' Compensation Commission, or by an electronic format prescribed by the Commission and accepted by the Illinois Office of the Comptroller; and 2) payment shall be mailed or presented within 30 days after the final order of the Commission or the order of the court on review after final adjudication to:

Illinois Workers' Compensation Commission
Fiscal Department
69 W. Washington Street, Suite 900
Chicago, Illinois 60602

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

**December 4, 2024**

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KAD/swj
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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 | 20WC008702 |
| Case Name | Alfonso Camarillo-Herrera v.<br>Fields Lexus Glenview |
| Consolidated Cases | |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 24IWCC0583 |
| Number of Pages of Decision | 24 |
| Decision Issued By | Raychel Wesley, Commissioner |

| | |
|---|---|
| Petitioner Attorney | David Barish |
| Respondent Attorney | Daniel Grant |

DATE FILED: 12/4/2024

/s/Raychel Wesley,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

ALFONSO CAMARILLO-HERRERA,

Petitioner,

vs. NO: 20 WC 08702

FIELDS LEXUS GLENVIEW,

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 whether Petitioner sustained an accidental injury on March 18, 2020, whether his left knee condition is causally related to his work activities, entitlement to Temporary Total Disability benefits, entitlement to medical expenses, and the nature and extent of any permanent disability, and being advised of the facts and law, amends the Decision of the Arbitrator as stated below, but otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

CONCLUSIONS OF LAW

I. Accident

The Arbitrator found Petitioner proved the March 18, 2020 incident arose out of and occurred in the course of his employment. The Commission concludes a different analysis is required. To be clear, the parties' dispute is not whether or not the knee injury Petitioner described constitutes an accident arising out of and occurring in the course of Petitioner's employment; rather, in dispute is whether or not Petitioner suffered a left knee injury on March 18, 2020.

Petitioner testified he injured his left knee on March 18, 2020 while moving a granite desktop. T. 16-17. Petitioner acknowledged he continued working until March 24, 2020, when Respondent implemented layoffs, and did not report the injury until April 1, 2020; Petitioner explained this was

because he was worried about his job: "Because things were changing at work, I did not want to lose my job more than anything." T. 19-20. In asserting Petitioner is not credible and fabricated the work injury, Respondent directs our attention to three "key" facts:

> (1) the Petitioner's delayed reporting of the alleged accidental injuries to his Employer until a week after he was terminated; (2) the Petitioner's delay in seeking medical care until after he was terminated; and (3) the fact that Petitioner continued to work full duty following the time of the alleged injury through his termination. Respondent's Statement of Exceptions, p. 9.

As detailed below, the Commission views the evidence differently.

Respondent first emphasizes Petitioner's admission that he did not report the injury on the date it allegedly occurred, nor during the March 24, 2020 meeting with his supervisor, Anthony Thommes, but instead it was not until April 1, 2020, after learning his insurance had lapsed, that Petitioner reported the injury. Respondent acknowledges Petitioner's testimony that he did not immediately report the injury because he was worried about being terminated, but Respondent argues that concern "evaporated upon his actual termination" on March 24, 2020. Respondent's Statement of Exceptions, p. 10. The Commission disagrees. We find this argument fails to acknowledge Respondent was under new ownership and both Petitioner and Respondent's witness, Mr. Thommes, testified changes were being made at the dealership. T. 15, 41. While Petitioner had worked at the dealership for nearly 30 years, he no longer had established relationships with his supervisors like he did under the prior owners. We find Petitioner's testimony of being fearful of losing his job is credible and we believe he was understandably reluctant to report a work injury in the early stage of his new employment relationship. Further, while Respondent asserts Petitioner was fired, our review of the evidence reveals Petitioner was simply one of several of Respondent's employees placed on layoff because of the COVID-19 shutdown. T. 31.

Our review of the evidence revealed that Mr. Thommes testified that Petitioner was part of dealership-wide layoffs related to the evolving pandemic:

> Q. Why was he let go?
> A. Work had slowed due to no customers coming in for COVID and we were performing layoffs.
>
> Q. Was he the only employee that was let go?
> A. No. T. 44 (Emphasis added).

The Commission concludes Petitioner's inclusion in the company-wide pandemic layoff is not equivalent to Petitioner being fired with no expectation for recall.

Respondent next argues Petitioner's explanation for not seeking immediate treatment despite complaining of significant symptoms is not credible:

> He attempted to explain this delay by claiming the reason he delayed seeking treatment was due to the his [*sic*] health insurance lapsing. However, the petitioner testified on cross-examination that his health insurance was in place through March 31, 2020, and he could have sought treatment during that period of time. Respondent's Statement of Exceptions, p. 10-11.

The Commission disagrees. Initially, we observe Petitioner did not claim to have delayed treatment because his group insurance lapsed. Rather, Petitioner testified he was not aware his insurance had lapsed until he was informed of that fact by the office staff at Delaware Physicians on April 1, 2020. T. 33-34, 38. As to Respondent's suggestion Petitioner could have sought treatment in the week after being laid off, this again ignores the impact of the COVID-19 shutdown. As Petitioner's orthopedic surgeon, Dr. Giannoulis, explained during his deposition, medical offices were closed and it was difficult for people to get appointments. PX4, p. 14. The Commission concludes the initial treatment date of April 1, 2020 does not reflect negatively on Petitioner's credibility.

Finally, Respondent argues Petitioner's ability to continue working full-duty for a week after the alleged incident establishes that no injury occurred:

> If the petitioner was facing such difficulties that impacted his quality of life as testified, it would stand to raise the question how the petitioner was able to continue with his job duties with no modifications, and no one noticing his limitations. Respondent's Statement of Exceptions, p. 11.

Again, we disagree. While Petitioner's normal job as head porter involved numerous knee-stressing activities, such as kneeling and squatting to detail customers' cars, the Commission emphasizes the pandemic had already resulted in modified job assignments for Respondent's employees. To be clear, Mr. Thommes testified customer work had waned prior to Petitioner's date of accident, so in order to keep the employees busy, Mr. Thommes assigned them miscellaneous tasks. T. 43. The Commission concludes Petitioner's ability to continue working under these circumstances does not impugn Petitioner's credibility. As to Respondent's claim "no one notic[ed]" Petitioner having difficulties, the Commission finds this assertion is unsupported by the record; we note the only witness presented at trial who could have offered firsthand observations of Petitioner's perceived physical capabilities that week was Mr. Thommes, but Mr. Thommes was not asked whether or not Petitioner had visible limitations or appeared to have difficulties. The Commission finds a negative inference based on this evidence is improper.

The Commission finds Petitioner is credible. His testimony was straightforward and we believe his actions with respect to his knee injury were motivated by legitimate concerns of not alienating the new ownership group, a worry which was further exacerbated by the developing pandemic and its resultant effect on job security. The Commission further finds Petitioner's credible testimony is corroborated by the medical records, which consistently document a March 18, 2020 work injury:

> April 1, 2020 Beverly Knigge, APN: "While working on 3/18/2020 he was pulling some heavy object, actually it was a countertop during his work and this ended up hurting his left knee" (PX1);
>
> April 3, 2020 Physical Therapy Evaluation: "On 3/18/2020 he was at work moving a piece of granite. He says him and his partner moved it onto a dolly. The patient says he put his left foot on the dolly and pushed on it to make it move. He says that when [*sic*] he first noticed the knee pain…it was a quick sharp pain that became dull." (PX4); and

> May 4, 2020 Dr. Christos Giannoulis: "…seen today for a consultation regarding a work injury that occurred on 3/18/2020. He had a [*sic*] injury at work when he stepped and twisted his knee awkwardly." (PX4, DepX2).

The Commission finds the preponderance of the credible evidence establishes Petitioner suffered a left knee injury while performing his work activities on March 18, 2020.

II. Causal Connection

The Arbitrator found Petitioner's current left knee condition is causally related to the March 18, 2020 accident. The Commission reaches the same conclusion, however our analysis differs.

A claimant bears the burden of proving all elements of the claim, including causation, by the preponderance of the credible evidence. *Ghere v. Industrial Commission*, 278 Ill. App. 3d 840, 847 (4th Dist. 1996). To establish causation under the Act, a claimant must prove only that some act or phase of his or her employment was a causative factor in the ensuing injury. *Land and Lakes Co. v. Industrial Commission*, 359 Ill. App. 3d 582, 592 (2nd Dist. 2005). *See also Sisbro, Inc. v. Industrial Commission*, 207 Ill. 2d 193, 205 (2003).

Respondent's expert, Dr. Cole, denied a causal relationship. In his April 5, 2021 §12 report, Dr. Cole opined the "fact pattern" did not support causation:

> I am not questioning what the claimant tells me, per se, but the timeline developed in the medical records and his fact pattern do not support that he had a traumatic medial meniscus tear given the lack of clinical presentation for 2-3 weeks after the injury and the delayed reporting. A traumatically induced meniscus tear caused acutely at the time of injury would have presented with severe pain and swelling and likely preclude him from the ability to continue working immediately thereafter on a more likely than not basis. RX4, DepX2.

During his deposition, Dr. Cole testified Petitioner had symptomatic pre-existing degenerative disease and the "increasing subjective pain" on March 18, 2020 was an "insidious manifestation of symptoms" no different than "what life would bring to him due to his pre-existing arthritis and meniscal pathology." RX1, p. 19. Dr. Cole further reiterated his belief that Petitioner had an arthritic knee and the treating surgeon would confirm his suspicion:

> I think you've got to pick your hypothesis here, is this an aggravation of a pre-existing condition or is it an acute meniscal tear, so I think my report is a roundabout way of saying that this guy had a degenerative meniscal tear with associated osteoarthritis, had evidence of pre-existing symptoms and, you know, certainly you can have an uptick of symptoms with doing something at work but even after that event he reported his symptoms got progressively worse over those subsequent days. So I'm telling you that I believe with a high degree of medical and surgical certainty that he did not have an acute meniscal tear for the reasons I provided and this is the manifestation of symptoms due to an underlying disease process and given the timeline and the pre-existing symptoms that I would argue that you could either say well, it is work that caused his need for treatment or it is the pre-existing process that manifested symptoms in the workplace that oh, by the way, actually got worse after this alleged event that led to the need for treatment. I'm

> telling you my opinion with a high degree of medical and surgical certainty that the facts support pre-existing disease manifesting symptoms prior to this alleged event and even after the event happened the symptoms got worse by his report. So I'm saying not acute tear. I would argue go ahead and depose, if you haven't already, his treater. It would be interesting to see what he says because it was in his knee when I read the report so this is an arthritic knee, pre-existing degenerative disease of the meniscus manifesting symptoms prior to and after an alleged event. RX1, p. 33-34 (Emphasis added).

Dr. Giannoulis, in turn, concluded Petitioner's left knee condition is causally related to the March 18, 2020 incident. During his deposition, Dr. Giannoulis opined there were indicators of a traumatic incident and explained the mechanism of injury Petitioner described is consistent with a meniscal tear. PX4, p. 18-19. Of note, on the post-accident MRI the radiologist, Dr. George Kuritza, identified "Joint effusion with some peripatellar soft tissue swelling, presumably posttraumatic soft tissue bruising" (PX2, Emphasis added); Dr. Giannoulis, who concurred with Dr. Kuritza and similarly identified effusion on the films, testified the effusion was likely traumatic: "Yes, the majority of times we see an effusion, unless somebody has severe arthritis, it's usually from trauma." PX4, p. 27. Dr. Giannoulis then explained Petitioner did not have severe arthritis that would have accounted for the effusion seen on the MRI:

> … the majority of patients that come in with an effusion or have an MRI with an effusion, it's usually some sort of an event that has happened or a trauma that has occurred. In the absence of significant arthritis, which Grade One chondromalacia is not significant arthritis. It's usually from some sort of a trauma, inflammation of the synovium or something that is not degenerative in nature…So the best way to determine how significant arthritis is is by looking at it, and I had the luxury of looking at it with a scope, with a camera. He had Grade One chondromalacia which is mild arthritis. There is not much arthritis at all in the knee joint in the medial compartment. He had a little bit more chondromalacia Grade Two in his patella. That's the kneecap, but that was not a source of pain for him. PX4, p. 35-36 (Emphasis added).

In challenging causation, Respondent insists Petitioner is not credible and further argues this renders Dr. Giannoulis' opinions unreliable. For the reasons set forth below, we disagree.

Respondent posits Petitioner's testimony that the left knee symptoms he experienced in November 2019 had resolved as of March 18, 2020 is "wholly inconsistent" with the history he provided on April 1, 2020 as well as at the §12 examination. Respondent further emphasizes Petitioner failed to have Dr. Portland "confirm that [Petitioner's] symptoms and condition completely resolved, through deposition or testimony." Respondent's Statement of Exceptions, p. 12. The Commission finds no fault in Petitioner not deposing Dr. Portland. Petitioner submitted Dr. Portland's subpoenaed records into evidence. The December 1, 2020 subpoena[1] requests "Date(s) of Medical Service: 01/01/2016 to the present – medical records/itemized bills and HCFA forms." PX5. The certified records provided in response include only one treatment record, that being the November 21, 2019 evaluation. As Dr. Portland had no direct knowledge of Petitioner's symptoms following November 21, 2019, the doctor was not in a position to comment on, let alone "confirm," the status of Petitioner's symptoms. Furthermore, the Commission concludes the absence of follow-up care with Dr. Portland corroborates

[1] The Commission observes Petitioner's personal identity information is unredacted from the subpoena. The Commission cautions Counsel to adhere to Supreme Court Rule 138. *Ill. S. Ct. R. 138* (eff. Jan. 1, 2018).

Petitioner's testimony of improved symptoms. We note it is undisputed that Petitioner had group insurance that would have covered his treatment expenses, so Petitioner had no financial motivation to defer treatment should his symptoms have warranted.

Respondent further asserts Dr. Giannoulis' opinions are predicated on misstatements and misrepresentations and Dr. Cole is the only credible expert. The Commission finds Respondent's argument is not well-founded as it ignores that Dr. Giannoulis had the same opportunity to review Dr. Portland's records as Dr. Cole. Moreover, Dr. Giannoulis' May 26, 2021 narrative report explains Dr. Portland's records did not alter his opinion:

> The diagnosis was torn medial meniscus and mild knee arthritis. An MRI was recommended. It appears the MRI was never done and he did not return to see Dr. Portland after that initial and only visit. In regards to the causation of his knee and the medial meniscus tear, if the patient improved his symptoms, did not experience additional symptoms after that 11/21/2019 visit, and never went on to get an MRI or surgery, it is most like [*sic*] than not that his condition of ill-being was aggravated or accelerated by the injury that he described to me in the previous notes from his date of accident at his work on 03/18/2020. PX4, DepX4 (Emphasis added).

The Commission finds Dr. Giannoulis' conclusions are credible, persuasive, and consistent with the medical evidence, and we adopt same. We further find Dr. Cole's opinions are inconsistent with the evidence of acute trauma on the post-accident diagnostic imaging as well as Dr. Giannoulis' intraoperative findings. The Commission observes Dr. Cole did not directly address the post-traumatic effusion noted on the MRI, though he did concede Dr. Portland did not document any effusion at the November 21, 2019 visit. RX1, p. 24. Moreover, while Dr. Cole expected the treating surgeon would confirm his opinion on the arthritic state of Petitioner's knee, Dr. Giannoulis instead definitively testified Petitioner had only mild arthritis. The Commission finds Petitioner's left knee condition is causally connected to the March 18, 2020 accident.

III. Correction

The Commission observes the Order reflects an award of 34 6/7 weeks of "temporary partial disability" benefits. The Commission corrects the Order to reflect the benefits at issue are Temporary Total Disability benefits, and the awarded period constitutes 34 4/7 weeks.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 27, 2023, as amended above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $506.66 per week for a period of 34 4/7 weeks, representing April 3, 2020 through November 30, 2020, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the sum of $52,663.54, as detailed in Petitioner's Exhibit 6, for medical expenses, as provided in §8(a), subject to §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $456.00 per week for a period of 32.25 weeks, as provided in §8(e)12 of the Act, for the reason that the injuries sustained caused the 15% loss of use of the left leg.

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

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

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

**December 4, 2024**

RAW/mck

O: 10/9/24

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/s/ *Raychel A. Wesley*

/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

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|---|---|
| Case Number | 20WC008702 |
| Case Name | Alfonso Camarillo-Herrera v. Fields Lexus Glenview |
| Consolidated Cases | |
| Proceeding Type | |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 16 |
| Decision Issued By | Joseph Amarilio, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | David Barish |
| Respondent Attorney | Daniel Grant |

DATE FILED: 11/27/2023

**THE INTEREST RATE FOR THE WEEK OF NOVEMBER 21, 2023 5.23%**

/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**

**Alfonso Camarillo-Herrera**
Employee/Petitioner

v.

**Fields Lexus Glenview**
Employer/Respondent

Case # **20** WC **8702**

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 D. Amarilio**, Arbitrator of the Commission, in the city of **Chicago**, on **September 27, 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 **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 $**39,520.00**; the average weekly wage was $**760.00.**

On the date of accident, Petitioner was **55** years of age, ***married*** with **0** dependent children.

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

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

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

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

**ORDER**

Respondent shall pay directly to the medical providers the reasonable and necessary medical services, pursuant to the medical fee schedule, of $2,665.00 to Riverside Health Clinic; $2,320.00 to Lakeshore Open MRI; $7,826.58 to Lakeshore Surgery Physicians; $17,541.76 to Lakeshore Surgery Facility; $735 Western Touhy Anesthesia; $2,120.20 to Delaware Physicians/Dr. Knigge/Oak Brook Medical; and, $19,455.00 G & T Ortho/Dr. Giannoulias, as provided in Section 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary partial disability benefits of $506.66 per week for 34-6/7th weeks, commencing 04/03/2020 through 11/30/2020, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $456.00 per week for 32.25 weeks, because the injuries sustained caused the 15% loss of the left leg, as provided in Section 8(e) of the Act.

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

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

/s/ *Joseph D. Amarilio* **NOVEMBER 27, 2023**

Signature of Arbitrator

**BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION**
**Attachment to Arbitration Decision**

| | | |
|---|---|---|
| **Alfonso Camarillo-Herrera,** | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | **Case No. 20 WC 008702** |
| | ) | |
| **Fields Lexus Glenview,** | ) | |
| | ) | |
| | ) | |
| Respondent. | ) | |

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

## I. PROCEDURAL HISTORY

Mr. Alfonso Camarillo-Herrera ("Petitioner"), by and through his attorney, filed an Application for Adjustment of Claim for benefits under the Workers' Compensation Act (Act) ( 820 ILCS 305/1 *et seq.* (West 2014)). Petitioner alleged that he sustained an accidental injury on March 18, 2020 while employed by Field Lexus Glenview ("Respondent"). A hearing was held on September 27, 2023 on the following five (5) disputed issues: 1. Whether Petitioner sustained an accident that arose out of and in the course of his employment. 2. Whether Petitioner's current condition of ill-being is causally connected to his injury; 3. Whether Respondent is liable for unpaid medical bills; 4. Whether Petitioner is entitled to temporary total disability (TTD) benefits; and 5. The nature and extent of the injury.

Petitioner testified in support of his claim. Mr. Anthony Thommes testified on behalf of Respondent. Dr. Christos Giannoulias, the treating orthopedic surgeon, was called to testify by evidence deposition. Dr. Brian Cole, Respondent's Section 12 orthopedic examiner, was called by Respondent to testify by evidence deposition. In addition to their testimony, both experts generated two (2) reports each addressing the disputed issues. The parties mutually requested a written decision, including findings of fact and conclusions of law pursuant to the Act. (Arb. X 1)

## II. FINDINGS OF FACT

Petitioner testified that he was employed by Field Lexus Glenview ("Respondent") for approximately twenty-eight (28) years as a porter and then was promoted as the head porter in 2020. (Transcript "T." 10). Petitioner testified that as a porter, his duties included washing and delivering vehicles to new and existing customers, removing snow, polishing and waxing the vehicles, and ensuring that all vehicles in the lot were secured prior to closing the showroom. (T. 11-12)

***Accident***

Petitioner testified that on March 18, 2020, he felt normal and did not have any problems with his left knee. (T. 13) Petitioner testified that on March 18, 2020, the General Manager Rocky and his supervisor, Anthony Thommes, had him and his co-workers clean the second floor. (T. 16). To clean the floor, Petitioner and his co-worker, Alex had to remove all the items including a granite countertop that was about five (5) by two and half (2 ½) feet. (T. 16, 18). Petitioner explained that he used a dolly to move the granite since it was very heavy. (T. 16). As he was maneuvering the dolly loaded with the granite, Petitioner felt something in his left knee. (T. 17) Petitioner said that he did not tell anyone about his left knee at the time of the injury and kept working for the remaining day. (T. 17-18). Petitioner testified that he felt pain but kept working because he did not want to be laid off from his employment. (T. 18-19). On the night of March 18, 2020, Petitioner testified that he could not sleep because of pain in his left knee and was unable to shower because he could not lift his leg up to get into the shower. (T. 21-22). Petitioner testified that he worked until March 24, 2020, at which time he was laid off. (T. 20). One week later, Petitioner testified that he told Mr. Thommes about his injury in Mr. Thommes' office. (T. 20-21).

Mr. Anthony Thommes testified that since January 2020, he was the manager of the dealership and Petitioner's supervisor. On March 18, 2020, he had the porters do miscellaneous tasks around the dealership when customer work had started to wane. (T. 40, 43, 49). He testified that Petitioner did not report an accident to him or anyone else in management either on March 18, 2020, or on March 24, 2020 when he was terminated. (T .44). Mr. Thommes testified that on April 1, 2020, he received a telephone call from Petitioner informing him of the injury that occurred on March 18, 2020. (T. 44, 45). Mr. Thommes testified that he sent an email to HR about the injury after speaking to Petitioner. Mr. Thommes added that he received a call from Petitioner's brother, 20 minutes after receiving Petitioner's call, that he too had work injury. Mr. Thommes added that Petitioner's health insurance terminated at the end of March. (T. 45-46).

Petitioner testified that since being released from Dr Giannoulias on November 30, 2020, he had not received any further treatment for his left knee. (T. 25-26). He testified that he currently works at a nursing home doing maintenance work. (T. 26). Since the accident of March 18, 2020, Petitioner states that his left knee is numb when it is cold. He does not have the flexibility or capacity to bend his left knee quickly or participate in physical activities such as playing soccer. (T. 26-27).

The Arbitrator takes judicial notice that on March 20, 2020, Governor Pritzker announced Executive Order 2020-10, a statewide order for all Illinois residents to stay home, unless traveling for essential needs or business, and requires businesses not engaged in essential activities to cease all activities except for minimum basic operations. The stay-at-home order was intended maximize COVID-19 containment. The order was to take effect 5:00 p.m. Saturday, March 21, 2020.

***Summary of Medical Evidence***

Petitioner testified that on November 21, 2019, three months before his work accident, he sought treatment from Dr. Gregory Portland, at Illinois Bone & Joint Institute, for pain in his left

knee. Dr. Portland recorded in his office notes that Petitioner said he has had the pain for three weeks. He did not recall any injury but experienced in increased pain when exercising. The records further reflect that he felt pain while jogging. (T. 13-14, 28) (PX 5). On physical examination, Dr. Portland noted that Petitioner had full range of motion of the left knee. Gait is normal heal-toe. Patellar crepitation is positive. Medial joint line is positive. Lateral joint line is negative. McMurray test is positive. Effusion (swelling) is negative. Lachman is negative. Dr. Portland diagnosed Petitioner with a torn medial meniscus on the left knee and ordered Petitioner to get an MRI and prescribed pain medication. (T. 14, 29) Petitioner testified that he took the pain medication and felt better, and therefore, he did not get an MRI nor return to Dr. Portland for additional treatment. (T. 14)

Two weeks after the alleged accident and one week after being laid off, Petitioner was seen by Beverly Knigge, APN-BC, a Board-Certified Advanced Practice Nurse, at Delaware Physicians, L.L.C. on April 1, 2020. (T. 21, 32) Nurse Knigge recorded Petitioner giving a history that he works a car dealership as a car detailer. "While working on March 18, 2020, was pulling some heavy object, it was a countertop during his work and ended up with hurting his left knee. He had some pain in the knee before but the pain worsened after doing this." He did not go to the Emergency Room. His pain level was 6 to 7 out of 10. After that he was laid off on 03/24/2020. At that time, he did not report the incident to his employer." (PX 1) Nurse Knigge labeled the visit as "Worker's Comp." (PX1). After performing a physical examination, Nurse Knigge ordered an MRI and prescribed pain medication and physical therapy. Nurse Knigge further instructed Petitioner to follow up in two weeks and, if the MRI revealed pathology, she would refer him to orthopedics. (PX 1).

On April 13, 2020, Petitioner obtained an MRI of his left knee at LakeShore Open MRI upon referral of Nurse Knigge. (PX 2). Radiologist, George G. Kurltza, M.D., a Diplomat, the American Board of Radiology, found the following. 1. There was normal joint alignment. 2. No fractures or dislocations. 3. The bone marrow of the osseous structures appears unremarkable. 4. The medial meniscus appears intact and unremarkable. 5. The medical meniscus demonstrates a tear involving the posterior horn, extending to the mid body region where it appears horizontal and extends to the free edge. 5. The lateral meniscus appears to be intact and unremarkable. 6. The anterior cruciate ligament, posterior cruciate ligament, medical collateral ligament, and the lateral collateral ligament appear unremarkable. 7. The is joint effusion. 8. There is some peripatellar soft tissue swelling, presumably posttraumatic soft tissue bruising. Dr. Kurltza's impression was that Petitioner has 1. Medial meniscal tear involving the posterior horn, extending to the midbody region where it appears horizontal and extends to the edge. 2. Joint effusion with some peripatellar soft tissue swelling, presumably posttraumatic and tissue bruising. 3. Intact collateral and cruciate ligaments as well as lateral meniscus.

On April 15, 2020, Petitioner started chiropractic physical therapy at Riverside Health Clinic as recommended by Nurse Knigge. Petitioner gave a consistent history to Dr. Amish Shaw of the March 18, 2020 work accident. He said he injured his left knee while moving granite. He said that he moved the granite onto a dolly with his partner. He put his left foot on the dolly and pushed it to make it move and then noticed the knee pain. Petitioner said it was a quick sharp pain that became dull. He came to Riverside Health to start physical therapy as prescribed by his doctor. (PX 3) [ Apparently, Petitioner believed Nurse Knigge was a physician.]

On April 22, 2020, Petitioner appeared before Nurse Knigge for a follow-up visit. Nurse Knigge labeled it a "Worker's Comp" visit. Petitioner reported that he was going the physical therapy. He continued to have significant 24/7 pain in the left knee. It has improved since the last office visit, but the pain continues in terms of aching and pain with movement and interfering with his sleep. She noted that Petitioner reported that he was not working. (PX 1)

Upon review of the April 13th MRI report, Nurse Knigge recommended Petitioner continue with the prescribed medications and physical therapy and that he obtain an orthopedic consult. (PX 1, T. 21). Petitioner testified that the pain was coming from below his kneecap. (T. 22). Petitioner testified that prior to the surgery, the pain affected him daily as the pain was preventing him from flexing, exercising, or doing any physical activities. (T. 24) Petitioner testified that no one paid for his medical bills. (T. 27).

Petitioner received physical therapy from April 3, 2020 to May 22, 2020 at Riverside Health Clinic, P.C. (Petitioner's Exhibit "PX" 3).

Petitioner introduced into evidence the October 4, 2021 evidence deposition transcript of Christos Giannoulias, M.D. In addition to the transcript, the exhibit includes the curriculum vitae of Dr. Giannoulias and his medical records pertaining to Petitioner's medical treatment and two (2) reports prepared by Dr. Giannoulias which were obtained by subpoena.

On May 4, 2020, Dr. Christos Giannoulias diagnosed Petitioner with a traumatic medial meniscus tear. Dr. Giannoulias advised Petitioner about a possible surgical repair. (PX4).

Dr. Giannoulias testified that on May 18, 2020, Petitioner came into his office and informed him that he wanted to avoid surgery. With that, Dr. Giannoulias gave the Petitioner a cortisone injection. On June 1, 2020, during a telephone consultation, Petitioner told Dr. Giannoulias that the injection gave him a relief for a couple of days but that he did not want to live with the pain and asked to proceed to surgery. (PX 4).

On August 18, 2020, underwent left knee surgery. Dr. Giannoulias performed the following procedures: (1) left knee partial medial meniscectomy, partial lateral meniscectomy; (2) left knee extensive multiple compartments synovectomy; and (3) left knee patellar chondroplasty. (PX 4). On August 31, 2020, Dr. Giannoulias removed Petitioner's sutures and noticed that Petitioner did not have any signs or symptoms of any immediate complications.) He gave Petitioner a note to start physical therapy. (PX 4).

On September 28, 2020, Dr. Giannoulias noticed that Petitioner made a great progress. (PX4). He saw that Petitioner had a near full range of motion, improvement in strength but some weakness with his extension. (PX 4). On November 30, 2020, Dr. Giannoulias noted that Petitioner was asymptomatic, a normal range of motion, a negative McMurray test. Dr. Giannoulias instructed Petitioner to return to activities and work as tolerated. (PX 4).

Dr. Giannoulias testified that he had reviewed the Independent Medical Examination ("IME") report prepared by Dr. Brian Cole and authored a letter dated May 12, 2021. He stated

that the main issue Dr. Cole raised in his Section report was that Petitioner failed to seek treatment after the injury on March 18, 2020. Dr. Giannoulias testified that he believed that the delay in receiving treatment was due to the Covid stay at home order. (PX 4). He said that many of the medical offices were closed including his own. (PX 4) He also believed that Dr. Cole had an issue with a causation, which was whether the injury that the Petitioner had on March 18, 2020 caused his meniscus tear. (PX 4). Dr. Giannoulias explained that some patients with symptoms of meniscus tears will continue to "muddle through" work and get to a point where they are no longer able to manage the pain. He believed that the Petitioner was in this situation and after he received an injection, Petitioner realized that he needed to have the surgery. (PX 4).

After reviewing the medical records from Dr. Gregory Portland of Illinois Bone & Joint Institute, Dr. Giannoulias authored a second letter dated May 26, 2021. (PX 5) This was the medical record Dr. Portland from November 21, 2019 that indicated Petitioner with a mild arthritis and meniscal tear in his left knee. Dr. Giannoulias noted that Petitioner sought a treatment after having had three (3) weeks of pain in his left knee with no specific injury. No MRI was completed, and no additional treatment was given or sought. Dr. Giannoulias opined that after a visit to Dr. Portland, Petitioner did not experience additional symptoms. He also opined that Petitioner's preexisting condition of ill-being was aggravated or accelerated by the injury described to him by Petitioner that occurred at work on March 18, 2020. (PX 4).

Dr. Giannoulias opined that the work incident as described by Petitioner is consistent with the mechanism of injury that would cause a meniscus tear. He opined that an MRI would best validate if he had a preexisting meniscus tear but one was not obtained. Dr. Giannoulias found that Petitioner did have some mild arthritis in his knee which would be consistent in some people to experience aches and pain from the mild arthritis. (PX 4).

Respondent introduced into evidence the deposition transcript of Dr. Brian Cole as Respondent's Exhibit. 1. Attached to the deposition transcript marked as Exhibit 2 are the Section 12 reports authored by Dr. Cole on April 5, 2021, and June 16, 2021. Dr. Cole testified that he has been an orthopedic surgeon licensed to practice medicine in the State of Illinois for twenty-four (24) years. He acknowledged that his 259 page curriculum vitae submitted to Petitioner's attorney was current. (RX 1, p. 5.) Dr. Cole's CV was not introduced into evidence at trial. Dr. Cole was retained by the Respondent to conduct a report pursuant to Section 12 of the Act. (RX 1, p. 6). Dr. Cole's qualification to perform Section 12 examinations and testify are not in dispute.

On April 5, 2021, Dr. Cole examined Petitioner's left knee. (RX 1, pp 6, 8, 9). He noted that Petitioner did not seek treatment until April 1, 2020, some two (2) weeks after the injury. (RX 1, pp. 9, 10). Dr. Cole testified that there was a small possibility that someone with an acute meniscus tear could continue to work after the injury as described by Petitioner, however, he believed that Petitioner had a pre-existing disease that progressed to the point where the meniscus progressively frayed and tore. (RX 1, pp. 13, 14, 16). Dr. Cole agreed with Dr. Giannoulias that Petitioner was at maximum medical improvement (MMI) as of November 30, 2020. (RX 1, p.12).

On June 16, 2021, Dr. Cole prepared an addendum to his Section 12 report after receiving an additional medical report. (RX 1, p. 17). Dr. Cole noted that Petitioner was previously diagnosed with a mild arthritis and meniscal tear on November 21, 2019. (RX 1, p, 18) Dr. Cole

did agree that the Governor of Illinois issued a shelter-in-place as of March 21, 2020, which made it difficult to schedule appointments with orthopedic offices. (RX 1, pp. 25, 26). Dr. Cole further agreed that Petitioner's description of his injury on March 18, 2020 could have caused a meniscal tear. (RX 1, p. 26). However, Dr. Cole opined that the Petitioner had a degenerative meniscal tear with associated osteoarthritis and that his pre-existing symptoms got progressively worse over time with the type of work he was performing. (RX 1, pp. 24, 30, 31). Dr. Cole believed that Petitioner's need for treatment was due to the progression of symptoms of underlying disease that continued to progress and not an injury that occurred on March 18, 2020. (RX 1, pp.33, 34, 35).

## III. CONCLUSIONS OF LAW

The Arbitrator adopts the above Statement of Facts 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. 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).*

In the case at hand, the Arbitrator observed Petitioner during the hearing and finds him be a credible witness. Petitioner was forthright when answering questions from his attorney and Respondent's attorney. 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. Although Petitioner is neither a Herodotus nor a Thucydides in providing a history, his history of the material facts of accident were consistent. The Arbitrator also observed Respondent's witness during the hearing and found that his testimony was generally consistent with Petitioner's testimony. The Arbitrator was not, however, persuaded by Mr. Thommes uncorroborated hearsay allegations.

The Arbitrator reviewed the deposition testimony of Dr. Giannoulias and Dr. Cole and compared their testimony with the record. The Arbitrator finds the findings and opinions of Dr. Giannoulias, Dr. Kurltza, and Dr. Shah to be more persuasive and consistent with the evidence and the reasonable inferences derived from the evidence over the opinions of Dr. Cole.

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

The phrase "in the course of employment" refers to the time, place, and circumstances of the injury. *McAllister v. Illinois Workers' Compensation Comm'n, 2020 IL 124848, ¶ 34*. A compensable injury occurs 'in the course of' employment when it is sustained while he performs reasonable activities in conjunction with his employment. *Id*.

"The 'arising out of' component is primarily concerned with causal connection. To satisfy this requirement it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Id. at ¶ 36*. To determine whether a claimant's injury arose out of his employment, the risks to which the claimant was exposed must be categorized. *Id*. The three categories of risks are "(1) risks distinctly associated with the employment; (2) risks personal to the employee; and (3) neutral risks which have no particular employment or personal characteristics." *Id. at ¶ 38*. "A risk is distinctly associated with an employee's employment if, at the time of the occurrence, the employee was performing (1) acts he or she was instructed to perform by the employer, (2) acts that he or she had a common-law or statutory duty to perform, or (3) acts that the employee might reasonably be expected to perform incident to his or her assigned duties." *Id. at ¶ 46.*

Petitioner testified that he was working on March 18, 2020. (T. 16). The Arbitrator notes that Mr. Thommes testified that on March 18, 2020, he was attempting to keep all porters busy by having them do miscellaneous tasks around the showroom since the business had slowed down due to covid 19. (T. 43, 49). Petitioner testified that he injured his left knee when he was utilizing a dolly with a co-worker named Alex to remove a granite countertop when he "felt something in his knee." (T. 16-17). Petitioner testified that he had difficulty sleeping due to the pain in his knee on the night of the accident and was unable to shower because he could not lift his leg up to get into the shower (T. 21-22).

The Arbitrator notes that although Petitioner was working with others, none of the employees working with Petitioner were called to testify in rebuttal regarding Petitioner's pre-accident and post-accident activities and physical capabilities. The Arbitrator is mindful that Petitioner's last day of work was March 24, 2020.

The parties agree that Respondent received notice of accident on April 1, 2020. The manner in which it was provided is disputed. The Arbitrator notes Petitioner testified that he provided notice of accident in Mr. Thommes in his office, Mr. Thommes believed he received notice by Petitioner's phone call. The Arbitrator finds it odd that Mr. Thommes testified that he completed paperwork about Petitioner's claimed accident but failed to bring Petitioner's employment file or any other corroborative documentation like the email he sent in the course of his duties after receiving notice of accident. The Arbitrator finds Petitioner's testimony to be more reliable as to how and where notice was given.

The Arbitrator notes that Mr. Thommes, who felt free to voice an indirect smear against Petitioner's integrity, an employee of nearly 28 years, without any supporting evidence, failed to bring any corroborative documentation in support of his hearsay allegation regarding Petitioner's brother. Mr Thommes testified that he understood the importance of corroborative documentation at work but failed to do so at trial. Mr. Thommes did not feel free to give an employee of 28 years with no reported prior work injuries the benefit of the doubt. He, however, felt free to a backhand attack of Petitioner's integrity. The Arbitrator gives no weight to Mr. Thommes unsupported and uncorroborated hearsay allegation.

The Arbitrator further notes that the defense to this claim is partly based on Dr. Cole's opinion that Petitioner's knee pathology is due to a progression of a degenerative condition. And yet, Mr. Thommes did not voice any concerns about Petitioner's ability to perform his duties before the claimed accident. He did not allege that Petitioner complained of knee pain before the accident. Mr. Thommes did not claim that Petitioner missed work due to a prior knee pathology. Mr. Thommes did not claim that Petitioner requested any reasonable accommodation before the accident due a knee problem. The Arbitrator infers that he did not say so because it was not so.

Neither Mr. Thommes nor Dr. Cole persuasively explained how Petitioner with an alleged significant preexisting knee pathology was able to perform the duties of a porter and detailer for over four (4) months before the date of the alleged accident; a physical job that requires walking, standing, bending, kneeling and squatting. No evidence was introduced or alleged that Petitioner had a sedentary job or was performing sedentary work.

The Arbitrator notes that, as a result of his work accident, Petitioner was diagnosed with a traumatic medial meniscus tear, and on August 18, 2020, Dr. Giannoulias performed arthroscopy of the Petitioner's left knee. (T. 26; PX 4)

Based on the Petitioner's testimony and medical records, the Arbitrator finds that Petitioner gave a consistent history of accident. Therefore, Arbitrator concludes that Petitioner has proven by a preponderance of the evidence that the March 18, 2020 accident arose out of and in the course of his employment by Respondent.

The Arbitrator notes that finding in favor of the Petitioner on accident and casual is not based on the lack of a vigorous and skillful defense. The case was well defended; defended with skill and competence along with a highly credentialed Section 12 expert. The Respondent did have the right to defend the claim. Red flags were seen. Respondent did not raise a false flag. However, after a well conducted trial, the evidence and the reasonable inference from the evidence, support the Petitioner's entitlement to benefits under the Act by a preponderance of the evidence.

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

It is well-established than an accident need not be the sole or primary cause-as long as employment is a cause-of a claimant's condition. *Sisbro, Inc. v. Industrial Comm'n,* 207 Ill.Ed 193, 205 (2003). Furthermore, an employer takes its employees as it finds them. *St. Elizabeth's Hospital v. Illinois Workers' Compensation Comm'n*, 371 Ill.App.3d 882, 888 (2007). A claimant with a preexisting condition may recover where employment aggravates or accelerates that condition. *Caterpillar Tractor Co. v. Industrial Comm'n,* 92 Ill.2d 30, 36 (1986). Where an accident accelerates the need for surgery, a claimant may recover under the Act. *Id. at 36*. 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, 63 (1994). Prior good health followed by a change immediately following an accident allows an inference that 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 rational justifying the use of the "chain of events" analysis to demonstrate the existence of an injury would also support its use to demonstrate an aggravation of a preexisting injury. *Patrick Szvmanski v. J Ave Development, Inc.,* 23IWCC0390, 7-8 (2003). If the claimant had health problems prior to a work-related injury, he bears the burden of showing that the preexisting condition was aggravated by the employment and that the aggravation occurred as a result of an accident which arose out of and in the course of his employment. *Nunn v. Industrial Comm'n,* 157 Ill.App.3d 470, 476 (1987).

Petitioner testified that he sought treatment for his left knee on November 9, 2019 from Dr. Gregory Portland, at Illinois Bone & Joint Institute, for pain in his left knee that he felt for about three (3) weeks. (T. 13, 14, 28.) Dr. Portland diagnosed Petitioner with a torn medial meniscus and mild arthritis on the left knee and ordered Petitioner to get an MRI with a prescription for pain medication. (T. 14, 29). Petitioner testified that he took the medication and felt better within the next twelve (12) days and therefore, he did not get an MRI nor return to Dr. Portland for additional treatment. (T. 14). Petitioner testified that he felt normal and did not have any problems with his left knee prior to the accident on March 18, 2020. (T. 13) The Arbitrator is mindful that Petitioner worked from November 9, 2019 to his accident and that he muddled through for a few days thereafter until his lay off of March 24th. He did so in a job that is physically demanding on a knee. The Arbitrator finds it more like than not that Petitioner worked a few days with a torn meniscus that for 4 months. The Arbitrator finds that Petitioner's testimony is consistent with the medical evidence and the totality of the evidence. `

The Arbitrator finds that Mr. Thommes testimony corroborates Petitioner's testimony. Mr. Thommes did not raise any concerns about Petitioner's ability to perform his duties before the accident. He did not testify that he saw Petitioner limp or observe Petitioner displaying pain behavior before the accident. He did not testify that Petitioner complained of preexisting knee pain. Mr. Thommes did not claim that Petitioner missed work due to a prior knee pathology nor he did testify that Petitioner requested a reasonable accommodation before the accident due a chronic knee problem. He did not testify that Petitioner had a sedentary job. He did not do so because it was not so.

Dr. Giannoulias diagnosed Petitioner with a traumatic medial meniscus tear, and on August 18, 2020, he performed arthroscopy of the Petitioner's left knee. (T. 26; PX 5, page 8, 11) After reviewing the medical records from November 19, 2019 and Dr. Cole's Section 12 report, Dr. Giannoulias believed that the accident of March 18, 2020 caused Petitioner to have a medial meniscus tear for the following reasons: (1) three (3) weeks of pain with no specific injury when Petitioner sought treatment in November of 2019; (2) no additional symptoms; and (3) Petitioner's condition of ill-being was aggravated or accelerated by the injury that occurred on March 18, 2020. (PX 4, pages 18-19)

Dr. Cole opined that Petitioner's symptoms were consistent with a natural progression of a degenerative meniscal tear, and not an acute meniscal tear that would be causally related to the accident of March 18, 2020. Dr. Giannoulias disagreed. He opined that Petitioner's injury was traumatic as did the radiologist, Dr. Kurltza. Dr. Cole and Dr. Giannoulias, however, both agreed that the mechanism of injury described by Petitioner is consistent with the meniscus tear.

The Arbitrator notes that the detailed findings and opinions of Dr. Kurltza were consistent with findings and opinions of with Dr. Giannoulias and inconsistent with the opinions of Dr. Cole. Dr. Kurltza found that the Petitioner had a medical meniscus tear involving the posterior horn. He found joint effusion with some peripatellar soft tissue swelling, which he interpreted as being posttraumatic soft tissue bruising. Dr. Giannoulias agreed. Dr. Cole did not. The Arbitrator notes that Dr. Kurltza did not opine that the meniscal tear was due to degenerative changes. Neither did Dr. Giannoulias. Dr. Kurltza's finding that Petitioner had normal joint alignment is inconsistent with a long standing progressive degenerative changes as asserted by Dr. Cole but is consistent with the findings and opinions of Dr. Giannoulias.

This Arbitrator, after reviewing the evidence depositions of Dr. Giannoulias and Dr Cole, finds the testimony of the Dr. Giannoulias to be more persuasive. His answers were direct, non-evasive and made sense. Whereas Dr. Cole's answers were at times argumentative and at times nonresponsive. Dr. Cole testified defensively and stated that his opinions were being made with "a high degree of medical and surgical certainty." (See e.g., Rx 1, pp. 33-34.).

The Arbitrator finds that Dr. Cole's opinion that Petitioner showed a progression of symptoms consistent with degenerative changes and not with an acute event is not consistent with the objective diagnostic findings. Dr. Cole opined that "patients…" with progressive degenerative changes like Petitioner who claim the cause of their pain is due to a work injury "as described is, frankly, a little too convenient and not factually correct in my opinion." (RX 1, p. 35). It appears that Dr. Cole opinion is consistent with an implicit bias of workers' who do not immediate report work accidents or Dr. Cole was having a bad day.

Dr. Cole mistakenly believed that Petitioner first reported the accident on April 7, 2021, not April 1, 2021 as testified by Respondent's witness. Dr. Cole mistakenly believed that Petitioner was 58 years old at the time of the accident instead of the correct age of 55 years. Dr. Cole had reviewed the initial medical office visit but during his deposition failed to persuasively address the initial office notes of Advance Practice Nurse Knigge. Nurse Knigge recorded Petitioner giving a honest history of having some pain in the knee before his alleged work accident but the pain worsened after his work accident and that Petitioner volunteered that he did not report

the injury and that he had been laid off. Dr. Cole apparently questioned Petitioner's veracity based upon his lack of command of some of the facts and his apparent implicit assumption that workers who do not immediately report an accident are not truthful. (RX 1, pp. 9-11). Dr. Cole's opinion is inconsistent with well-established Illinois law.

The Arbitrator finds that Dr. Cole failed to persuasively explain away the MRI findings. Objective MRI findings that are inconsistent "with the high degree of medical and surgical certainty" of the opinions of Dr. Cole. Which, incidentally, is not the standard. A reasonable degree of medical and surgical certainty will suffice.

The Arbitrator notes that Dr. Giannoulias enjoyed better eyes on Petitioner's pathology while performing the surgery. He carefully inspected the knee during surgery. Dr. Cole did not. Moreover, Dr. Cole failed to persuasively address the photograph snap shots of the surgery taken by Dr. Giannoulias. Still, Dr. Giannoulias would have enjoyed the clearer view.

The Arbitrator finds and concludes that the medical opinions of Dr. Giannoulias, Dr. Shah and Dr. Kurltza to be more persuasive than those of Dr. Cole. Dr. Cole's findings and opinions are inconsistent with the objective diagnostic findings. While Dr. Cole's misunderstanding of some facts like Petitioner's age or the date of first notice probably would not materially change the overall picture, it still is concerning. Based on Petitioner's testimony, the medical records and the findings and opinions of Dr. Giannoulias, Dr. Shah and Dr. Kurltza, the Arbitrator finds Petitioner's has proven by a preponderance of the evidence that his current condition of ill-being with respect to his left knee meniscus tear is causally related to the accident of March 18, 2020.

**WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:**

Section 8(a) of the Act states a Respondent is responsible "…for all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred, limited, however, to that which is reasonably required to cure or relieve from the effects of the accidental injury…" A claimant has the burden of proving that the medical services were necessary, and the expenses were reasonable. *See, Gallentine v. Industrial Comm'n*, 201 Ill.App.3d 880, 888 (2nd Dist. 1990).

The Arbitrator adopts his findings of fact and conclusions of law contained above and incorporates them by reference as though fully set forth herein. Petitioner's incurred medical bills are in dispute based on accident and causal and apparently not on reasonableness or necessity. Dr. Cole did not fault the treatment received.

Petitioner introduced into evidence as Petitioner's Exhibit 6 the unpaid medical bills in the amount of $52, 663.44. The Arbitrator finds Petitioner's treatment to be reasonable, necessary and causally related. Respondent has not paid for any of the treatment based on accident and causal defenses. The Arbitrator notes that Dr. Cole did not opine that the treatment was not reasonable or necessary. As such, Respondent shall pay directly to the medical providers for

reasonable and necessary medical services incurred, pursuant to the medical fee schedule and as provided in Sections 8(a) and 8.2 of the Act, for the following providers:

Riverside Health Clinic $2,665
Lakeshore Open MRI $2,320
Lakeshore Surgery Physicians $7,826.58
Lakeshore Surgery Facility $17,541.76
Western Touhy Anesthesia $735
Delaware Physicians/Dr. Knigge/Oak Brook Medical $2,120.20
G & T Ortho/Dr. Giannoulias $19,455

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

A claimant is temporarily totally disabled from the time an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of his injury will permit. *Westin Hotel v. Indus. Comm'n*, 372 Ill.App.3d 527, 542 (1st Dist. 2007). In determining whether a claimant remains entitled to receiving TTD benefits, the primary consideration is whether the claimant's condition has stabilized and whether she is capable of a return to the workforce. *Interstate Scaffolding, Inc. v. Illinois Workers' Comp. Comm'n*, 236 Ill.2d 132, 148 (2010). Once an injured employee's physical condition stabilizes, she is no longer eligible for TTD benefits. *Archer Daniels Midland Co. v. Indus. Comm'n*, 138 Ill.2d 107, 118 (1990).

Having found that Petitioner sustained an accident that arose out of and in the course of Petitioner's employment, and that Petitioner's current condition of ill-being is causally related to the injury, the Arbitration awards temporary total disability benefits to Petitioner. The Arbitrator finds that Petitioner's knee pathology had not stabilized nor was he capable of returning to work for the period claimed. The medical records showed that Petitioner was released to work full duty by Dr. Giannoulias on November 30, 2020. The Arbitrator finds that Petitioner has proven by a preponderance of the evidence of his entitlement is to temporary total disability benefits commencing from April 1, 2020 through November 30, 2020 for 34-6/7 weeks at a rate of $506.67 per week. Thus, the Arbitrator finds that Respondent shall pay Petitioner TTD benefits in the amount of $17,661.07, as provided in Section 8 (b) of the Act.

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

In determining the level of PPD benefits, Section 8.1b(b) of the Act directs the Commission to consider: "(i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records." 820 ILCS 305/8.1b(b); *Con-Way Freight, Inc. v. Illinois Workers'*

*Compensation Comm'n,* 2016 IL App (1st) 152576WC*, ¶ 22.*. "No single enumerated factor shall be the sole determinant of disability." *820 ILCS 305/8.1b(b).*

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

Under Section 8.1b(b)(ii), the occupation of the injured employee, the Arbitrator has considered this factor and notes that Petitioner was a porter- detailer. The Arbitrator therefore gives some weight to this factor as being a porter - detailer is a physically demanding job.

Under Section 8.1b(b)(iii), the age of the employee at the time of the injury, the Arbitrator notes that Petitioner was fifty-five (55) years old at the time of the accident. *See Flexible Staffing Services v. Illinois Workers' Compensation Commission,* 2016 IL App (1st) 151300WC (1st Dist. 2016) (holding that the Commission can make reasonable inferences from the medical evidence as it relates to how the claimant's age affects his disability). The Arbitrator gives greater weight to this factor.

Under Section 8.1b(b)(iv), the employee's future earning capacity, the Arbitrator has considered this factor and notes that Petitioner is currently working in a less physically demanding job and there is no indication of reduced earnings. The Arbitrator gives no weight to this factor.

Under Section 8.1b(b)(iv), evidence of disability corroborated by the treating medical records, the Arbitrator has considered this factor and notes that the medical records indicate the following procedures were performed on Petitioner: (1) left knee partial medial meniscectomy, partial lateral meniscectomy; (2) left knee extensive multiple compartments synovectomy; and (3) left knee patellar chondroplasty. (PX 4) The Arbitrator gives greater weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 15 percent of use of his left leg, pursuant to §8(e) of the Act.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 22WC000566 |
| Case Name | Milagros Medina v.<br>Focal Point, LLC |
| Consolidated Cases | 22WC012751; |
| Proceeding Type | Petition for Review under 19(b)<br>Remand Arbitration |
| Decision Type | Commission Decision |
| Commission Decision Number | 24IWCC0584 |
| Number of Pages of Decision | 20 |
| Decision Issued By | Marc Parker, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Michael Folga |
| Respondent Attorney | Courtney Schoch |

DATE FILED: 12/4/2024

/s/Marc Parker, Commissioner
Signature

STATE OF ILLINOIS )
) SS.
COUNTY OF COOK )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Milagros Medina,

Petitioner,

vs. No. 22 WC 566

Focal Point, LLC,

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, temporary disability, prospective medical care, and the two-physician rule, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission,* 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 30, 2024, is hereby affirmed and adopted.

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

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

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

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

**December 4, 2024**

MP/mcp
o-11/21/24
068

/s/ *Marc Parker*
Marc Parker

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

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

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 22WC000566 |
| Case Name | Milagros Medina v.<br>Focal Point, LLC |
| Consolidated Cases | 22WC012751; |
| Proceeding Type | 19(b) Petition<br>Remand Arbitration |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 17 |
| Decision Issued By | Charles Watts, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Michael Folga |
| Respondent Attorney | Courtney Schoch |

DATE FILED: 4/30/2024

/s/Charles Watts, Arbitrator
Signature

**THE INTEREST RATE FOR THE WEEK OF APRIL 30, 2024 5.165%**

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)**

**MILAGROS MEDINA** Case # **22** WC **000566**
Employee/Petitioner
v.
**FOCAL POINT, L.L.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 **CHARLES WATTS**, Arbitrator of the Commission, in the city of **CHICAGO**, on **APRIL 18, 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 **Prospective Medical Care**

**FINDINGS**

On **February 24, 2021**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**26,900.98**; the average weekly wage was $**517.33**.

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

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

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

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**13,764** for nonoccupational indemnity disability benefits representing $8,928 paid in short term disability and $4,836 paid in long term disability, and $8,749.58 in other benefits for which credit may be allowed under Section 8(j).

**ORDER**

Respondent shall authorize and pay for prospective medical care and treatment including ongoing work conditioning ordered by Dr. Thomas McNally on December 15, 2022 following the lumbar fusion surgery performed on July 27, 2022 for Petitioner's low back injury, as well as any necessary post-operative care.

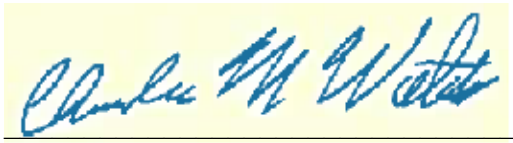
Respondent shall pay all reasonable and necessary medical bills from February 24, 2021 through April 18, 2023, including any unpaid bills noted on Petitioner's Exhibit 8, according to the fee schedule.

Respondent shall pay Petitioner temporary total disability benefits of $344.85 per week for 39.85 weeks, commencing 7-27-2023 through 4-18-2023, as provided in Section 8(b) of the Act.

If 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

April 30, 2024

STATE OF ILLINOIS )
) SS
COUNTY OF COOK )

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

| | | |
|---|---|---|
| MILAGROS MEDINA, | ) | |
| | ) | |
| Employee/Petitioner, | ) | |
| | ) | Case Number 22 WC 000566 |
| | ) | 22 WC 012751 |
| v. | ) | Arbitrator Watts |
| | ) | |
| FOCAL POINT, LLC | ) | |
| | ) | |
| Employer/Respondent. | ) | |

**RIDER TO MEMORANDUM OF DECISION OF ARBITRATOR**

This matter proceeded to hearing on April 18, 2023, in Chicago, Illinois, before Arbitrator Charles Watts on Petitioner's Petition for Immediate Hearing under Section 19(b)/8(a). Issues in dispute are causation of current condition to injury, medical bills, TTD, prospective medical, and a penalties petition. Arbitrator's Exhibit 1 (Ax 1); (Tr. 5).

As an initial matter, this Arbitrator makes note that all exhibits of both parties were successfully admitted at the time of trial and noted here again in this Decision, including Petitioner's Exhibit 4 and Petitioner's Exhibit 5.

**FINDINGS OF FACT**

Petitioner Milagros Medina testified she had never "experienced back pain . . . "nor ". . . sought and underwent any medical care and treatment for (her) back before February 24th of 2021." (Tr.30). Neither "(h)ad anyone ever recommended surgery for (her) back before. . . "that date. (Tr. 31).

On February 24, 2021, Petitioner fell in Respondent's parking lot after her shift, slipping on ice. (Tr. 15-17). She felt pain "on (her) right side, the hip buttocks area and... in her upper right thigh." (Tr.19). She needed assistance getting up from the ground. (Tr. 20,78). She went home and in the remaining days of February 2021 and treated her persistent pain with Tylenol (Tr 24, 25, 26).

On March 4, 9 and 16, Petitioner testified she treated at an urgent care facility for which no records were introduced into evidence. (Tr. 27, 28). Petitioner testified Respondent sent her to the urgent care. (Tr. 23). She could not recall address of treatment in March 2021, stating "South

Archer," but I don't remember." (Tr. 59). She testified she went "when they sent me." (Tr. 23). The alleged March treatment dates are solely based upon Petitioner's testimony and not supported by any medical record. (Tr. 28). When questioned on the name of the person that treated her, Petitioner testified that Ana Berno treated her in March. (Tr. 60). Upon additional requests for confirmation, Petitioner identified that Ana Berno treated her in June and July. (Tr. 60). When asked for clarification on who she treated with in March, she identified a "Dr. Anderson." (Tr. 60). When asked for Dr. Anderson's address, her only response was that "that place, they closed it. They closed it and that's why they sent me there, Immediate Care." (Tr. 60).

The first medical record in evidence is from June 8, 2021, at Physicians Immediate Care (PIC) with Amanda Berno, PA-C. Petitioner reported lower back pain. She reported she fell backwards at work landing on her low back "and was treated elsewhere." (Px 1). She "denied that any non-work-related event or illness possibly contributed to or is related to development of symptoms." (Px 1). Petitioner reported she had pain once or twice per week since February, though it had worsened / started again on 6/5/21. X-rays from 6/8/21 indicated no acute fractures, minimal early degenerative changes in both hips, and phleboliths throughout the pelvis. without restriction. The diagnosis was low back pain, lumbar strain, UTI/pyelonephritis, disc herniation, sciatica, and pain in right hip. The plan was to use a back brace while at work and for Petitioner to return for follow up on 6/14/21. (Px 1). PIC personnel recorded: "At this time, suspect (Petitioner's) symptoms could be related to original injury." Likewise, PIC personnel "called the designated employer representative for this worker's comp case to discuss management. (The) discussion involved elements of (Petitioner's ) diagnosis and how they impact restrictions and return to work." (PX 1)

On June 14, 2021, Petitioner treated again at PIC complaining of lower back pain that started again the Saturday before her June 8 examination. Petitioner's history of falling backwards and hitting her back in February was noted as were the x-rays showing arthritis. Her pain was reported to be 6/10. She denied any non-work-related event or illness contributed to her symptoms. The diagnoses were low back pain, disc herniation, sciatica, lumbar strain, and pain in the right hip. Petitioner could work so long as she wore a brace. She had instructions to begin performing home exercises for her low back, continue Tylenol for pain, and take a steroid dose pack. (Px 1).

On June 21, 2021, Petitioner returned to PIC where she was diagnosed with low back pain, lumbar radiculopathy, lumbar strain, and sciatica. She was found fit for work with directions to wear a back brace. A referral was made for an MRI. (Tr. 38)

Petitioner was back at PIC on June 28, 2021 and reported pain of 7/10. At that point she was returned to work without restrictions. (Px 1).

Petitioner complained of tension and tightness in her back to PA-C Berno at PIC on July 7, 2021. Her medications were reported to be helping but only for 2 hours. Pain was reported at 7/10 and it waxed and waned. She had yet to be approved for the MRI. There was no complaint of pain radiating down her legs. She was assessed to be fit for duty without restrictions. The MRI was still recommended. (Px 1).

On July 19, 2021, Petitioner went again to PIC where she rated her pain at 6/10. She noticed it mostly upon sitting down too long. She reported pain down the front of her thigh and intermittent tingling in her toes. Medication was reported to help but the pain returned once the medication wears off. The record indicates that Petitioner reiterated that her initial injury occurred in a parking lot when she slipped on ice on 2/25/21. She was fit for duty without restrictions. She was instructed to begin physical therapy. (Px 1).

On July 30, 2021, Petitioner underwent a lumbar MRI. Impression was (1) loss of normal lumbar lordosis likely due to muscular spasm, (2) disc dehydration is identified in multiple levels, (3) mixed modic changes identified at L4-5. Modic type I changes seen L3-L4. (4) Abnormal T1 hypointense T2 hyperintense cystic area at S2, likely representing Tarlov cyst, measures 1.6 x 1.6 cm at LS and AP dimensions. (5) L5-S1 shows disc bulge at 1.9 mm causing thecal sac indentation without significant lateral recess and neural foramina narrowing. (6) L4-5 disc bulge of 4.0 mm with left preponderance causing thecal sac indentation with severe left and moderate right sided lateral recess and neural foramina narrowing resulting in compression over exiting nerve roots, more marked on left. (7) L3-4 diffuse disc bulge of 2.9 mm with right preponderance causing thecal sac indentation with moderate right and mild left sided lateral recess and neural foramina narrowing. (8) L2-L3 disc bulge 1.6 mm with right paracentral disc protrusion causing thecal sac indentation with minimal bilateral lateral recess and neural foramina narrowing. (Px 1).

On August 2, 2021, Petitioner reported to PIC that her pain was at a level of 6/10 in her low back that occasionally extended down the back of her leg. Petitioner was returned to work without restrictions. (Px 1). On August 7, 2021, Petitioner returned for care at PIC with PA Berno where the plan was to have physical therapy. (Px 1).

According to the report at PIC on August 16, 2021, Petitioner was having trouble reaching back and experiencing throbbing pain in her lower back when sitting more than 30 minutes. The pain was radiating down her right leg and was worsening. It hurt her to bend forward. She was given work restrictions which were to avoid prolonged bending, effective until 8/30/21 (Px 1). PIC personnel "called (Petitioner's) designated employer representative for this worker's comp case to discuss management." This "discussion involved elements of (Petitioner's) diagnosis and how they impact restrictions and return to work." (Px. 1)

On August 26, 2021, Petitioner treated at Neurological Surgery and Spine Surgery, SC, with Dr. John Song, MD, upon referral (Tr 40). Her presence for initial workers' compensation evaluation was noted. Petitioner reported working on 2/24/21 when she slipped on ice and fell onto her backside. She has had lower back pain on right posterior thigh pain with radiation to her foot. She was working full duty, having missed only 2 days due to pain. According to Dr. Song, her 7/30/21 MRI showed multilevel degenerative changes, but no obviously acute problems, although a left L4-5 foraminal disc herniation was visualized. There were no surgery recommendations. Recommendations for PT and lumbar injections were made as was a referral to pain medicine. Gabapentin was prescribed and she was allowed to continue to work. (Px 2).

Petitioner was next seen on August 30, 2021 at PIC complaining that her pain was 6/10 and that she had seen another provider who recommended injections for her back. PIC found her fit for duty with directions to avoid prolonged bending over. PIC again called Petitioner's employer and discussed her diagnosis and how it impacts work restrictions. (Px 1).

Petitioner came back to PIC on September 7, 2021, reporting the prescribed medicine made her sleepy, so she took it only on weekends. If she sat for too long, she struggled when getting up. Her pain was recorded as 4/10. She was counseled to avoid prolonged bending over at work. Respondent was again contacted to discuss elements of the diagnosis and work restrictions. (Px 1).

PIC noted as of September 20, 2021, that Petitioner was in for a "Worker's Comp Recheck." Her pain was reported to be 6/10 and radiating down her anterior leg. Her pain was similar to what she had been experiencing since her fall in February. Respondent was again contacted and it was specifically noted that contract was made to "the adjuster on multiple occasions, leaving messages each time." It was noted that Petitioner was scheduled for injection at Premier Pain and Spine due to bulging disc with nerve root compression. (Px 1).

On October 4, 2021, Petitioner again treated at PIC and was still experiencing pain. She reported that the prescribed muscle relaxer helps but gives her an upset stomach. She reported low back pain radiating towards her right hip and down her right leg. The plan was to call Premier Pain and Spine to set up appointment. Petitioner was again fit for duty with instructions to avoid prolonged bending over. She was to call Athletico to schedule a PT appointment. (Px 1).

On October 11, 2021, Petitioner treated at Premier Pain & Spine with Dr. Asma Asif. She was referred by Dr. Song for procedural intervention for low back pain. Insurance coverage was listed as Travelers. Her pain level was reported to be 6-8/10 and worsened with prolonged walking/standing/bending forward. Petitioner was noted to have had minimal relief with physical therapy. Petitioner was currently working. Prior surgical history of carpal tunnel in 2017 was noted as was the MRI of her lumbar spine from August 2021. The assessment was (1) radiculopathy, lumbar region, (2) urine drug testing for medication compliance, 3) low back pain, and (4) myalgia. Notes under patient history reported low back pain since January 2021 after she fell on ice. It was noted that the MRI showed modic changes of L4-L5 and L3-4 with a diffuse disc bulge. A right epidural steroid injection, ESI, was administered at L3-4 and L4-5.

A claim professional for Travelers, wrote to Dr Song Dr Song on October 20, 2021 notifying him that his care of Petitioner would be scrutinized pursuant to the Utilization Process. (Px 2).

On October 22, 2021, Petitioner returned to PIC reporting pain at 7/10. (Px 1).

On October 28, 2021, Petitioner treated at Premier Pain & Spine where another right ESI, at L3-4, L4-5 was administered.

Petitioner reported pain of 5/10 on November 5, 2021 and she also specified intermittent pain down her right leg. She was told to continue physical therapy. (Px 1).

On November 12, 2021, Petitioner treated at Premier Pain & Spine with Jeffrey Johnson PA-C for follow up, post ESI. She reported 50% durable pain relief. Her pain was noted to have progressively worsened since she fell on ice. The plan was to schedule another ESI at L3-4 and L4-5 and continue cyclobenzaprine, PT, a follow up with PCP, and to continue care with Dr. Song. (Px 1).

On November 19, 2021, Petitioner treated at Physicians Immediate Care reporting 5/10 pain. She reported occasional numbness on her right leg and plantar surface of her right foot. (Px 1).

On December 2, 2021, Petitioner treated at Premier Pain & Spine with Dr. Kapoor, MD. She was currently working. The assessment was (1) radiculopathy, (2) low back pain, (3) myalgia, (4) encounter for screening of viral diseases, and (5) anxiety disorder. An ESI at L3-4 and L4-5 was administered. She was to continue with referring physician Dr. Song. (Px 6).

On December 10, 2021, Petitioner was back at PIC and was directed to consult with neurosurgery. Her complaints of back pain were noted as were reports of cramping /tightness in her lower back and right leg. She had undergone an ESI on 12/2/21 and physical therapy on 12/7/21. (Px 1).

On December 17, 2021, Petitioner failed to appear for an appointment with PA-C Jeffrey Johnson at Premier Pain & Spine for follow up post injection. (Px 6)

On January 7, 2022, Petitioner was examined Dr. Song. She reported right sided low back pain with pain/tingling down the lateral aspect of her right thigh and numbness in her right leg. She complained also of aching and pain in the bottom of her right foot. Dr. Song assessed lumbar spondylosis. Petitioner's job duties had been adjusted such that bending was limited as she continued to work. Petitioner reported she had pain if she overdid activity. Her MRI revealed mild spondylosis in her lumbar spine without stenosis. Some slight degeneration on L4-5-disc space was noted, with no clear herniation. She was assessed to have not had much improvement, and Dr. Song found that she was likely at MMI. It was noted Petitioner might need continued treatments for pain and could continue to work. Recommendations for acupuncture or chiropractic manipulations were given and referrals made. (Px 2).

Petitioner changed medical providers and presented to Dr McNally at Lakefront Medical Associates on February 10, 2022. Petitioner underwent an x-ray for the lumbar spine revealing moderate intervertebral degenerative changes L3-4 and L4-5. Dr. McNally assessed her with (1) lumbar radiculopathy, (2) degeneration of lumbar intervertebral disc, (3) low back strain, and (4) retrolisthesis. He noted her fall at work on 2/23/21 and that she had failed physical therapy. Dr. McNally noted he had operated on a friend of Medina's husband's and that she was seeing him on her regular insurance. It was noted that she had previously treated with Dr. Song who directed her to PT, chiropractic care, and acupuncture. She did not seek care from either a chiropractor or acupuncturist. (Px 4).

On February 24, 2022, Petitioner underwent a lumbar MRI without contrast. It disclosed (1) moderate degenerative disease at mid-lower lumbar levels with minimal neuroforaminal stenosis;

and, (2) partially seen high T2 structure in left aspect of S2 consistent with nerve root cyst. (Px 4).

On April 7, 2022, Dr. McNally saw Petitioner. She was using BCBS insurance. Her chief complaints were back pain and right low back and hip pain that travelled down the leg. Assessment was (1) lumbar radiculopathy, (2) degeneration lumbar intervertebral disc, (3) low back strain, and (4) retrolisthesis. The plan was to obtain an EMG/NCS. Petitioner was reported to have maximized and failed conservative treatment. Discussion of potential surgery was noted and decompressive surgery and/or laminectomy was considered. Petitioner was assessed to have modic changes L3-4 and L4-5, and Dr. McNally opined she was unlikely to have lasting relief from decompression alone. The risks of fusion surgery were discussed. (Px 4).

On April 11, 2022, Presence Resurrection Medical Center conducted an EMG. The EMG Report was abnormal with electrophysiologic evidence of mild chronic bilateral low lumbar radiculopathy which is most notable at L4/L5. (Px 7).

Petitioner continued to treat with Dr McNally on various occasions in April, Mary and June of 2022. Her low back pain persisted, and it continued to radiate down her right leg. Dr. McNally, noting Petitioner's complaints comported with findings on two MRI's and the EMG/NCV, and also with a diagnostic right SI injection he had Dr Andrew Engel perform, recommended L3-4 and L4-5 anterior lumbar interbody fusions with allograft, infuse, cages and instrumentation, possible posterior decompression and fusion. (Px 4).

From her accident through July 27th, 2022, Petitioner effectively continued to work full duty for Focal as an Assembler II, a job requiring, she "put the guts into the housing of the fixture. . . ballasts, screwing in... screws, fasteners, LED components. . . parts (weighing) . . . anywhere from five pounds and 15 pounds . . ." and using tools as heavy as three pounds. (Tr 33, 60, 84)

On July 27, 2022, Dr. McNally performed an anterior lumber interbody fusion at L3-L4 and L4-L5. Records from Weiss detail Petitioner's "low back pain with radiculopathy that has been present since a fall at work on 2/24/21. Two lumber mri's are consistent with her radicular complaints that have been objectified by EMG/NCS." Operative findings included mild degenerative scoliosis with collapse on right side of disk space at L3-4, collapse of both disk spaces at L3-4, and L4-5 and sagittal images with retrolisthesis of L3 on L4 and L4 on L5 with significant improvement at sagittal alignment and disk space at both levels. (Px 5)

On August 25, 2022, Petitioner was examined by Dr. McNally. Her pain was reported to be 4/10. She was noted to be doing well post-surgery. Dr. McNally reported some leg swelling. Petitioner was sent to the ER where she was diagnosed with DVT. (Px 4); (Px 5).

On August 31, 2022, Dr. Kern Singh, MD, performed an Independent Medical Examination on behalf of Focal. He reviewed MRIs, the "actual images" dated 2/25/21, 8/4/21, and 2/24/22 diagnosing Medina with (1) lumbar muscular strain, (2) degenerative lumbar spondylolysis without stenosis, (3) status post L3-5 ALIF with instrumentation. Dr. Singh opined Petitioner had suffered only soft tissue muscular strain of the lumbar spine related to the work accident on 2/24/21. This strain had resolved prior to surgery in his opinion. Her current condition comprised

degenerative lumbar spondylosis without stenosis and did not correlate with her reported pain complaints. The degenerative spondylosis was opined to be minimal and not caused or aggravated by her fall at work. Dr. Singh opined that Petitioner could work full duty without restriction after her fall on ice. In answer to a specific Interrogatory Dr. Singh noted Petitioner's "3 consecutive lumbar MRI scans that confirm mild degenerative lumber spondylosis without stenosis which is age appropriate and is not causally connected to the date of injury of 02/24/2021. (Rx 8). Dr Singh acknowledged Petitioner's pain improved had improved post-surgery (Rx 8., 38). When he examined her, he found "full range of motion of her neck and low back at 40 degrees of flexion and extension of rotation. . ." (Rx 8., p. 39). Dr. Singh uncovered "no symptom magnification." (Rx 8 p. 39).

On September 29, 2022, Petitioner returned to Dr. McNally, reporting sharp pain traveling to the bottom of her tailbone. She continued, though according to Dr. McNally, to do well post-surgery. Her DVT has resolved. Petitioner was reported to go as much as three days without pain and thereafter experience it fleetingly. (Px 5).

On December 15, 2022, Dr. McNally saw Petitioner for a post-surgery follow-up. She had back pain with twisting with 4/10 pain. Petitioner had finished PT and, because it had helped, she wished to do more, including work conditioning. The assessment was: (1) lumbar radiculopathy, (2) degenerative lumbar intervertebral disc, (3) low back strain, (4) retrolisthesis, (5) pain in right sacroiliac joint, (6) disorder of right sacroiliac joint, (7) history of lumbar fusion, and (8) deep venous thrombosis of lower extremity. It was noted that Petitioner had two pre-op lumbar MRIs consistent with radicular symptoms objectified by EMG/NCS. She was five months post L3-4 and L4-5 lumbar interbody fusions. No symptoms from Petitioner's DVT remained. Petitioner was assessed to be ready for work conditioning. (Px 5).

On January 17, 2023, Petitioner returned to Dr. McNally. Her lower back pain was 2/10. Notes reflects she planned to return to work on February 27, 2023. But she reported she felt throbbing, sharp radiating pain of lower back with lifting with more activity. The assessment at that point was: lumbar radiculopathy, degeneration of lumbar intervertebral disc, low back strain, retrolisthesis, right sacroiliac joint pain. Petitioner was to continue PT and then start work conditioning. She was allowed to return to work on 2/27/23 but with restrictions. (Px 5).

On February 14, 2023, Petitioner treated at Chicago Center for Orthopaedics at Weiss with Dr. McNally. She reported pain at 2/10 in her lower back and right thigh. The chief complaint was now right sided groin pain.

**Testimony of Yolanda Villa:**

Yolanda Villa has worked for Focal Point for three years and has known Petitioner since she started working at the company. (Tr. 74-75). Ms. Villa described that on the date of accident, Petitioner was leaving work, walking towards the parking lot. (Tr. 76-77). Coworkers present included Juan Gabriel Silva, Petitioner, and Lorena. (Tr. 77). The weather was cold, and there was ice. (Tr. 77). Petitioner slipped and fell on her butt. (Tr. 77). Ms. Villa indicated that she believed the fall was very heavy because she yelled very loud. (Tr. 78). Coworkers tried to help

her up, but they had to walk very slowly so they did not fall themselves. (Tr. 77). Ms. Villa advised her line lady, Jahaira, regarding the accident.

**Testimony of Leticia Fuentes:**

Leticia Fuentes has worked at Focal Point for 12.5 years as Safety Facility and Environmental Manager. (Tr. 82). She works to ensure safety of employees, performs intake for injuries, environmental reporting, and manages the facility and maintenance team. (Tr. 83). When someone reports a workers' compensation accident, the accident is reported to her, and she reports the accident to the insurance company. (Tr. 83).

Ms. Fuentes identified Petitioner's job description as Assembler II. Petitioner's job duties entailed assembling the housing of the fixture, including ballasts, screws, fasteners, LED components, as well as testing to ensure the fixture worked properly. The parts or tools weighed between 5-15 pounds. The tools weighed about 3 pounds. (Tr. 84).

The Arbitrator notes the job description describes using 10 pounds of force constantly, up to 20 pounds frequently, and up to 50 pounds occasionally. (Rx 1). On cross-examination, Petitioner's counsel queried whether Petitioner would need to exert up to 50 pounds. (Tr. 100). Ms. Fuentes indicated that anything over 50 pounds needed two people to carry. (Tr. 100). Employees should not lift over 25 pounds. (Tr. 100). Ms. Fuentes checked with the supervisor, who confirmed that Petitioner does not lift anything over 15-17 pounds. (Tr. 100).

Focal Point received notice of the work accident the day following the accident. (Tr. 85). Ms. Fuentes testified that Focal Point's understanding of Petitioner's first date of treatment was in June 2021 at Physicians Immediate. (Tr. 84). Petitioner continued to work full time with no restrictions. (Tr. 85). She did not miss any work and did not ask for accommodations. (Tr. 85). She worked her regular job. (Tr. 85).

Ms. Fuentes identified the Time Card Report as showing Petitioner's punch ins and out of work. The document was pulled by Human Resources. The information is kept in the ordinary course of business for all employees. (Tr. 86-87).

Ms. Fuentes identified the completed Family Medical Leave Act form. (Tr. 87). Petitioner's FMLA began on July 27, 2022. (Tr. 88).

Ms. Fuentes identified the short-term disability claim payout and application. Petitioner received short-term disability from August 10, 2022 through January 2023. (Tr. 89). This information is kept in the ordinary course of business in HR's file. (Tr. 89).

Ms. Fuentes identified the long-term disability report, indicating Petitioner received long term disability from January 25, 2023 through March 24, 2023. (Tr. 90). Petitioner also received long term disability from March 25, 2023 through April 24, 2023. (Tr. 90). This information is kept in the ordinary course of business in HR's file. (Tr. 90).

Ms. Fuentes identified pay check stubs with pay dates December 19, 2021, December 25, 2021, September 4, 2022, and September 10, 2022. (Tr. 91).

Leticia Fuentes testified that Focal Point tries to accommodate employees wherever they can. (Tr. 91). There was no indication that Focal Point could not accommodate restrictions. (Tr. 92). Focal Point tries to bring employees back to work, but this does depend on restrictions on a case-by-case basis. (Tr. 92). Leticia Fuentes testified that she had no indication that Petitioner was released to return to work with restrictions. (Tr. 92). Ms. Fuentes indicated that she was not aware of Focal Point receiving anything from Dr. McNally regarding ongoing work restrictions. (Tr. 93).

Leticia Fuentes testified that this matter is a denied case. Ongoing medical treatment is categorized under FMLA and short-term disability. (Tr. 93).

## CONCLUSIONS OF LAW

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

Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. 820 ILCS 305/1(b)3(d). To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of 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). An injury is accidental within the meaning of the Act when it is traceable to a definite time, place, and cause and occurs in the course of employment, unexpectedly and without affirmative act or design of the employee. Mathiessen & Hegeler Zinc. Co. V. Industrial Board, 284 Ill. 378 (1918).

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 or her evidence worthy of belief. The arbitrator, whose province it is to evaluate witness credibility, evaluates the demeanor of the witness and any external inconsistencies with his testimony. Where a claimant's testimony is inconsistent with his actual behavior and conduct, the Commission has held that an award cannot stand. McDonald v. Industrial Commission, 39 Ill. 2d 396 (1968); Swift v. Industrial Commission, 52 Ill. 2d 490 (1972). While it is true that an employee's uncorroborated testimony will not bar a recovery under the Act, it does not mean that the employee's testimony will always support an award of benefits when considering all the testimony and circumstances shown by the totality of the evidence. Caterpillar Tractor Co. v. Industrial Commission, 83 Ill. 2d 213 (1980).

Petitioner testified in open hearing before the Arbitrator who viewed her demeanor under direct examination and under cross-examination. Petitioner's manner of speech, body language, and flow of answers to questions was, overall, indicative of sincerity. At first, Petitioner seemed nervous, especially when answering questions about her initial care after the accident. That no records for the first three visits to Physician's Immediate Care were entered into evidence, that the specific clinic where Petitioner had treated was now closed, and that Petitioner could not remember the address clearly caused the Arbitrator to have some doubts. As the trial progressed, Petitioner became more comfortable and answered questions with greater ease. The medical record – excepting the initial care and treatment – is supportive of Petitioner's testimony overall. Petitioner is mostly credible.

Respondent's two company witnesses were also credible and their testimony supports that Petitioner gave accurate and credible testimony.

This case really comes down to the credibility of the medical providers both through deposition and the medical record. The credibility of the physicians is discussed below.

**1. With respect to (F) is the Petitioner's current condition of ill being as of February 24, 2021 causally related to the injury, the Arbitrator finds as follows:**

"Whether a causal connection exists is a question of fact for the Commission, and a reviewing court will overturn the Commission's decision only if it is against the manifest weight of the evidence... The test is whether the evidence is sufficient to support the Commission's finding, not whether this court or any other tribunal might reach an opposite conclusion. For the Commission's decision to be against the manifest weight of the evidence, the record must disclose that an opposite conclusion clearly was the proper result." Navistar International Transportation Corp. v. Industrial Comm'n, 331 Ill.App.3d 405, 415 (2002); Pietrzak v. Industrial Comm'n, 329 Ill.App.3d 828, 833 (2002); and Gallianetti v. Industrial Comm'n, 315 Ill.App.3d 721, 729-30 (2000).

A co-worker of Medina's, Ms. Villa, testified she was a very good and responsible worker and honest and trustworthy and there is no mention of symptom exaggeration found in any of Petitioner's medical records or in the report of Respondent's section 12 examiner, Dr. Singh. (TR p75; Respondent's Exhibit 8, p.39 and Singh Exhibit 2, p.3).

The credibility of Respondent's Section 12 expert, Dr Singh is somewhat called into question. He insisted that Medina underwent three MRI's, the first being on February 25th, 2021 (Rx 8, p. 13). There was no MRI on that date. It was the day after her accident and she in fact worked that day. (Tr. 24, 25). Her only care on February 25th, 2021 was self- administered, consisting of Tylenol and ice (Tr. 25). Dr. Singh examined Medina just once, after her surgery, (Rx 8, p. 8). The medical record indicates that Petitioner's low back never returned to anywhere near her pre-accident state. Dr. Singh finds otherwise but is not persuasive that Petitioner was ever at MMI. Nonetheless, Dr. Singh looked at the same MRI as Dr. Song and found that Petitioner's low back findings were degenerative in nature. Dr. Song also found Petitioner's condition to be

degenerative and advised a course of conservative care which is supportive of Dr. Singh's assessment. Dr. Song, in his last record, opined that Petitioner was nearing MMI.

Dr. McNally had a different opinion than Dr. Song as happens often in low back cases where the MRI findings are degenerative. Dr. McNally believed that Petitioner had exhausted conservative care and required surgery. While it may be hypothetically true that Petitioner could have continued to treat conservatively and gotten better, Petitioner had multiple injections, physical therapy, and examinations over a period of more than a year without any significant improvement. It is worth noting that Petitioner continued to work until under the care of Dr. McNally which indicates that Petitioner was compliant with the return to work instructions and exhibited the type of effort associated with a person who is trying their best to improve their physical condition. The fusion surgery resulted in significant reduction in symptoms.

Additionally, Respondent introduced no records evidencing any prior treatment. Thus, only the Petitioner's testimony and her treating records can be scrutinized. Specifically, the Petitioner testified to having no prior history of low back pain, no prior course of treatment, imaging, nor receiving any recommendations for steroid injections or surgery for her low back before February 24, 2021. (Tr. 30-31). The Arbitrator gives great weight to this testimony which is wholly corroborated by the supporting medical evidence.

Furthermore, the Arbitrator was presented with no evidence of any intervening or superseding causes for the Petitioner's low back injury, other than the February 24, 2021 work injury which occurred as a result of the Petitioner slipping and falling upon ice.

The Arbitrator finds the medical records support the Petitioner's testimony that she suffered a low back injury on February 24, 2021, resulting in her need for ongoing treatment, including the lumbar fusion surgery of July 27, 2022. For example, on August 25, 2021, Dr. Song casually related Medina's work injury to her back and leg pain. (Px 2).

Likewise, Dr. McNally confirmed that Petitioner's low back condition, including the lumbar fusion surgery, is causally related to her work accident of February 24, 2021. He stated on May 26, 2022 the following:

> "54 yo female presents for low back pain with radiculopathy that has been present since a fall at work on 2/24/21. Two lumbar mri's are consistent with her radicular complaints that have been objectified by EMG/NCS." (Px 4).

Where a work injury aggravates, exacerbates, or accelerates an underlying condition worker's compensation benefits are owed. Rock Road Construction Co. v. Industrial Commissi*on*, 37 Ill.2d 123 (Ill. 1967); Illinois Valley Irrigation, Inc. v. Industrial Commission, 66 Ill.2d 234 (Ill. 1977); and St. Elizabeth's Hospital v. Worker's Compensation Commission, 371 Ill.App.3d 882 (Ill. 2007). A work injury need only be 'a' cause of the condition and care, not the sole cause, or even the primary cause, for the Illinois Act to apply. Tower Automotive v. Illinois Workers' Compensation Commission, 407 Ill.App.3d 427 (1st Dist. 2011).

In sum, the Arbitrator finds that this case follows a common fact pattern of a person with degenerative changes in their spine that became symptomatic after an accident. The Arbitrator finds that Petitioner injuries and the care she has sought to treat them, including the fusion surgery performed by Dr. McNally, are causally connected to the fall she suffered on February 24, 2021.

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

Under section 8(a) of the Act, the claimant is entitled to recover reasonable medical expenses that are causally related to the accident and that are determined to be required to diagnose, relieve, or cure the effects of claimant's injury. University of Illinois v. Industrial Comm'n, 232 Ill. App. 3d 154, 164, 596 N.E.2d 823, 830, 173 Ill. Dec. 199 (1992). Claimant has the burden of proving that the medical services were necessary and the expenses were reasonable. Gallentine v. Industrial Comm'n, 201 Ill. App. 3d 880, 888, 559 N.E.2d 526, 532, 147 Ill. Dec. 353 (1990). What is reasonable and necessary is a question of fact for the Commission, and the Commission's determination will not be overturned unless it is against the manifest weight of the evidence. Cole v. Byrd, 167 Ill. 2d 128, 136-37, 656 N.E.2d 1068, 1072, 212 Ill. Dec. 234 (1995).

The Arbitrator finds that all involved in the Petitioner's care for her low back injury sustained on February 24, 2021, including those physicians, therapists, and radiologists referred to in Petitioner's Exhibits 1 through 8 provided reasonable and necessary medical care and treatment.

For the reasons outlined above regarding causal connection and the testimony of the Petitioner and Yolanda Villa, the Arbitrator finds that the Petitioner's medical care and treatment for her low back from June 8, 2021 throughout all of her visit's records up to April 18, 2023, including her lumbar fusion surgery that occurred on July 27, 2022, has been reasonable and medically necessary.

As such the Arbitrator awards the Petitioner all the medical bills incurred from June 8, 2021, through the day of trial of April 18, 2023 pursuant to the Illinois Workers' Compensation Fee schedule.

In making this finding it is noted that Respondent did not adequately raise the issue of whether Petitioner exceeded her choice of physicians under section 8(a) of the Act. That Section sets forth the two-physician rule. Absolute Cleaning/SVMBL v. Illinois Workers' Compensation Comm'n, 409 Ill.App.3d 463, 468 (2011). Under section 8(a) of the Act, an employer's liability to pay for medical services is limited to (1) first aid and emergency treatment plus (2) two additional doctors chosen by the employee and (3) any additional providers and services recommended by the two physicians selected by the employee. 820 ILCS 305/8(a) (West 2010); Bob Red Remodeling, Inc. v. Illinois Workers' Compensation Comm'n, 2014 IL App (1st) 130974WC, ¶ 47.

Respondent did not raise the issue in the Request for Hearing Form and has forfeited its ability to make any such argument now. The Request for Hearing Form contains no reference at all to all

to any such issue. (Arb. Ex 1) Thus, Petitioner gave no notice to Petitioner that this issue ever needed to be addressed. The point of the Request for Hearing Form is to delineate and to limit the issues. Gallentine v Industrial Comn'n., 201 Ill. App 3d 880, 559 N. E. 2d 525 (2nd Dist. 1990). To allow Focal to bring up the two-doctor rule would be to ignore the oft stated purpose of the Request for Hearing Form.

Even had Respondent made a proper record, its argument that Petitioner had chosen more than her allotment would remain unpersuasive. The evidence demonstrates she asserted at the time of trial that she sought treatment in March 2021 at Immediate Care after "they" sent her. When read in total, Petitioner's testimony surrounding her allusions to "they", focused on how she continued to work. It's thus reasonable to infer that ''they" was Respondent.

As to Physician's Immediate Care, the record is clear that its personnel routinely communicated with Respondent regarding Petitioner's care.

Considering these circumstances, the Arbitrator finds that neither provider counts as Petitioner's choice. To the contrary both constitute company clinics. It is axiomatic that an Arbitrator may draw reasonable inferences from circumstantial evidence. Givenrod-Lipe, Inc. v. Industrial Comm'n, 71 Ill. 2d 440.

There is no direct proof as to Petitioner's source of referral to neurosurgeon, Dr Song on August 26, 2021 (Tr. 40, Px 2). However, by 12/10/21, PIC directed Petitioner to follow up with the neurosurgery practice at which Dr Song had previously worked. (Px 2). Since PIC was a company clinic this directive demonstrates its acquiescence in the care Petitoiner undertook to that point. Any objection should have been made then. Neither Dr Song, nor the physicians to whom he referred Petitioner at Premier Pain & Spine, (Px 6), count as choices.

Dr. McNally was Petitioner's only second opinion and functionally her first choice under the two provider rule.

**3. With respect to (K) the amount of temporary total disability benefits the Arbitrator finds as follows:**

Petitioner continued to work following her accident, including up to her eventual surgery date and the Arbitrator appreciates that, "an employee who continues to work on a regular basis despite his own progressive ill-being should not be punished merely for trying to perform his duties without complaint.". Three "D" Discount Store v. Industrial Commission, 1989 Ill.App.3d 43, 48 (Ill. 1989).

However, on July 27, 2022, Petitioner underwent surgery and has been unable to work ever since while undergoing reasonable, necessary and causally related treatment at the behest of her physicians. For the time period of July 27, 2022, through the trial date of April 18, 2023, she is owed $13,742.27 (39.85 weeks x $344.85) in temporary total disability benefits. Petitioner stipulated that she has been paid $13,764 in disability benefits for this period. (Arbitrator's Ex 1; Tr. 61, 62). Accordingly, Respondent has effectively discharged its obligation of paying to

Petitioner 66 2/3rds of her average weekly wage. Should the group carrier demand reimbursement, of course, Respondent would have to satisfy that payment in Medina's behalf.

**4. With respect to (M), should penalties or fees be imposed upon Respondent, the Arbitrator finds as follows:**

Evidence reveals that, effectively Respondent covered Petitioner's temporary total wage loss. It also paid $8,749.58 towards her medical expense. (Arbitrator's Ex 1). Petitioners' Exhibit 8 reflects that out of a total of $232, 286. 48 in medical charges a balance of $28, 918.42 remains outstanding. Thus, as a practical matter Medina's rights to indemnity and medical care were satisfied, or largely so, even though Respondent denied liability under the Worker's before April 2021, nor does she assert she was not being cared for to the contrary, she agrees on the record she has been drawing benefits, just not Worker's Comp benefits.

Most importantly, Respondent's Section 12 examiner Dr. Singh and Petitioner's treating physician Dr. Song both opined that Petitioner was not a surgical candidate. Thus, Respondent had a reasonable basis to deny approval of the surgery Petitioner ultimately chose to have with Dr. McNally. Also, Dr. Singh opined that Petitioner's injury to her back healed to the point of MMI prior to the surgery and that any symptoms related to her back were degenerative in nature. It is only by a narrow margin that the Arbitrator found the surgery to be appropriate care in this case. The opinion of Dr. Song was a persuasive counter to that of Dr. McNally; almost persuasive enough to deny the surgery and certainly persuasive enough to support the Arbitrator's opinion that Respondent does not owe penalties in this case.

Finally, as discussed below, Respondent paid disability benefits to Petitioner when she was not working. This is another action by Respondent that persuades the Arbitrator that penalties are not warranted.

**5. With respect to (O), prospective medical, the Arbitrator finds as follows:**

The Arbitrator finds that as a result of the causal connection being established between the Petitioner's current symptoms and the work-related accident, the further low back treatment recommendations of Dr. McNally, namely that she requires work conditioning for her low back, and further follow-up visits, reasonable and necessary prospective medical care is awarded.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 22WC012751 |
| Case Name | Milagros Medina v.<br>Focal Point, LLC. |
| Consolidated Cases | 22WC000566; |
| Proceeding Type | Petition for Review under 19(b)<br>Remand Arbitration |
| Decision Type | Commission Decision |
| Commission Decision Number | 24IWCC0585 |
| Number of Pages of Decision | 20 |
| Decision Issued By | Marc Parker, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Michael Folga |
| Respondent Attorney | Courtney Schoch |

DATE FILED: 12/4/2024

/s/Marc Parker,Commissioner

Signature

STATE OF ILLINOIS )
) SS.
COUNTY OF COOK )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Milagros Medina,

Petitioner,

vs. No. 22 WC 12751

Focal Point, LLC,

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, temporary disability, prospective medical care, and the two-physician rule, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission,* 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 30, 2024, is hereby affirmed and adopted.

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

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

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

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

**December 4, 2024**

MP/mcp
o-11/21/24
068

/s/ *Marc Parker*
Marc Parker

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

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

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 22WC012751 |
| Case Name | Milagros Medina v.<br>Focal Point, LLC. |
| Consolidated Cases | 22WC000566; |
| Proceeding Type | 19(b) Petition<br>Remand Arbitration |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 17 |
| Decision Issued By | Charles Watts, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Michael Folga |
| Respondent Attorney | Courtney Schoch |

DATE FILED: 4/30/2024

/s/Charles Watts, Arbitrator
Signature

**THE INTEREST RATE FOR THE WEEK OF APRIL 30, 2024 5.165%**

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)**

**MILAGROS MEDINA**
Employee/Petitioner
v.
**FOCAL POINT, L.L.C.**
Employer/Respondent

Case # **22 WC 012751**

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 **APRIL 18, 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 **Prospective Medical Care**

**FINDINGS**

On **February 24, 2021**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**26,900.98**; the average weekly wage was $**517.33**.

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

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

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

Respondent shall be given a credit pursuant to the Arbitration Decision issued in the consolidated case of 22 WC 566.

**ORDER**

See Order terms on the Arbitration Decision issued in the consolidated case of 22 WC 566.

If 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

April 30, 2024

STATE OF ILLINOIS )
) SS
COUNTY OF COOK )

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

| | | |
|---|---|---|
| MILAGROS MEDINA, | ) | |
| | ) | |
| Employee/Petitioner, | ) | |
| | ) | Case Number 22 WC 000566 |
| | ) | 22 WC 012751 |
| v. | ) | Arbitrator Watts |
| | ) | |
| FOCAL POINT, LLC | ) | |
| | ) | |
| Employer/Respondent. | ) | |

**RIDER TO MEMORANDUM OF DECISION OF ARBITRATOR**

This matter proceeded to hearing on April 18, 2023, in Chicago, Illinois, before Arbitrator Charles Watts on Petitioner's Petition for Immediate Hearing under Section 19(b)/8(a). Issues in dispute are causation of current condition to injury, medical bills, TTD, prospective medical, and a penalties petition. Arbitrator's Exhibit 1 (Ax 1); (Tr. 5).

As an initial matter, this Arbitrator makes note that all exhibits of both parties were successfully admitted at the time of trial and noted here again in this Decision, including Petitioner's Exhibit 4 and Petitioner's Exhibit 5.

**FINDINGS OF FACT**

Petitioner Milagros Medina testified she had never "experienced back pain . . . "nor ". . . sought and underwent any medical care and treatment for (her) back before February 24th of 2021." (Tr.30). Neither "(h)ad anyone ever recommended surgery for (her) back before. . . "that date. (Tr. 31).

On February 24, 2021, Petitioner fell in Respondent's parking lot after her shift, slipping on ice. (Tr. 15-17). She felt pain "on (her) right side, the hip buttocks area and... in her upper right thigh." (Tr.19). She needed assistance getting up from the ground. (Tr. 20,78). She went home and in the remaining days of February 2021 and treated her persistent pain with Tylenol (Tr 24, 25, 26).

On March 4, 9 and 16, Petitioner testified she treated at an urgent care facility for which no records were introduced into evidence. (Tr. 27, 28). Petitioner testified Respondent sent her to the urgent care. (Tr. 23). She could not recall address of treatment in March 2021, stating "South

Archer," but I don't remember." (Tr. 59). She testified she went "when they sent me." (Tr. 23). The alleged March treatment dates are solely based upon Petitioner's testimony and not supported by any medical record. (Tr. 28). When questioned on the name of the person that treated her, Petitioner testified that Ana Berno treated her in March. (Tr. 60). Upon additional requests for confirmation, Petitioner identified that Ana Berno treated her in June and July. (Tr. 60). When asked for clarification on who she treated with in March, she identified a "Dr. Anderson." (Tr. 60). When asked for Dr. Anderson's address, her only response was that "that place, they closed it. They closed it and that's why they sent me there, Immediate Care." (Tr. 60).

The first medical record in evidence is from June 8, 2021, at Physicians Immediate Care (PIC) with Amanda Berno, PA-C. Petitioner reported lower back pain. She reported she fell backwards at work landing on her low back "and was treated elsewhere." (Px 1). She "denied that any non-work-related event or illness possibly contributed to or is related to development of symptoms." (Px 1). Petitioner reported she had pain once or twice per week since February, though it had worsened / started again on 6/5/21. X-rays from 6/8/21 indicated no acute fractures, minimal early degenerative changes in both hips, and phleboliths throughout the pelvis. without restriction. The diagnosis was low back pain, lumbar strain, UTI/pyelonephritis, disc herniation, sciatica, and pain in right hip. The plan was to use a back brace while at work and for Petitioner to return for follow up on 6/14/21. (Px 1). PIC personnel recorded: "At this time, suspect (Petitioner's) symptoms could be related to original injury." Likewise, PIC personnel "called the designated employer representative for this worker's comp case to discuss management. (The) discussion involved elements of (Petitioner's ) diagnosis and how they impact restrictions and return to work." (PX 1)

On June 14, 2021, Petitioner treated again at PIC complaining of lower back pain that started again the Saturday before her June 8 examination. Petitioner's history of falling backwards and hitting her back in February was noted as were the x-rays showing arthritis. Her pain was reported to be 6/10. She denied any non-work-related event or illness contributed to her symptoms. The diagnoses were low back pain, disc herniation, sciatica, lumbar strain, and pain in the right hip. Petitioner could work so long as she wore a brace. She had instructions to begin performing home exercises for her low back, continue Tylenol for pain, and take a steroid dose pack. (Px 1).

On June 21, 2021, Petitioner returned to PIC where she was diagnosed with low back pain, lumbar radiculopathy, lumbar strain, and sciatica. She was found fit for work with directions to wear a back brace. A referral was made for an MRI. (Tr. 38)

Petitioner was back at PIC on June 28, 2021 and reported pain of 7/10. At that point she was returned to work without restrictions. (Px 1).

Petitioner complained of tension and tightness in her back to PA-C Berno at PIC on July 7, 2021. Her medications were reported to be helping but only for 2 hours. Pain was reported at 7/10 and it waxed and waned. She had yet to be approved for the MRI. There was no complaint of pain radiating down her legs. She was assessed to be fit for duty without restrictions. The MRI was still recommended. (Px 1).

On July 19, 2021, Petitioner went again to PIC where she rated her pain at 6/10. She noticed it mostly upon sitting down too long. She reported pain down the front of her thigh and intermittent tingling in her toes. Medication was reported to help but the pain returned once the medication wears off. The record indicates that Petitioner reiterated that her initial injury occurred in a parking lot when she slipped on ice on 2/25/21. She was fit for duty without restrictions. She was instructed to begin physical therapy. (Px 1).

On July 30, 2021, Petitioner underwent a lumbar MRI. Impression was (1) loss of normal lumbar lordosis likely due to muscular spasm, (2) disc dehydration is identified in multiple levels, (3) mixed modic changes identified at L4-5. Modic type I changes seen L3-L4. (4) Abnormal T1 hypointense T2 hyperintense cystic area at S2, likely representing Tarlov cyst, measures 1.6 x 1.6 cm at LS and AP dimensions. (5) L5-S1 shows disc bulge at 1.9 mm causing thecal sac indentation without significant lateral recess and neural foramina narrowing. (6) L4-5 disc bulge of 4.0 mm with left preponderance causing thecal sac indentation with severe left and moderate right sided lateral recess and neural foramina narrowing resulting in compression over exiting nerve roots, more marked on left. (7) L3-4 diffuse disc bulge of 2.9 mm with right preponderance causing thecal sac indentation with moderate right and mild left sided lateral recess and neural foramina narrowing. (8) L2-L3 disc bulge 1.6 mm with right paracentral disc protrusion causing thecal sac indentation with minimal bilateral lateral recess and neural foramina narrowing. (Px 1).

On August 2, 2021, Petitioner reported to PIC that her pain was at a level of 6/10 in her low back that occasionally extended down the back of her leg. Petitioner was returned to work without restrictions. (Px 1). On August 7, 2021, Petitioner returned for care at PIC with PA Berno where the plan was to have physical therapy. (Px 1).

According to the report at PIC on August 16, 2021, Petitioner was having trouble reaching back and experiencing throbbing pain in her lower back when sitting more than 30 minutes. The pain was radiating down her right leg and was worsening. It hurt her to bend forward. She was given work restrictions which were to avoid prolonged bending, effective until 8/30/21 (Px 1). PIC personnel "called (Petitioner's) designated employer representative for this worker's comp case to discuss management." This "discussion involved elements of (Petitioner's) diagnosis and how they impact restrictions and return to work." (Px. 1)

On August 26, 2021, Petitioner treated at Neurological Surgery and Spine Surgery, SC, with Dr. John Song, MD, upon referral (Tr 40). Her presence for initial workers' compensation evaluation was noted. Petitioner reported working on 2/24/21 when she slipped on ice and fell onto her backside. She has had lower back pain on right posterior thigh pain with radiation to her foot. She was working full duty, having missed only 2 days due to pain. According to Dr. Song, her 7/30/21 MRI showed multilevel degenerative changes, but no obviously acute problems, although a left L4-5 foraminal disc herniation was visualized. There were no surgery recommendations. Recommendations for PT and lumbar injections were made as was a referral to pain medicine. Gabapentin was prescribed and she was allowed to continue to work. (Px 2).

Petitioner was next seen on August 30, 2021 at PIC complaining that her pain was 6/10 and that she had seen another provider who recommended injections for her back. PIC found her fit for duty with directions to avoid prolonged bending over. PIC again called Petitioner's employer and discussed her diagnosis and how it impacts work restrictions. (Px 1).

Petitioner came back to PIC on September 7, 2021, reporting the prescribed medicine made her sleepy, so she took it only on weekends. If she sat for too long, she struggled when getting up. Her pain was recorded as 4/10. She was counseled to avoid prolonged bending over at work. Respondent was again contacted to discuss elements of the diagnosis and work restrictions. (Px 1).

PIC noted as of September 20, 2021, that Petitioner was in for a "Worker's Comp Recheck." Her pain was reported to be 6/10 and radiating down her anterior leg. Her pain was similar to what she had been experiencing since her fall in February. Respondent was again contacted and it was specifically noted that contract was made to "the adjuster on multiple occasions, leaving messages each time." It was noted that Petitioner was scheduled for injection at Premier Pain and Spine due to bulging disc with nerve root compression. (Px 1).

On October 4, 2021, Petitioner again treated at PIC and was still experiencing pain. She reported that the prescribed muscle relaxer helps but gives her an upset stomach. She reported low back pain radiating towards her right hip and down her right leg. The plan was to call Premier Pain and Spine to set up appointment. Petitioner was again fit for duty with instructions to avoid prolonged bending over. She was to call Athletico to schedule a PT appointment. (Px 1).

On October 11, 2021, Petitioner treated at Premier Pain & Spine with Dr. Asma Asif. She was referred by Dr. Song for procedural intervention for low back pain. Insurance coverage was listed as Travelers. Her pain level was reported to be 6-8/10 and worsened with prolonged walking/standing/bending forward. Petitioner was noted to have had minimal relief with physical therapy. Petitioner was currently working. Prior surgical history of carpal tunnel in 2017 was noted as was the MRI of her lumbar spine from August 2021. The assessment was (1) radiculopathy, lumbar region, (2) urine drug testing for medication compliance, 3) low back pain, and (4) myalgia. Notes under patient history reported low back pain since January 2021 after she fell on ice. It was noted that the MRI showed modic changes of L4-L5 and L3-4 with a diffuse disc bulge. A right epidural steroid injection, ESI, was administered at L3-4 and L4-5.

A claim professional for Travelers, wrote to Dr Song Dr Song on October 20, 2021 notifying him that his care of Petitioner would be scrutinized pursuant to the Utilization Process. (Px 2).

On October 22, 2021, Petitioner returned to PIC reporting pain at 7/10. (Px 1).

On October 28, 2021, Petitioner treated at Premier Pain & Spine where another right ESI, at L3-4, L4-5 was administered.

Petitioner reported pain of 5/10 on November 5, 2021 and she also specified intermittent pain down her right leg. She was told to continue physical therapy. (Px 1).

On November 12, 2021, Petitioner treated at Premier Pain & Spine with Jeffrey Johnson PA-C for follow up, post ESI. She reported 50% durable pain relief. Her pain was noted to have progressively worsened since she fell on ice. The plan was to schedule another ESI at L3-4 and L4-5 and continue cyclobenzaprine, PT, a follow up with PCP, and to continue care with Dr. Song. (Px 1).

On November 19, 2021, Petitioner treated at Physicians Immediate Care reporting 5/10 pain. She reported occasional numbness on her right leg and plantar surface of her right foot. (Px 1).

On December 2, 2021, Petitioner treated at Premier Pain & Spine with Dr. Kapoor, MD. She was currently working. The assessment was (1) radiculopathy, (2) low back pain, (3) myalgia, (4) encounter for screening of viral diseases, and (5) anxiety disorder. An ESI at L3-4 and L4-5 was administered. She was to continue with referring physician Dr. Song. (Px 6).

On December 10, 2021, Petitioner was back at PIC and was directed to consult with neurosurgery. Her complaints of back pain were noted as were reports of cramping /tightness in her lower back and right leg. She had undergone an ESI on 12/2/21 and physical therapy on 12/7/21. (Px 1).

On December 17, 2021, Petitioner failed to appear for an appointment with PA-C Jeffrey Johnson at Premier Pain & Spine for follow up post injection. (Px 6)

On January 7, 2022, Petitioner was examined Dr. Song. She reported right sided low back pain with pain/tingling down the lateral aspect of her right thigh and numbness in her right leg. She complained also of aching and pain in the bottom of her right foot. Dr. Song assessed lumbar spondylosis. Petitioner's job duties had been adjusted such that bending was limited as she continued to work. Petitioner reported she had pain if she overdid activity. Her MRI revealed mild spondylosis in her lumbar spine without stenosis. Some slight degeneration on L4-5-disc space was noted, with no clear herniation. She was assessed to have not had much improvement, and Dr. Song found that she was likely at MMI. It was noted Petitioner might need continued treatments for pain and could continue to work. Recommendations for acupuncture or chiropractic manipulations were given and referrals made. (Px 2).

Petitioner changed medical providers and presented to Dr McNally at Lakefront Medical Associates on February 10, 2022. Petitioner underwent an x-ray for the lumbar spine revealing moderate intervertebral degenerative changes L3-4 and L4-5. Dr. McNally assessed her with (1) lumbar radiculopathy, (2) degeneration of lumbar intervertebral disc, (3) low back strain, and (4) retrolisthesis. He noted her fall at work on 2/23/21 and that she had failed physical therapy. Dr. McNally noted he had operated on a friend of Medina's husband's and that she was seeing him on her regular insurance. It was noted that she had previously treated with Dr. Song who directed her to PT, chiropractic care, and acupuncture. She did not seek care from either a chiropractor or acupuncturist. (Px 4).

On February 24, 2022, Petitioner underwent a lumbar MRI without contrast. It disclosed (1) moderate degenerative disease at mid-lower lumbar levels with minimal neuroforaminal stenosis;

and, (2) partially seen high T2 structure in left aspect of S2 consistent with nerve root cyst. (Px 4).

On April 7, 2022, Dr. McNally saw Petitioner. She was using BCBS insurance. Her chief complaints were back pain and right low back and hip pain that travelled down the leg. Assessment was (1) lumbar radiculopathy, (2) degeneration lumbar intervertebral disc, (3) low back strain, and (4) retrolisthesis. The plan was to obtain an EMG/NCS. Petitioner was reported to have maximized and failed conservative treatment. Discussion of potential surgery was noted and decompressive surgery and/or laminectomy was considered. Petitioner was assessed to have modic changes L3-4 and L4-5, and Dr. McNally opined she was unlikely to have lasting relief from decompression alone. The risks of fusion surgery were discussed. (Px 4).

On April 11, 2022, Presence Resurrection Medical Center conducted an EMG. The EMG Report was abnormal with electrophysiologic evidence of mild chronic bilateral low lumbar radiculopathy which is most notable at L4/L5. (Px 7).

Petitioner continued to treat with Dr McNally on various occasions in April, Mary and June of 2022. Her low back pain persisted, and it continued to radiate down her right leg. Dr. McNally, noting Petitioner's complaints comported with findings on two MRI's and the EMG/NCV, and also with a diagnostic right SI injection he had Dr Andrew Engel perform, recommended L3-4 and L4-5 anterior lumbar interbody fusions with allograft, infuse, cages and instrumentation, possible posterior decompression and fusion. (Px 4).

From her accident through July 27th, 2022, Petitioner effectively continued to work full duty for Focal as an Assembler II, a job requiring, she "put the guts into the housing of the fixture. . . ballasts, screwing in... screws, fasteners, LED components. . . parts (weighing) . . . anywhere from five pounds and 15 pounds . . ." and using tools as heavy as three pounds. (Tr 33, 60, 84)

On July 27, 2022, Dr. McNally performed an anterior lumber interbody fusion at L3-L4 and L4-L5. Records from Weiss detail Petitioner's "low back pain with radiculopathy that has been present since a fall at work on 2/24/21. Two lumber mri's are consistent with her radicular complaints that have been objectified by EMG/NCS." Operative findings included mild degenerative scoliosis with collapse on right side of disk space at L3-4, collapse of both disk spaces at L3-4, and L4-5 and sagittal images with retrolisthesis of L3 on L4 and L4 on L5 with significant improvement at sagittal alignment and disk space at both levels. (Px 5)

On August 25, 2022, Petitioner was examined by Dr. McNally. Her pain was reported to be 4/10. She was noted to be doing well post-surgery. Dr. McNally reported some leg swelling. Petitioner was sent to the ER where she was diagnosed with DVT. (Px 4); (Px 5).

On August 31, 2022, Dr. Kern Singh, MD, performed an Independent Medical Examination on behalf of Focal. He reviewed MRIs, the "actual images" dated 2/25/21, 8/4/21, and 2/24/22 diagnosing Medina with (1) lumbar muscular strain, (2) degenerative lumbar spondylolysis without stenosis, (3) status post L3-5 ALIF with instrumentation. Dr. Singh opined Petitioner had suffered only soft tissue muscular strain of the lumbar spine related to the work accident on 2/24/21. This strain had resolved prior to surgery in his opinion. Her current condition comprised

degenerative lumbar spondylosis without stenosis and did not correlate with her reported pain complaints. The degenerative spondylosis was opined to be minimal and not caused or aggravated by her fall at work. Dr. Singh opined that Petitioner could work full duty without restriction after her fall on ice. In answer to a specific Interrogatory Dr. Singh noted Petitioner's "3 consecutive lumbar MRI scans that confirm mild degenerative lumber spondylosis without stenosis which is age appropriate and is not causally connected to the date of injury of 02/24/2021. (Rx 8). Dr Singh acknowledged Petitioner's pain improved had improved post-surgery (Rx 8., 38). When he examined her, he found "full range of motion of her neck and low back at 40 degrees of flexion and extension of rotation. . ." (Rx 8., p. 39). Dr. Singh uncovered "no symptom magnification." (Rx 8 p. 39).

On September 29, 2022, Petitioner returned to Dr. McNally, reporting sharp pain traveling to the bottom of her tailbone. She continued, though according to Dr. McNally, to do well post-surgery. Her DVT has resolved. Petitioner was reported to go as much as three days without pain and thereafter experience it fleetingly. (Px 5).

On December 15, 2022, Dr. McNally saw Petitioner for a post-surgery follow-up. She had back pain with twisting with 4/10 pain. Petitioner had finished PT and, because it had helped, she wished to do more, including work conditioning. The assessment was: (1) lumbar radiculopathy, (2) degenerative lumbar intervertebral disc, (3) low back strain, (4) retrolisthesis, (5) pain in right sacroiliac joint, (6) disorder of right sacroiliac joint, (7) history of lumbar fusion, and (8) deep venous thrombosis of lower extremity. It was noted that Petitioner had two pre-op lumbar MRIs consistent with radicular symptoms objectified by EMG/NCS. She was five months post L3-4 and L4-5 lumbar interbody fusions. No symptoms from Petitioner's DVT remained. Petitioner was assessed to be ready for work conditioning. (Px 5).

On January 17, 2023, Petitioner returned to Dr. McNally. Her lower back pain was 2/10. Notes reflects she planned to return to work on February 27, 2023. But she reported she felt throbbing, sharp radiating pain of lower back with lifting with more activity. The assessment at that point was: lumbar radiculopathy, degeneration of lumbar intervertebral disc, low back strain, retrolisthesis, right sacroiliac joint pain. Petitioner was to continue PT and then start work conditioning. She was allowed to return to work on 2/27/23 but with restrictions. (Px 5).

On February 14, 2023, Petitioner treated at Chicago Center for Orthopaedics at Weiss with Dr. McNally. She reported pain at 2/10 in her lower back and right thigh. The chief complaint was now right sided groin pain.

**Testimony of Yolanda Villa:**

Yolanda Villa has worked for Focal Point for three years and has known Petitioner since she started working at the company. (Tr. 74-75). Ms. Villa described that on the date of accident, Petitioner was leaving work, walking towards the parking lot. (Tr. 76-77). Coworkers present included Juan Gabriel Silva, Petitioner, and Lorena. (Tr. 77). The weather was cold, and there was ice. (Tr. 77). Petitioner slipped and fell on her butt. (Tr. 77). Ms. Villa indicated that she believed the fall was very heavy because she yelled very loud. (Tr. 78). Coworkers tried to help

her up, but they had to walk very slowly so they did not fall themselves. (Tr. 77). Ms. Villa advised her line lady, Jahaira, regarding the accident.

**Testimony of Leticia Fuentes:**

Leticia Fuentes has worked at Focal Point for 12.5 years as Safety Facility and Environmental Manager. (Tr. 82). She works to ensure safety of employees, performs intake for injuries, environmental reporting, and manages the facility and maintenance team. (Tr. 83). When someone reports a workers' compensation accident, the accident is reported to her, and she reports the accident to the insurance company. (Tr. 83).

Ms. Fuentes identified Petitioner's job description as Assembler II. Petitioner's job duties entailed assembling the housing of the fixture, including ballasts, screws, fasteners, LED components, as well as testing to ensure the fixture worked properly. The parts or tools weighed between 5-15 pounds. The tools weighed about 3 pounds. (Tr. 84).

The Arbitrator notes the job description describes using 10 pounds of force constantly, up to 20 pounds frequently, and up to 50 pounds occasionally. (Rx 1). On cross-examination, Petitioner's counsel queried whether Petitioner would need to exert up to 50 pounds. (Tr. 100). Ms. Fuentes indicated that anything over 50 pounds needed two people to carry. (Tr. 100). Employees should not lift over 25 pounds. (Tr. 100). Ms. Fuentes checked with the supervisor, who confirmed that Petitioner does not lift anything over 15-17 pounds. (Tr. 100).

Focal Point received notice of the work accident the day following the accident. (Tr. 85). Ms. Fuentes testified that Focal Point's understanding of Petitioner's first date of treatment was in June 2021 at Physicians Immediate. (Tr. 84). Petitioner continued to work full time with no restrictions. (Tr. 85). She did not miss any work and did not ask for accommodations. (Tr. 85). She worked her regular job. (Tr. 85).

Ms. Fuentes identified the Time Card Report as showing Petitioner's punch ins and out of work. The document was pulled by Human Resources. The information is kept in the ordinary course of business for all employees. (Tr. 86-87).

Ms. Fuentes identified the completed Family Medical Leave Act form. (Tr. 87). Petitioner's FMLA began on July 27, 2022. (Tr. 88).

Ms. Fuentes identified the short-term disability claim payout and application. Petitioner received short-term disability from August 10, 2022 through January 2023. (Tr. 89). This information is kept in the ordinary course of business in HR's file. (Tr. 89).

Ms. Fuentes identified the long-term disability report, indicating Petitioner received long term disability from January 25, 2023 through March 24, 2023. (Tr. 90). Petitioner also received long term disability from March 25, 2023 through April 24, 2023. (Tr. 90). This information is kept in the ordinary course of business in HR's file. (Tr. 90).

Ms. Fuentes identified pay check stubs with pay dates December 19, 2021, December 25, 2021, September 4, 2022, and September 10, 2022. (Tr. 91).

Leticia Fuentes testified that Focal Point tries to accommodate employees wherever they can. (Tr. 91). There was no indication that Focal Point could not accommodate restrictions. (Tr. 92). Focal Point tries to bring employees back to work, but this does depend on restrictions on a case-by-case basis. (Tr. 92). Leticia Fuentes testified that she had no indication that Petitioner was released to return to work with restrictions. (Tr. 92). Ms. Fuentes indicated that she was not aware of Focal Point receiving anything from Dr. McNally regarding ongoing work restrictions. (Tr. 93).

Leticia Fuentes testified that this matter is a denied case. Ongoing medical treatment is categorized under FMLA and short-term disability. (Tr. 93).

## CONCLUSIONS OF LAW

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

Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. 820 ILCS 305/1(b)3(d). To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of 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). An injury is accidental within the meaning of the Act when it is traceable to a definite time, place, and cause and occurs in the course of employment, unexpectedly and without affirmative act or design of the employee. Mathiessen & Hegeler Zinc. Co. V. Industrial Board, 284 Ill. 378 (1918).

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 or her evidence worthy of belief. The arbitrator, whose province it is to evaluate witness credibility, evaluates the demeanor of the witness and any external inconsistencies with his testimony. Where a claimant's testimony is inconsistent with his actual behavior and conduct, the Commission has held that an award cannot stand. McDonald v. Industrial Commission, 39 Ill. 2d 396 (1968); Swift v. Industrial Commission, 52 Ill. 2d 490 (1972). While it is true that an employee's uncorroborated testimony will not bar a recovery under the Act, it does not mean that the employee's testimony will always support an award of benefits when considering all the testimony and circumstances shown by the totality of the evidence. Caterpillar Tractor Co. v. Industrial Commission, 83 Ill. 2d 213 (1980).

Petitioner testified in open hearing before the Arbitrator who viewed her demeanor under direct examination and under cross-examination. Petitioner's manner of speech, body language, and flow of answers to questions was, overall, indicative of sincerity. At first, Petitioner seemed nervous, especially when answering questions about her initial care after the accident. That no records for the first three visits to Physician's Immediate Care were entered into evidence, that the specific clinic where Petitioner had treated was now closed, and that Petitioner could not remember the address clearly caused the Arbitrator to have some doubts. As the trial progressed, Petitioner became more comfortable and answered questions with greater ease. The medical record – excepting the initial care and treatment – is supportive of Petitioner's testimony overall. Petitioner is mostly credible.

Respondent's two company witnesses were also credible and their testimony supports that Petitioner gave accurate and credible testimony.

This case really comes down to the credibility of the medical providers both through deposition and the medical record. The credibility of the physicians is discussed below.

**1. With respect to (F) is the Petitioner's current condition of ill being as of February 24, 2021 causally related to the injury, the Arbitrator finds as follows:**

"Whether a causal connection exists is a question of fact for the Commission, and a reviewing court will overturn the Commission's decision only if it is against the manifest weight of the evidence... The test is whether the evidence is sufficient to support the Commission's finding, not whether this court or any other tribunal might reach an opposite conclusion. For the Commission's decision to be against the manifest weight of the evidence, the record must disclose that an opposite conclusion clearly was the proper result." Navistar International Transportation Corp. v. Industrial Comm'n, 331 Ill.App.3d 405, 415 (2002); Pietrzak v. Industrial Comm'n, 329 Ill.App.3d 828, 833 (2002); and Gallianetti v. Industrial Comm'n, 315 Ill.App.3d 721, 729-30 (2000).

A co-worker of Medina's, Ms. Villa, testified she was a very good and responsible worker and honest and trustworthy and there is no mention of symptom exaggeration found in any of Petitioner's medical records or in the report of Respondent's section 12 examiner, Dr. Singh. (TR p75; Respondent's Exhibit 8, p.39 and Singh Exhibit 2, p.3).

The credibility of Respondent's Section 12 expert, Dr Singh is somewhat called into question. He insisted that Medina underwent three MRI's, the first being on February 25th, 2021 (Rx 8, p. 13). There was no MRI on that date. It was the day after her accident and she in fact worked that day. (Tr. 24, 25). Her only care on February 25th, 2021 was self- administered, consisting of Tylenol and ice (Tr. 25). Dr. Singh examined Medina just once, after her surgery, (Rx 8, p. 8). The medical record indicates that Petitioner's low back never returned to anywhere near her pre-accident state. Dr. Singh finds otherwise but is not persuasive that Petitioner was ever at MMI. Nonetheless, Dr. Singh looked at the same MRI as Dr. Song and found that Petitioner's low back findings were degenerative in nature. Dr. Song also found Petitioner's condition to be

degenerative and advised a course of conservative care which is supportive of Dr. Singh's assessment. Dr. Song, in his last record, opined that Petitioner was nearing MMI.

Dr. McNally had a different opinion than Dr. Song as happens often in low back cases where the MRI findings are degenerative. Dr. McNally believed that Petitioner had exhausted conservative care and required surgery. While it may be hypothetically true that Petitioner could have continued to treat conservatively and gotten better, Petitioner had multiple injections, physical therapy, and examinations over a period of more than a year without any significant improvement. It is worth noting that Petitioner continued to work until under the care of Dr. McNally which indicates that Petitioner was compliant with the return to work instructions and exhibited the type of effort associated with a person who is trying their best to improve their physical condition. The fusion surgery resulted in significant reduction in symptoms.

Additionally, Respondent introduced no records evidencing any prior treatment. Thus, only the Petitioner's testimony and her treating records can be scrutinized. Specifically, the Petitioner testified to having no prior history of low back pain, no prior course of treatment, imaging, nor receiving any recommendations for steroid injections or surgery for her low back before February 24, 2021. (Tr. 30-31). The Arbitrator gives great weight to this testimony which is wholly corroborated by the supporting medical evidence.

Furthermore, the Arbitrator was presented with no evidence of any intervening or superseding causes for the Petitioner's low back injury, other than the February 24, 2021 work injury which occurred as a result of the Petitioner slipping and falling upon ice.

The Arbitrator finds the medical records support the Petitioner's testimony that she suffered a low back injury on February 24, 2021, resulting in her need for ongoing treatment, including the lumbar fusion surgery of July 27, 2022. For example, on August 25, 2021, Dr. Song casually related Medina's work injury to her back and leg pain. (Px 2).

Likewise, Dr. McNally confirmed that Petitioner's low back condition, including the lumbar fusion surgery, is causally related to her work accident of February 24, 2021. He stated on May 26, 2022 the following:

> "54 yo female presents for low back pain with radiculopathy that has been present since a fall at work on 2/24/21. Two lumbar mri's are consistent with her radicular complaints that have been objectified by EMG/NCS." (Px 4).

Where a work injury aggravates, exacerbates, or accelerates an underlying condition worker's compensation benefits are owed. Rock Road Construction Co. v. Industrial Commissi*on*, 37 Ill.2d 123 (Ill. 1967); Illinois Valley Irrigation, Inc. v. Industrial Commission, 66 Ill.2d 234 (Ill. 1977); and St. Elizabeth's Hospital v. Worker's Compensation Commission, 371 Ill.App.3d 882 (Ill. 2007). A work injury need only be 'a' cause of the condition and care, not the sole cause, or even the primary cause, for the Illinois Act to apply. Tower Automotive v. Illinois Workers' Compensation Commission, 407 Ill.App.3d 427 (1st Dist. 2011).

In sum, the Arbitrator finds that this case follows a common fact pattern of a person with degenerative changes in their spine that became symptomatic after an accident. The Arbitrator finds that Petitioner injuries and the care she has sought to treat them, including the fusion surgery performed by Dr. McNally, are causally connected to the fall she suffered on February 24, 2021.

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

Under section 8(a) of the Act, the claimant is entitled to recover reasonable medical expenses that are causally related to the accident and that are determined to be required to diagnose, relieve, or cure the effects of claimant's injury. University of Illinois v. Industrial Comm'n, 232 Ill. App. 3d 154, 164, 596 N.E.2d 823, 830, 173 Ill. Dec. 199 (1992). Claimant has the burden of proving that the medical services were necessary and the expenses were reasonable. Gallentine v. Industrial Comm'n, 201 Ill. App. 3d 880, 888, 559 N.E.2d 526, 532, 147 Ill. Dec. 353 (1990). What is reasonable and necessary is a question of fact for the Commission, and the Commission's determination will not be overturned unless it is against the manifest weight of the evidence. Cole v. Byrd, 167 Ill. 2d 128, 136-37, 656 N.E.2d 1068, 1072, 212 Ill. Dec. 234 (1995).

The Arbitrator finds that all involved in the Petitioner's care for her low back injury sustained on February 24, 2021, including those physicians, therapists, and radiologists referred to in Petitioner's Exhibits 1 through 8 provided reasonable and necessary medical care and treatment.

For the reasons outlined above regarding causal connection and the testimony of the Petitioner and Yolanda Villa, the Arbitrator finds that the Petitioner's medical care and treatment for her low back from June 8, 2021 throughout all of her visit's records up to April 18, 2023, including her lumbar fusion surgery that occurred on July 27, 2022, has been reasonable and medically necessary.

As such the Arbitrator awards the Petitioner all the medical bills incurred from June 8, 2021, through the day of trial of April 18, 2023 pursuant to the Illinois Workers' Compensation Fee schedule.

In making this finding it is noted that Respondent did not adequately raise the issue of whether Petitioner exceeded her choice of physicians under section 8(a) of the Act. That Section sets forth the two-physician rule. Absolute Cleaning/SVMBL v. Illinois Workers' Compensation Comm'n, 409 Ill.App.3d 463, 468 (2011). Under section 8(a) of the Act, an employer's liability to pay for medical services is limited to (1) first aid and emergency treatment plus (2) two additional doctors chosen by the employee and (3) any additional providers and services recommended by the two physicians selected by the employee. 820 ILCS 305/8(a) (West 2010); Bob Red Remodeling, Inc. v. Illinois Workers' Compensation Comm'n, 2014 IL App (1st) 130974WC, ¶ 47.

Respondent did not raise the issue in the Request for Hearing Form and has forfeited its ability to make any such argument now. The Request for Hearing Form contains no reference at all to all

to any such issue. (Arb. Ex 1) Thus, Petitioner gave no notice to Petitioner that this issue ever needed to be addressed. The point of the Request for Hearing Form is to delineate and to limit the issues. Gallentine v Industrial Comn'n., 201 Ill. App 3d 880, 559 N. E. 2d 525 (2nd Dist. 1990). To allow Focal to bring up the two-doctor rule would be to ignore the oft stated purpose of the Request for Hearing Form.

Even had Respondent made a proper record, its argument that Petitioner had chosen more than her allotment would remain unpersuasive. The evidence demonstrates she asserted at the time of trial that she sought treatment in March 2021 at Immediate Care after "they" sent her. When read in total, Petitioner's testimony surrounding her allusions to "they", focused on how she continued to work. It's thus reasonable to infer that ''they" was Respondent.

As to Physician's Immediate Care, the record is clear that its personnel routinely communicated with Respondent regarding Petitioner's care.

Considering these circumstances, the Arbitrator finds that neither provider counts as Petitioner's choice. To the contrary both constitute company clinics. It is axiomatic that an Arbitrator may draw reasonable inferences from circumstantial evidence. Givenrod-Lipe, Inc. v. Industrial Comm'n, 71 Ill. 2d 440.

There is no direct proof as to Petitioner's source of referral to neurosurgeon, Dr Song on August 26, 2021 (Tr. 40, Px 2). However, by 12/10/21, PIC directed Petitioner to follow up with the neurosurgery practice at which Dr Song had previously worked. (Px 2). Since PIC was a company clinic this directive demonstrates its acquiescence in the care Petitoiner undertook to that point. Any objection should have been made then. Neither Dr Song, nor the physicians to whom he referred Petitioner at Premier Pain & Spine, (Px 6), count as choices.

Dr. McNally was Petitioner's only second opinion and functionally her first choice under the two provider rule.

**3. With respect to (K) the amount of temporary total disability benefits the Arbitrator finds as follows:**

Petitioner continued to work following her accident, including up to her eventual surgery date and the Arbitrator appreciates that, "an employee who continues to work on a regular basis despite his own progressive ill-being should not be punished merely for trying to perform his duties without complaint.". Three "D" Discount Store v. Industrial Commission, 1989 Ill.App.3d 43, 48 (Ill. 1989).

However, on July 27, 2022, Petitioner underwent surgery and has been unable to work ever since while undergoing reasonable, necessary and causally related treatment at the behest of her physicians. For the time period of July 27, 2022, through the trial date of April 18, 2023, she is owed $13,742.27 (39.85 weeks x $344.85) in temporary total disability benefits. Petitioner stipulated that she has been paid $13,764 in disability benefits for this period. (Arbitrator's Ex 1; Tr. 61, 62). Accordingly, Respondent has effectively discharged its obligation of paying to

Petitioner 66 2/3rds of her average weekly wage. Should the group carrier demand reimbursement, of course, Respondent would have to satisfy that payment in Medina's behalf.

**4. With respect to (M), should penalties or fees be imposed upon Respondent, the Arbitrator finds as follows:**

Evidence reveals that, effectively Respondent covered Petitioner's temporary total wage loss. It also paid $8,749.58 towards her medical expense. (Arbitrator's Ex 1). Petitioners' Exhibit 8 reflects that out of a total of $232, 286. 48 in medical charges a balance of $28, 918.42 remains outstanding. Thus, as a practical matter Medina's rights to indemnity and medical care were satisfied, or largely so, even though Respondent denied liability under the Worker's before April 2021, nor does she assert she was not being cared for to the contrary, she agrees on the record she has been drawing benefits, just not Worker's Comp benefits.

Most importantly, Respondent's Section 12 examiner Dr. Singh and Petitioner's treating physician Dr. Song both opined that Petitioner was not a surgical candidate. Thus, Respondent had a reasonable basis to deny approval of the surgery Petitioner ultimately chose to have with Dr. McNally. Also, Dr. Singh opined that Petitioner's injury to her back healed to the point of MMI prior to the surgery and that any symptoms related to her back were degenerative in nature. It is only by a narrow margin that the Arbitrator found the surgery to be appropriate care in this case. The opinion of Dr. Song was a persuasive counter to that of Dr. McNally; almost persuasive enough to deny the surgery and certainly persuasive enough to support the Arbitrator's opinion that Respondent does not owe penalties in this case.

Finally, as discussed below, Respondent paid disability benefits to Petitioner when she was not working. This is another action by Respondent that persuades the Arbitrator that penalties are not warranted.

**5. With respect to (O), prospective medical, the Arbitrator finds as follows:**

The Arbitrator finds that as a result of the causal connection being established between the Petitioner's current symptoms and the work-related accident, the further low back treatment recommendations of Dr. McNally, namely that she requires work conditioning for her low back, and further follow-up visits, reasonable and necessary prospective medical care is awarded.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 20WC030515 |
| Case Name | Brant Wade v.<br>City of Springfield Fire Department |
| Consolidated Cases | |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 24IWCC0586 |
| Number of Pages of Decision | 19 |
| Decision Issued By | Marc Parker, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Kevin Elder |
| Respondent Attorney | L. Robert Mueller |

DATE FILED: 12/6/2024

/s/Marc Parker, Commissioner

Signature

STATE OF ILLINOIS )
) SS.
COUNTY OF SANGAMON )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Brant Wade,

Petitioner,

vs. No. 20 WC 030515

City of Springfield Fire Department,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, 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 Arbitrator awarded Petitioner the reasonable and necessary medical services contained in Petitioner's Exhibits 10 and 12, as provided in Sections 8(a) and 8.2 of the Act and per the stipulation of the parties, subject to any Section 8(j) credit. We find, without regard to whether Respondent entered into any stipulation, that Petitioner proved the bills for medical services in Petitioner's Exhibit 10 were reasonable, necessary, and causally related to his December 21, 2019 accident. We therefore affirm the award of the medical bills contained in Petitioner's Exhibit 10, as provided in Sections 8(a) and 8.2 of the Act, subject to any Section 8(j) credit.

Petitioner's Exhibit 12 contains two bills. The $3,713.00 statement from Advanced MRI is for the same medical services provided to Petitioner that are reflected in the Advanced MRI statement in Petitioner's Exhibit 10, which we have awarded Petitioner. Accordingly, the Commission modifies the Arbitrator's decision to find that the Advanced MRI bill in the amount

of $3,713.00 is awarded as part of Petitioner's Exhibit 10 only and not as part of Petitioner's Exhibit 12.

The second bill in Petitioner's Exhibit 12 is from Dr. Noyes at Christie Clinic, in the amount of $272.81. At arbitration, Petitioner's counsel stated on the record that Petitioner was not seeking payment of the Dr. Noyes/Christie Clinic bill in Petitioner's Exhibit 12, and that it was being offered into evidence only to show that Petitioner had been treated there (transcript, pp. 6-7). Accordingly, the Commission reverses the Arbitrator's award of the $272.81 Christie Clinic bill in Petitioner's Exhibit 12. 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 June 29, 2023, is hereby modified as stated herein and otherwise affirmed and adopted.

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

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

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.

**December 6, 2024**

MP/mcp
o-11/07/24
068

/s/ *Marc Parker*
Marc Parker

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

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

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 20WC030515 |
| Case Name | Brant Wade v.<br>City of Springfield Fire Department |
| Consolidated Cases | |
| Proceeding Type | |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 16 |
| Decision Issued By | Jeanne AuBuchon, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Kevin Elder |
| Respondent Attorney | L. Robert Mueller |

DATE FILED: 6/29/2023

/s/ Jeanne AuBuchon, Arbitrator
Signature

**THE INTEREST RATE FOR THE WEEK OF JUNE 27, 2023 5.21%**

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**

**BRANT WADE**
Employee/Petitioner

v.

**CITY OF SPRINGFIELD FIRE DEPARTMENT**
Employer/Respondent

Case # **20** WC **30515**

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 **SPRINGFIELD**, on **MAY 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 **12/21/2019**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**76,070.28**; the average weekly wage was $**1,462.89**.

On the date of accident, Petitioner was **40** years of age, ***married*** with **2** dependent children.

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

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

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

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

**ORDER**

Respondent shall pay reasonable and necessary medical services contained in Petitioner's Exhibits 10 and 12, as provided in Sections 8(a) and 8.2 of the Act and per the stipulation of the parties, subject to any credit pursuant to Section 8(j).

Respondent shall pay Petitioner the sum of $**836.69**/week for a further period of **225** weeks, as provided in Section **8(d)(2)** of the Act, because the injuries sustained caused permanent partial disability to the person as a whole to the extent of 45%.

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

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

Jeanne L. AuBuchon
Signature of Arbitrator

**June 29, 2023**

## PROCEDURAL HISTORY

This matter proceeded to trial on May 24, 2023. The issues in dispute are: 1) the causal connection between the accident and the Petitioner's current conditions; 2) liability for medical bills; and 3) the nature and extent of the Petitioner's injury. The parties initially stipulated that the Petitioner is seeking payment of medical expenses listed in Petitioner's Exhibit 10 but not for those in Petitioner's Exhibit 12. Following the hearing, the Respondent stipulated that all of the bills submitted were related to the accident, and medical expenses were no longer a disputed issue.

## FINDINGS OF FACT

At the time of the accident, the Petitioner, who was 33 years old, was employed by the Respondent as a firefighter. (AX1, T. 12) On December 21, 2019, the Petitioner was extinguishing a two-story dwelling fire when he was out of air and ran downstairs, hitting his head on the stairway header and falling to the ground. (T. 13-14) After getting outside, he noticed that he had cracked his helmet, his neck was sore and he had a cut on his nose where the helmet went down and impacted his nose. (T. 14) He said he continued to respond to calls that day but could not remember much of anything from that day. (T. 15)

The Petitioner testified that prior to the accident, he did not have a head or neck injury or vision problems, other than getting hit by a baseball in seventh grade, for which he had surgery for a cracked orbital and recovered from that. (T. 38-39) He said he had not reinjured his neck, head or eyes since the accident. (T. 39)

The Petitioner testified that after his shift, he drove from Springfield to the emergency room in Bloomington and had to pull over multiple times because it was like being in a whiteout condition and he was getting sick. (T. 45) At Advocate BroMenn Hospital, the Petitioner complained of a head injury and underwent head and neck CT scans and an electrocardiogram,

which were all negative. (PX3) He was diagnosed with a closed-head injury and a neck strain and was given instructions to follow up with his primary care physician. (Id.)

On December 23, 2019, the Petitioner saw his primary care physician, Dr. James Hancock at Medical Hills, and complained of confusion, migraine headaches, dizziness, forgetfulness and nausea. (PX7) Dr. Hancock diagnosed a concussion without loss of consciousness, an acute post-traumatic headache and neck pain. (Id.) He took Petitioner off work, restricted him from driving and ordered physical therapy for his neck. (Id.) The Petitioner underwent physical therapy at Medical Hills from January 2, 2020, through March 20, 2020, and reported improvement. (Id.) Physical therapy records were not submitted at arbitration.

On December 31, 2019, the Petitioner sought treatment at VisionPoint Eye Center, where he underwent testing and was diagnosed with dry eye, astigmatism, far-sightedness, photophobia secondary to concussion and subjective floaters without ocular pathology. He was advised to use artificial tears, get good sunglasses, have no screen time and see his primary care physician for continued treatment of the concussion. (PX8)

At a follow-up visit to Dr. Hancock on January 6, 2020, the Petitioner was referred to a neurologist. (PX7). On January 20, 2020, the Petitioner saw neurologist Dr. Fang Li at Advocate Medical Group with his main complaints being severe light sensitivity, poor balance and headaches. (PX6) Dr. Li performed an examination and found the Petitioner's symptoms consistent with post-concussive syndrome that more likely than not would improve with time. (Id.) Dr. Li ordered neuropsychological testing due to decreased concentration and change in behavior, prescribed medication for headaches and ordered a cervical spine MRI. (Id.)

The cervical MRI was performed on January 29, 2020, at Advanced MRI and showed smooth reversal of normal lordotic curvature (vertebrae bending in the wrong direction) that could

be associated with muscular spasm. (Id.) On February 19, 2020, Dr. Li performed an electroencephalogram (testing spontaneous electrical activity of the brain), which was unremarkable. (PX3)

On February 5, 2020, the Petitioner saw Dr. Edward Pegg, a neurologist at OSF Healthcare, and reported issues with short-term memory, reading, watching TV, everyday functions of life, sleeping, focusing, balance and getting aggravated easily. (PX4) He said his main issues were light sensitivity and headaches. (Id.) After an examination that was normal, Dr. Pegg prescribed medication for mood disorder and recommended a nutritional supplement to help with recovery from the concussion. (Id.)

The Petitioner had a follow-up visit with Dr. Hancock on February 10, 2020, at which time he was diagnosed with mood changes and referred to psychiatry. (PX7) Aside from neuropsychology evaluations mentioned below, no records regarding mental health treatment were submitted at arbitration.

On March 10, 2020, Dr. Pegg referred the Petitioner to a concussion clinic at Northwestern University. (PX4) Dr. Alan Shepard, a neurologist at Northwestern Medicine, saw the Petitioner on May 28, 2020, examined him and determined that the Petitioner's vision was what seemed to bother him the most. (Id.) He diagnosed post-concussion syndrome and neck pain and referred the Petitioner to an ophthalmologist. (Id.)

On June 3, 2020, and June 9, 2020, the Petitioner underwent a neuropsychological evaluation interview and testing by Dr. Neil Jepson, a licensed clinical psychologist at Psychology Specialists. (RX11) Dr. Jepson diagnosed concussion with loss of consciousness (based on medical records), mild memory disturbance and unspecified anxiety disorder. (Id.) Dr. Jepson reported the following test results: mildly impaired ranges in information processing speed

(thinking speed); mild to moderately impaired in confrontation naming (object naming); mildly impaired in both immediate and delayed memory for stories; mild to moderately impaired in both immediate and delayed free recall visual memory; and mildly impaired in fine hand motor coordination for both hands. (Id.) Dr. Jepson said the Petitioner appeared to be struggling with mild emotional distress. (Id.) He said the Petitioner may have been underreporting the severity of his psychological symptoms such that a test to assess personality disorders and clinical syndromes was invalid – adding that the Petitioner reported mild levels of anxiety on other tests. (Id.) The Petitioner's strengths included: intact and good functioning in overall attention abilities, language fluency skills, visuospatial abilities (ability to accurately see and understand visual information and the spatial relationships between objects), executive functioning skills ability to solve problems, complete purposeful and goal-directed behavior, being able to flexibly shift between tasks and inhibiting initial responses and impulses), overall hand motor dexterity and grip strength, ability to complete instrumental activities of daily living and neurocognitive status performance. (Id.)

Dr. Jepson concluded that the Petitioner did not meet diagnostic criteria for a mild cognitive impairment due to his overall neurocognitive status performance being within non-impaired ranges. (Id.) He stated that because there was no testing date from before the work injury, it could not be confirmed or denied that the Petitioner's cognitive symptoms were a direct result of the head injury. (Id.) Dr. Jepson recommended: continued psychological therapy; speech therapy; testing for vitamin and thyroid levels to assess any irregularities; quitting smoking; engaging with friends, family and other people; taking nutritional supplements; having his attention engaged before imparting important information or things he needs to remember; memory and cognitive

exercises; participating in enjoyable activities; aerobic exercise; spending time in nature; pleasant aromas; music; and humor. (Id.)

The Petitioner returned to VisionPoint Eye Center on June 12, 2020, with complaints of long streamers coming off lights. (PX8) He was advised to update his glasses prescription, and the option of yellow-tinted polarized glasses was discussed. (Id.) On August 5, 2020, after continued complaints of light sensitivity, it was recommended that the Petitioner follow-up with a neurologist, and eye muscle/tracking exercises were discussed. (Id.)

The Petitioner followed up with Dr. Shepard on August 28, 2020, and reported feeling about 70 percent better but was still having vision problems. (PX2) Dr. Shepard referred the Petitioner for a functional capacity evaluation. (Id.)

On November 4, 2020, the Petitioner underwent a Section 12 neuropsychological evaluation by Dr. Michael Oliveri, a neuropsychologist. (RX4) Following review of medical records, an interview and testing, Dr. Oliveri found: 1) the Petitioner had a broadly normal neurocognitive profile representing a general preservation of higher level brain-behavior functions and no objective support for a memory retrieval disorder and 2) somatoform (experiencing physical symptoms in response to psychological distress) was indicated with a psychological assessment of qualified validity due to a response style suggesting symptom under-reporting. (Id.) Dr. Oliveri concluded that the neuropsychological assessment results did not provide objective support for a residual neuropsychological disorder due to the work injury. (Id.) He said the Petitioner's sustained subjective complaints were not in keeping with the natural course of recovery following a mild concussive injury, adding that good outcome is fully expected in the early weeks to months post-injury. (Id.) He also concluded: no further diagnostic assessment was indicated; no additional treatment was supported from a neuropsychological perspective; early

treatment for post-concussive sequalae was appropriate; there were no contraindications to the resumption of work as a firefighter; there were no indications of symptom magnification; he had no opinion regarding whether the Petitioner presented inconsistent medical histories to various doctors; and the Petitioner's memory and cognitive complaints were not due to the work injury but likely were supported by such non-injury related factors such as stress, anxiety, behavioral issues and potential motivation confounds. (Id.)

On December 16, 2020, the Petitioner saw Dr. Michael Rosenberg, an ophthalmologist at Northwestern Medicine, who performed a physical examination and scans of the eyes that were normal. (PX5, RX5) Dr. Rosenberg diagnosed post-concussive syndrome, abnormal vision and photophobia of both eyes. (Id.) He prescribed new glasses with a special tint and told the Petitioner he should not wear his sunglasses frequently because there is evidence that acclimating to the darkening will increase photophobia. (Id.)

At a follow-up visit on February 1, 2021, Dr. Shepard referred the Petitioner to occupational therapy. (PX2) No occupational therapy records were submitted at arbitration. The Petitioner's last visit to Northwestern neurology was on February 26, 2021, at which time he saw neurologist Dr. Neena Charayil, who noted that the Petitioner's post-concussive symptoms, including visual symptoms, had overall improved. (Id.) However, he still had photophobia and headaches. (Id.) Dr. Charayil diagnosed photophobia of both eyes, post-concussive syndrome and abnormal vision. (Id.) She discussed with the Petitioner that photophobia is common following concussion either as primary or secondarily associated with post-traumatic migraines and said she would reach out to the Petitioner's neurologist to discuss anti-cGRP medications that could inhibit the sensory process known as the "photophobia pathway." (Id.) She said the Petitioner should

continue to follow-up with his neurologist and undergo occupational therapy. (Id.) She encouraged him to continue to increase activity as tolerated and update his glasses. (Id.)

According to Dr. Rosenberg's records, Dr. Shepard prescribed anti-cGRP medication in March and April 2021. (PX5) There was no reference to this medication in Dr. Shepard's records. (PX2)

The Petitioner attempted to return to work on January 4, 2021, for about three months. (T. 26, PX9) He said that he started doing basic chores, like cleaning the station, and computer training. (T. 26-27) He said his battalion chief had him do a sample exposure to lights on three different apparatus. (T. 27-28) He said he had physical reactions to the exposure, including coughing, eyes twitching and watering and sinus drainage. (T. 29) He said he couldn't function in those conditions. (T. 30) Battalion Chief Tyler Sextor prepared a written update on January 28, 2021, regarding the Petitioner's attempt to return to work. (PX9) His observations were similar to the Petitioner's testimony, and he noted that the Petitioner was extremely diligent and hard working in the past few weeks even when his appearance was that of someone who was feeling ill. (Id.) He concluded that the Petitioner needed more time, treatment or coping strategies before returning to the firehouse. (Id.)

The Petitioner testified that on or about March 17, 2021, he decided to use his sick time because he was not getting better and was digressing. (T. 30-31) He said it took months for him to recover after that. (T. 31) On December 15, 2021, he was awarded a full disability pension. (T. 31-32)

On July 12, 2021, Dr. Shepard prepared a report stating that the Petitioner continued to suffer from vision abnormalities related to his concussion. (PX1) He said that although the physical examination and imaging studies were unremarkable, his symptoms of photophobia and

vision abnormalities were consistent per the neuroopthalmologist and his own experience. (Id.) He said the Petitioner could drive short distances during the day, but with more complicated issues such as bright lights, stressful situations, loud sounds and fatigue, his vision abnormality as a result of his concussion would prevent him from performing safely as a fireman. (Id.) Dr. Shepard stated that given the length of time from the injury to the fact that the Petitioner continued to have symptoms, he was not confident that the Petitioner would improve significantly enough to be able to drive normally as he once did before. (Id.) He believed the Petitioner's current situation was a direct result of his head trauma and did not think the Petitioner had reached maximum medical improvement, as he thought there was a chance for some recovery. (Id.)

The Petitioner underwent a vocational evaluation on December 29, 2021, performed by Elizabeth Skyles at Skyles Vocational Consulting. (RX2) Ms. Skyles concluded that the Petitioner was employable based on the Petitioner's education, training, employment history and skills, medical information, age, transferrable skills and labor market. (Id.) She said the types of positions the Petitioner might perform could include but are not limited to employment utilizing materials, products, subject matter and services including protective services, medical and other health services, insurance and real estate. (Id.) She noted that the Petitioner was not looking for work and was not interested in anything other than being a firefighter, which he was hoping to work towards with more time and medical documentation. (Id.)

Ms. Skyles completed a labor market sample report on June 10, 2022, in which she identified 10 positions in the safety, health and environmental services and 19 positions in claims, coordinator and analyst positions – with salaries ranging from $33,000 to $100,000 per year but most being below the Petitioner's earnings as a firefighter. (RX3) These positions were within 50 miles of the Petitioner's home. (Id.)

The Respondent submitted video surveillance of the Petitioner totaling approximately 2½ hours over six days in October 2021, four days in September 2022 and two days in October 2022. (RX1) The videos showed the Petitioner outside his home – a majority of the time with sunglasses and a hat – and driving several times during the day and once at night. (Id.) On one occasion, his wife drove at night. (Id.) The videos in which the Petitioner was followed while driving during the day showed the Petitioner drove for approximately 25 minutes on one occasion, four minutes on another, two minutes on another and 16 minutes on another – apparently while wearing sunglasses. (Id.)

The Petitioner testified that bright lights and flickering lights cause his eyes to shutter, which would then have his eyes watering, which would then lead to runny nose, coughing and sneezing. (T. 22) He said extreme flashing lights, long screen time on computers and florescent lighting causes headaches. (T. 22) He said he still has those reactions to a flickering bright light or a light on top of an emergency vehicle. (Id.) He said he takes ibuprofen for the headaches and tries not to be in environments that create his symptoms. (Id.) He said Dr. Shepard instructed him to limit his driving at night but do it if he feels safe and comfortable, adding that the symptoms are not consistent – with some days being good and others not – and drives at night once or twice a week. (T. 32-33, 35) He wears three or four different glasses with protective lenses for using computers, extreme sunlight and florescent lights. (T. 33) He said there are times when he does not wear sunglasses, such as when it is cloudy and darker out. (Id.) He said his short-term memory has been challenging but has gotten better. (T. 34) He also has suffered depression because he lost the job for which he had a college degree that was everything he worked towards. (T. 37) He said he had not felt like himself after the accident and is living a completely opposite lifestyle as he had before, which has been challenging. (Id.)

The Petitioner stated that he has not looked for other work because it is difficult to find a job using minimal screen time for computers and because he is still trying to move forward and learn his limitations. (T. 36) He said he would like to eventually return to some kind of employment. (Id.)

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?**

Dr. Shepard's opinion that the Petitioner's vision problems were caused by the concussion the Petitioner suffered in the accident was unrebutted. The dispute appears to be regarding the cognitive problems of which the Petitioner complained.

Following the accident, the Petitioner complained of classic concussion symptoms – confusion, headaches, dizziness, forgetfulness and nausea. Dr. Jepson diagnosed concussion with loss of consciousness, mild memory disturbance and unspecified anxiety disorder but could neither confirm nor deny that the Petitioner's cognitive symptoms were a direct result of the head injury because no cognitive testing was performed before the accident. His tests revealed impairment in information processing speed, confrontation naming, immediate and delayed memory for stories, free recall visual memory and fine hand motor coordination for both hands. But he found the Petitioner's overall neurocognitive status performance to be within non-impaired ranges and concluded that the Petitioner did not meet diagnostic criteria for a mild cognitive impairment.

Dr. Oliveri's testing revealed normal functioning, and he opined that this did not provide objective support for a residual neuropsychological disorder due to the work 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. Industrial. Comm'n*, 77 Ill. 2d 469, 471-472, 397 N.E.2d 834, 34 Ill.Dec. 162 (1979); *Gano Elec. Contracting v. Industrial Comm'n*, 260 Ill.App.3d 92, 96–97, 631 N.E.2d 724, 197 Ill.Dec. 502 (4th Dist. 1994); *International Harvester v. Industrial Com.*, 93 Ill.2d 59, 63-64, 442 N.E.2d 908, 66 Ill.Dec. 347 (1982).

Circumstantial evidence of the Petitioner not having cognitive problems before the accident support a conclusion that his symptoms were caused by the accident. However, it appears that these problems were neither severe nor long-lasting.

The experts did indicate that the Petitioner had anxiety, which he was underreporting. Suffering anxiety after a traumatic injury and the loss of a job that the Petitioner has spent his whole life working toward is sure to cause anxiety. However, there was no evidence that this has caused any type of disabling condition, such as post-traumatic stress disorder.

Lastly, the Arbitrator finds the Petitioner to be credible. His reports to the healthcare providers and experts were consistent, and none of the experts noted malingering.

Based on this, the Arbitrator finds that the Petitioner has met his burden of proving by a preponderance of the evidence that the accident of December 21, 2019, caused his vision problems, concussion and short-term cognitive issues.

**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?**

At the end of the arbitration hearing, the parties stipulated to the reasonableness and necessity of the medical expenses listed in Petitioner's Exhibits 10 and 12.

**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.** According to Dr. Shepard, the Petitioner cannot work as a firefighter. He was also doubtful that the Petitioner could ever return to this occupation. The vocational reports indicated that the Petitioner would be able to find work in safety, health and environmental services and positions in claims, coordinator and analyst. However, the Petitioner has not sought employment. The Arbitrator considers this to be a loss of occupation case and places great weight on this factor.

(iii) **Age.** The Petitioner was 40 years old at the time of the injury. He has many work years left during which time he will need to deal with the residual effects of the injury. The Arbitrator places significant weight on this factor.

(iv) **Earning Capacity.** There was no specific evidence of limitation of the Petitioner's earning capacity. The vocational reports identified other jobs the Petitioner could perform, most of which paid less than his wages as a firefighter. The Arbitrator places little weight on this factor.

(v) **Disability.** The Petitioner still suffers from photophobia to the extent that he is unable to work as a firefighter. He experiences headaches and has good and bad days. His cognitive and mood issues have appeared to improve. He admits that he has not tried to find other employment. The Arbitrator puts significant weight on this factor.

Therefore, the Arbitrator finds the Petitioner's permanent partial disability to be 45 percent of the body as a whole.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 22WC022874 |
| Case Name | Dick Lulay v.<br>State of Illinois |
| Consolidated Cases | |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 24IWCC0587 |
| Number of Pages of Decision | 12 |
| Decision Issued By | Amylee Simonovich, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Stephen Kelly |
| Respondent Attorney | Kayla Koyne |

DATE FILED: 12/6/2024

/s/Amylee Simonovich,Commissioner

Signature

24IWCC0587

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

Dick Lulay,

Petitioner,

vs. NO: 22 WC 22874

State of Illinois,

Respondent.

DECISION AND OPINION ON REVIEW

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

In the interest of efficiency, the Commission relies on the detailed recitation of facts in the Arbitration Decision. After considering the credible evidence, the Commission partially modifies the Arbitrator's Section 8.1b analysis. The Commission also modifies the Arbitrator's permanency award.

The Commission modifies the Arbitrator's analysis of Petitioner's age pursuant to Section 8.1b(b)(iii) of the Act. The Arbitrator assigned lesser weight to this factor; however, the Commission views this factor differently. On July 19, 2022, the date of accident, Petitioner was 69 years old. He voluntarily retired on December 31, 2022. Thus, the Commission assigns greater weight to this factor.

Finally, the Arbitrator concluded Petitioner sustained a 12.5% loss of the whole person due his work injury. After carefully considering the totality of the evidence and weighing the five factors, the Commission finds an award of 10% loss of the whole person is most appropriate.

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 May 1, 2024, is modified as stated herein.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner permanent partial disability benefits of $900/week for 50 weeks, because the injuries sustained caused the 10% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

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

**December 6, 2024**

d: 10/15/24
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 | 22WC022874 |
| Case Name | Dick Lulay v.<br>State of Illinois |
| Consolidated Cases | |
| Proceeding Type | |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 9 |
| Decision Issued By | Maureen Pulia, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Stephen Kelly |
| Respondent Attorney | Kayla Koyne |

DATE FILED: 5/1/2024

/s/Maureen Pulia, Arbitrator

Signature

**THE INTEREST RATE FOR THE WEEK OF APRIL 30, 2024 5.165%**

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

May 1, 2024

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation Commission

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**

**DICK LULAY,**
Employee/Petitioner

v.

**STATE OF ILLINOIS,**
Employer/Respondent

Case # **22** WC **22874**

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 **Maureen Pulia** , Arbitrator of the Commission, in the city of **Peoria**, on **4/15/24**. By stipulation, the parties agree:

On the date of accident, **7/19/22**, 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 $**78,000.00**, and the average weekly wage was $**1,500.00**.

At the time of injury, Petitioner was **69** years of age, ***married*** with **no** dependent children.

Necessary medical services and temporary compensation benefits have been, or shall be provided by Respondent.

Respondent shall be given a credit of $**00.00** for TTD, $**00.00** for TPD, $**00.00** for maintenance, and $**00.00** for other benefits, for a total credit of $**00.00**.

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 $**900.00**/week for a further period of **62.5** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused **12.5% loss of use of the person as a whole**.

Respondent shall pay Petitioner compensation that has accrued from **7/19/22** through **4/15/24**, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Signature of Arbitrator

**May 1, 2024**

**THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:**

Petitioner, a 69 year old maintenance worker, sustained an accidental injury to his person as a whole, that arose out of and in the course of his employment by respondent on 7/19/22. Petitioner worked in the Sign Shop for respondent replacing road and highway signs. Petitioner would go out with the crews and replace signs. Petitioner performed these duties for 10 years. Before working for the respondent, the petitioner worked as an equipment operator with the City of Peoria for 28 years, and then retired. Petitioner also served in the Air National Guard.

On 7/19/22 the respondent conducted a pop drug inspection. Respondent had a mobile unit, that was like a motor home, that came to the work site and the workers were required to enter the mobile unit and be tested. The employees would enter the mobile unit by walking up some stairs. As petitioner was walking up the stairs and reached the top of the stairs to enter the mobile unit he struck the crown of his head on the threshold and buckled his knees. Petitioner is about 6 foot 5 inches tall in work boots.

Immediately after the injury petitioner felt "little bubbles going off, or star like things." Petitioner underwent the drug test, returned to work, and just sat down for a while. Petitioner was initially sent to IMPR by respondent for treatment.

On 7/26/22 petitioner completed the Employee's Notice of Injury. He provided a consistent history of the injury and noted that the injury was to the top of his head. That same day respondent completed the Employer's First Report of Injury. A consistent history of the accident was noted. The type of injury or illness was identified as "contusion on top of head, headache and vertigo." On 7/27/22 a Workers' Compensation Witness Report was completed by Dianna Bhear. She also noted a consistent history of the injury. On 8/3/22, the Supervisor's Report of Injury was completed. It contained the same history of the injury, and noted that petitioner's head was injured.

On 8/1/22 petitioner presented to Dr. Farhana Ali Kahn, his primary care physician at OSF Center for Health. Petitioner gave a history of hitting his head while boarding a bus on 8/19/22, and immediately having pain in his head. He did not have any laceration or loss of consciousness. Petitioner reported that since then he had been having intermittent dizziness, usually when he positions or moves his head. He denied any visual symptoms, focal weakness or numbness. He also denied any nausea, vomiting, or decreased level of consciousness. Dr. Khan's neurological exam was positive for dizziness. Dr. Khan diagnosed postural dizziness, traumatic injury of the head, primary hypertension and post-concussion syndrome. Dr. Khan prescribed physical therapy. A CT scan of the head was performed that revealed no acute intercranial abnormality.

Petitioner underwent physical therapy through 10/18/22. On 10/18/22 petitioner had decreased dizziness and vertigo, increased tolerance, and showed minimal impairments. Petitioner was instructed to continue doing home exercises for his vertigo.

Petitioner testified that from 7/19/22 through 12/31/22 he was unsteady at work, but was allowed to stay in the shop. Petitioner stated that he would have to steady himself when going from bay to bay or going to the restroom. He also testified that he had headaches and was dizzy. Petitioner testified that during this time he did not go out and replace signs because that included work on ladders and in a bucket truck. He stated that just looking up "gets things going into action."

On 12/31/22 petitioner voluntarily retired. He testified that his ongoing symptoms played a role in his decision to retire.

On 1/10/23 petitioner presented to Dr. Maria Karbowska-Jankowska. Petitioner gave a consistent history of the accident. He reported that he was dizzy and had some headaches following the injury. Petitioner reported that since the injury he had developed dizziness, and after that headaches and balance problems. He stated that he had been working on his balance by performing vestibular exercises. Petitioner does these exercises when he is dizzy, but still gets dizzy almost every day. He reported that he feels like he is on a boat. Petitioner also reported that at night he still holds on to furniture when he goes to the bathroom due to balance problems. Petitioner noted that he gets mild headaches maybe twice a week. He also noted that he did not think his short-term memory was as sharp as it was prior to the injury. This was confirmed by his wife who noted that when they have to fill out forms he gets confused. Petitioner reported that it is like slow thinking or a mental fog. He has no problems using the computer or phone for daily activities. Overall, petitioner reported that it takes him a little bit longer to figure things out. Petitioner stated that he still drives.

Following a neurological examination, Dr. Jankowska assessed chronic post-concussion headache; post concussion vertigo; memory change; tension post concussion headache; short term memory problems and mental fog; vestibular dysfunction unspecified laterality; and, vertigo and balance problems due to concussion. Dr. Jankowska ordered blood work (B12 and thyroid), a future neurology referral, a future thyroid stimulating hormone, and a referral audiology and Dr. Kattah.

On 5/24/23 petitioner presented to Audiologist Emily Buenting at Illinois Neurological Institute-Penn-Aud-Vert for his vestibular dysfunction for purpose of evaluating vestibular status. Petitioner provided a consistent history of the accident. Petitioner reported episodic dizziness, especially when laying on his back or when turning quickly. He reported that when he sits up from lying on his back he has to steady himself before walking. He noted that this can last from several seconds to half an hour. He also reported that when he moves quickly he feels as if the movements are not slow. He denied a true spinning vertigo. He reported that he was

diagnosed with Benign Paroxysmal Positional Vertigo (BPPV) for which exercises were prescribed and did help some. Petitioner reported that when he lays on his left side at night it seems to help with the dizziness. However, it has persisted along with the unsteadiness when moving quickly. Petitioner noted that he has a significant history of hearing loss and tinnitus, and has hearing aids which he does not wear frequently. He denied migraines.

Following an examination and testing, Buenting's impression was abnormal head impulse testing; abnormal head impulse test in both directions; catch up saccades; slight right beat nystagmus with vibration; positive right Dix Hallpike with brief up beat torsional nystagmus; and peripheral vestibular dysfunction. Buenting referred petitioner back to Dr. Jankowska and Dr. Kattah for ongoing neurovestibular care. She also instructed petitioner to sleep upright for one night to avoid sleeping on the symptomatic ear for the next seven days.

On 6/22/23 petitioner presented to Dr. Jorge Kattah for a neuro-vestibular exam. His complained of dizziness, and being a bit off when first laying down. He reported that he was unsteady, and perhaps veering to the left more. He also noted brief spinning when first getting up. Following the examination, Dr. Kattah assessed a possible neuropathy cause, chronic; elements of mild vestibulopathy and persistent, postural, persistent dizziness (PPPD); and, mild essential tremor. Dr. Kattah was of the opinion that physical therapy and the use of different medication may be helpful.

On 7/10/23 petitioner returned to Dr. Jankowska. He still reported positive brief upbeat torsional nystagmus upon lying back with the head hanging to the right. He noted that he was diagnosed with elements of mild vestibulopathy and persistent posterior perceptual dizziness, which is still present, especially when he turns right. Petitioner noted that he still drives. He reported that his headaches were much better and his memory was improved. Following a physical, neurological and visual ocular motor screening, Dr. Jankowska assessed post concussive vertigo; persistent postural-perceptual dizziness; vertigo and balance problems due to concussion; resolved tension post-concussion headache; and, short-term memory problems and mental fog that was improved. Dr. Jankowska recommended continued daily exercises learned in physical therapy, and brain stimulating exercises on the computer.

Petitioner testified that from January of 2023 to 7/10/23 his condition did not change. He noted that the headaches persisted, and his dizziness never went way. Petitioner testified that he is constantly unsteady. He also testified that when driving and takes a left turn, it is "cartoonish" and feels like he is on a ride at the fair. He noted that he has "just an uneasy feeling like you're a little dizzy."

Petitioner testified that while walking down a hallway he does not feel steady or stable. He stated that he feels better if he is closer to the wall, or is able to use guardrails. He was of the opinion that he probably looks like he is halfway intoxicated sometimes when he is walking down an aisle.

Petitioner testified that the symptoms he had when he last saw Dr. Jankowska on 7/10/23 have probably gotten a little bit worse. He testified that he has problems with dizziness with standing, turning or walking. He described it as "more unsteady walking than dizzy." Petitioner testified that he still has problems with balance and his memory. He stated that sometimes when he goes into a room for something he can't remember what he went in that room for. He testified that he still has issues with a sensation of fogginess. Petitioner reports that he has difficulty sleeping. He stated that during the night he tosses and turns, and gets up in the middle of the night. Petitioner works out early because there are not as many people there, and he is embarrassed that he stumbles against stuff.

Petitioner testified that he does his balance exercises at home on a daily basis. Petitioner takes no medication for his symptoms. Petitioner testified that he felt the physical therapy helped him. He noted that the therapist suggested sleeping on one side rather than the other, in order to try to normalize things and a few other small exercises to start the day.

Petitioner testified that he has had two prior workers' compensation cases with respect to his bilateral shoulders. He stated that both cases settled.

Petitioner's wife, Barbara Lulay, was called as a witness on behalf of petitioner. Barbara has been married to petitioner for almost 30 years. Barbara stated that they three children. Barbara testified she was able to observe petitioner prior to, and after the injury on 7/19/22. Barbara testified that right after the accident she noted that he was dizzy, and even when getting up in the middle of the night to go to the restroom petitioner has to hang onto something. She testified that petitioner sometimes walks sideways and is very unstable. She noted that when petitioner gets up from anything (i.e., a bed or chair), he is unstable. Barbara testified that when petitioner drives a car he does this thing with his head, where he shakes his head to get his eyes set or get his bearings. Barbara testified that petitioner is definitely more unstable and unsteady on his feet where he hangs onto things more frequently. She stated that she never saw him do that before the injury.

Barbara testified that petitioner has issues with memory, fogginess, focus, and forgetfulness. She also testified that petitioner complained of headaches, especially right after the injury. She testified that she has not seen improvement in petitioner's symptoms that she and the petitioner had hoped. Barbara testified that before she met petitioner he was a power lifter, but now just getting off a bench causes dizziness. Barabara testified that petitioner's unsteadiness, memory fog and headaches are still present.

Barbara testified that for petitioner's memory issues she has note cards for what they do. She testified that it as simple as a single word on a card to help trigger what petitioner is trying to remember. She stated that if petitioner is overwhelmed with things his memory is worse. Barbara testified that she and petitioner do crossword puzzles and petitioner now struggles to find the word sometimes.

Barbara testified that she is more concerned about leaving petitioner for a long period of time. She stated that she is primarily worried about petitioner falling. She noted that stumbling is a big deal for petitioner.

With regard to the nature and extent of the injury, the Arbitrator makes the following conclusions of law. In support of this conclusion, the Arbitrator notes the following:

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

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that neither party submitted an impairment rating. Therefore, no weight is given to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes petitioner was a maintenance worker for respondent. After his injury, petitioner continued to work light duty for respondent. On 12/31/22 petitioner voluntarily retired. Petitioner testified that his ongoing symptoms played a role in his decision to retire. For this reason, the Arbitrator gives some weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes Petitioner was 69 years old on the date of injury. Petitioner retired on 12/31/22. For this reason, the Arbitrator gives lesser weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earning capacity, petitioner voluntarily retired on 12/31/22. There was no evidence offered regarding petitioner's future earning capacity. For this reason, the Arbitrator gives no weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, petitioner underwent a neurological examination performed by Dr. Jankowska on 1/10/23. Dr. Jankowska assessed chronic post-concussion headache; post concussion vertigo; memory change; tension post concussion headache; short term memory problems and mental fog; vestibular dysfunction unspecified laterality; and, vertigo and balance problems due to concussion.

On 5/24/23 Emily Buenting evaluated petitioner's vestibular status. Following an examination and testing, Buenting's impression was abnormal head impulse testing; abnormal head impulse test in both directions; catch up saccades; slight right beat nystagmus with vibration; positive right Dix Hallpike with brief up beat torsional nystagmus; and peripheral vestibular dysfunction. Buenting also instructed petitioner to sleep upright for one night to avoid sleeping on the symptomatic ear for the next seven days.

Petitioner underwent neuro-vestibular testing by Dr. Kattah on 6/22/23. Following the examination, Dr. Kattah assessed a possible neuropathy cause, chronic; elements of mild vestibulopathy and persistent, postural, persistent dizziness (PPPD); and, mild essential tremor. Dr Kattah was of the opinion that physical therapy and the use of different medication may be helpful. However, petitioner does not take any medication.

Petitioner last sought treatment with Dr. Jankowska on 7/10/23. He still reported positive brief upbeat torsional nystagmus upon lying back with the head hanging to the right. He noted that he was diagnosed with elements of mild vestibulopathy and persistent posterior perceptual dizziness, which is still present, especially when he turns right. Petitioner noted that he still drives. He also noted that his headache was much better, and his memory had improved. Following a physical, neurological and visual ocular motor screening, Dr. Jankowska assessed post concussive vertigo; persistent postural-perceptual dizziness; vertigo and balance problems due to concussion; resolved tension post-concussion headache; and, short-term memory problems and mental fog that was improved. Dr. Jankowska recommended continued daily exercises learned in physical therapy, and brain. stimulating exercises on the computer.

Petitioner testified that the symptoms he had when he last saw Dr. Jankowska on 7/10/23 have probably gotten a little bit worse. He testified that he has problems with dizziness with standing, turning or walking. He described it as "more unsteady walking than dizzy." Petitioner testified that he still has problems with balance and his memory. He stated that sometimes when he goes into a room for something he can't remember what he went in that room for. He testified that he still has issues with a sensation of fogginess. Petitioner reports that he has difficulty sleeping. He stated that during the night he tosses and turns, and gets up in the middle of the night. Petitioner works out early because there are not as many people there, and he is embarrassed that he stumbles against stuff. Petitioner takes no medication for his symptoms

Despite all his complaints regarding driving, petitioner was able to drive to work every day, until his retirement on 12/31/22, without any incidents, and continues driving as of the date of trial.

For these reasons, the Arbitrator gives greater weight to this factor.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner sustained a 12.5% loss of use of his person as a whole, pursuant to Section 8(d)2 of the Act.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 21WC011563 |
| Case Name | Cheryl Rawski v.<br>Village of Schaumburg |
| Consolidated Cases | |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 24IWCC0588 |
| Number of Pages of Decision | 19 |
| Decision Issued By | Maria Portela, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Patrick Serowka |
| Respondent Attorney | Jeffrey Rusin |

DATE FILED: 12/9/2024

/s/Maria Portela,Commissioner

Signature

24IWCC0588

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

CHERYL RAWSKI,

Petitioner,

vs. NO: 21 WC 11563

VILLAGE OF SCHAUMBURG,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission affirms and adopts the Decision of the Arbitrator, however, makes the following modifications and correction of a scrivener's error:

In the third paragraph under Section "C" on page 12 of the Arbitrator's Decision, the Commission strikes the second sentence.

In the third paragraph under Section "C" on page 12 of the Arbitrator's Decision, the Commission strikes the phrase within the parentheses in the third sentence.

In the second paragraph on page 14 of the Arbitrator's Decision, the Commission strikes the phrase within the parentheses in the fourth sentence.

Finally, in the first paragraph under Section "F" on page 13 of the Arbitrator's Decision, the Commission replaces "October 12, 2021" with "October 11, 2021".

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,316.53 per week for a period of 25-4/7 weeks, from May 13, 2021 through November 7, 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 pay to Petitioner the sum of $871.73 per week for a period of 86 weeks, as provided in §8(e)12 of the Act, for the reason that the injuries sustained caused the 40% loss of use of the right leg.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $19,687.34 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.

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

**December 9, 2024**

MEP/dmm
O:111924
49

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

/s/ *Raychel A. Wesley*
Raychel A. Wesley

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

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 21WC011563 |
| Case Name | Cheryl Rawski v.<br>Village of Schaumburg |
| Consolidated Cases | |
| Proceeding Type | |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 16 |
| Decision Issued By | Jeffrey Huebsch, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Patrick Serowka |
| Respondent Attorney | Jeffrey Rusin |

DATE FILED: 8/25/2023

/s/ Jeffrey Huebsch, Arbitrator

Signature

**THE INTEREST RATE FOR THE WEEK OF AUGUST 22, 2023 5.29%**

C. Rawski v. Village of Schaumburg, 21 WC 011563

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**

**Cheryl Rawski**
Employee/Petitioner

v.

**Village of Schaumburg**
Employer/Respondent

Case # **21** WC **011563**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeffrey Huebsch**, Arbitrator of the Commission, in the city of **Chicago**, on **4/24/2023.** 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 **2/10/21,** Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**102,689.08,** the average weekly wage was $**1,974.79**.

On the date of accident, Petitioner was **48** years of age, ***single*** with **2** dependent children.

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

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

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0.00** for other benefits, for a total credit of $**0.00.**

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

**ORDER**

**Respondent shall pay reasonable and necessary medical services of $19,687.34, 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 $1,316.53/week for 25-4/7 weeks, commencing May 13, 2021 through November 7, 2021, as provided in Section 8(b) of the Act.**

**Respondent shall pat Petitioner permanent partial disability benefits of $871.73/week for 86 weeks, because the injuries sustained caused Petitioner to suffer the 40% loss of use of her right leg, as provided in section 8(e)12 of the Act.**

Respondent shall pay Petitioner the compensation benefits that have accrued from 2/10/2021 through April 24, 2023 in a lump sum, and shall pay the remainder of the award, if any, in weekly payments.

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

**STATEMENT OF INTEREST RATE** If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the

date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

August 25, 2023

## FINDINGS OF FACT

Petitioner is employed as a firefighter for Respondent and was so employed in February of 2021. (TA 10). She had been employed for 20 years at that time. Petitioner was working full-time, full duty, as a firefighter on February 10, 2021. (TA 10-11).

Petitioner testified that on February 10, 2021, she was working as a firefighter shoveling snow from buried fire hydrants to ensure access. (TA 12-13). They shovel out the entire circumference around the hydrant. Petitioner testified that while shoveling and moving, her right foot slipped down the snow pile farther behind her and she felt some pain in her groin. She was standing on top of the snow digging down towards the hydrant with both feet on the drift. She is 5'6" tall and she estimated the snow was about two feet deep. She explained she had to dig down and throw snow when the slip occurred (TA 13-15). After they finished shoveling the hydrants the firefighters returned to quarters. Following the slip, she noticed right groin pain, like she pulled a muscle. Petitioner authenticated PX 1, a photograph of her in the street approaching a snow-covered hydrant from February 10, 2021. Lt. Kelly took the photograph and was Petitioner's Commanding Officer. The photos were sent to the Battalion Chief on February 10, 2021. (TA 16-17).

Petitioner testified that following the slipping incident, around lunch time, she told the members of her crew at the firehouse of her groin pain experienced while shoveling. She told CO Lieutenant Kelly, Eric Vitols, Tim Murray and Dan Miller. (TA 15-19). She did not fill out a Form 45 at that time. The Arbitrator notes that a Form 45 is the Employer's First Report of Injury and is to be completed by the employer, not the injured employee (although many unsophisticated employers have the employee fill out the 45). In any event, no accident report was completed at that time. Petitioner explained she was under a great amount of stress at the time in her family life. Her kids' father was being investigated for medical neglect allegations and they found him viewing pornography, amongst other issues, with the kids. The DCFS investigator tried to have it handled in juvenile court to have visitation removed from the father, but because there was one fit and able parent, it was sent out to family court. At the end of January, there was a Guardian ad Litem appointed to the case. Further, initially, Petitioner did not think the right groin pain was serious. Due to this family situation, her medical treatment was of a much lower priority than everything else going on; the kids were 11 years of age. (TA 19-

21). She felt filing a workers' compensation claim would further complicate her life and she kept working despite the pain. Petitioner said that firefighters get hurt in minor ways a lot at work, it seemed minor, and she is a single mother who needs to provide a house and stuff for her kids. She remarked to co-workers in February and March about her right hip condition. (TA 20-21). She told her crew, the same people as before, that it was getting worse and certain activities became more painful. Examples of the painful activities were getting into and out of the ambulance, carrying patients, uneven ground and certain movements. She told Lieutenant Kelly, Dan Miller, Tim Murray and Eric Vitols about this.

Petitioner was seen at ANEW Chiropractic on February 17, 202, for right SI joint issues and right hip pain, but there was no mention of a shoveling incident at work. She recalled the visit and explained she had been seeing the chiropractor for a long time, they had similar histories with kids, once she would say where it hurt and we would just talk about our kids. (TA 22-23).

Petitioner testified that she never had any right hip pain before this incident. Further, nothing was affecting her ability to work prior to February 10, 2021. (TA 23).

Petitioner remembered the March 23, 2021 visit with Dr Shah Rhodes, her PCP, with complaints of right hip pain. She testified that she did tell Dr. Rhodes how she injured her right hip, Dr. Shah Rhodes recommended physical therapy and she went to DuPage Medical Group for therapy. (TA 23-24). She participated in PT from March 25, 2021 through May 16, 2021 and did inform the therapist of how she injured her right hip shoveling snow at work. She agreed that if the March 25, 2021 records of Duly PT reflect a history of hip pain after digging up a hydrant in January of 2021, the date would not have been accurate. She explained that by late March she hadn't remembered the exact date of the incident; she just knew it was either the end of January/beginning of February. She continued therapy during this period and kept working, but the therapy did not resolve her symptoms (TA 24-25). She was able to do her job with right hip pain, it was just with pain. Pain was caused by getting into and out of ambulances or fire engines, carrying patients, moving certain ways and uneven ground.

Petitioner filled out an accident report on April 5, 2021. Petitioner authenticated PX 2, (Accident report documents). The injury date was February 10, 2021, and the investigating supervisor was Lt. Kelly. Kelly's Supervisor's Accident Investigation Report states that Petitioner reported during roll call on April 5, 2021 that on February 10, 2021 she injured her right hip while shoveling snow from around hydrants in District 53 that morning. "While removing snow and with her left foot planted firmly,…she lost traction on her right foot causing her legs to spread to a position that caused immediate discomfort." Kelly's report further states that Petitioner stated that the injury seemed minor initially "and that is why she waited to notify me, however the injury has continued to linger and has worsened." (PX 2, p. 3) Kelly obtained a statement from FF Vitols and sent Petitioner to Northwest Community Hospital for evaluation. Kelly does not document that the accident did not happen or was suspicious. Kelly documented that he attached photos that he took of Petitioner shoveling snow on February 10, 2021 to his daily report on that day. (PX 2, p.3)

The Employee Statement portion of the report, signed by Petitioner, states: "On February 10, we were out shoveling snow away from hydrants. I was standing on a large pile of snow, lifting the shovel and my right leg fell into the snow pile. Because my left leg was still on top of the pile, my legs were spread farther than comfortable and I felt a twinge in my right groin/hip area. I thought it was a pulled muscle, so I did not write it up as an incident and did not seek medical attention until it got worse." (TA 27-28, PX 2, p. 6).

Eric Vitols statement reflects on February 10, 2021, FF/Paramedic Cheryl Rawski mentioned to me after lunch that she felt something pull in her hip/groin on her right side from shoveling hydrants earlier that morning. Further, on multiple occasions after this date, she mentioned how this area was still sore while getting into and out of the ambulance. (TA 28-29, PX 2, p. 5).

Petitioner was sent to Northwest Community Hospital by Lt. Kelly on April 5, 2021. Petitioner confirmed that if those records reflect a right hip injury in February when her right leg sunk into the snow while shoveling, they'd be correct. Further, she told them she had to keep working and the records reflected the patient was communicating to coworkers of ongoing symptoms. Although she was released to work, she was still symptomatic. Petitioner asked to return to work because she had full ROM and strength but with pain and she was engaged in PT at that time. (TA 33-35).

Petitioner next sought treatment with Dr. LaReau at Hinsdale Orthopedics. She agreed the May 13, 2021 records of Dr. LaReau reflect restrictions from work but she didn't receive any workers' compensation benefits. She used sick and vacation time. (TA 35-36).

The May 14, 2021 records of Dr. Shah-Rhodes reflected that Petitioner's hip pain had worsened and Dr. Shah-Rhodes referred her to Dr. Andrew Kim at DuPage Medical Group to evaluate her for surgical treatment. (TA 37, PX 4). On October 11, 2021 she underwent a total hip replacement by Dr. Kim at Edwards Hospital. Thereafter, she underwent physical therapy at DuPage Medical Group through January 10, 2022, but had been returned to modified duty work on November 7, 2021. Dr. Kim released her to full duty on January 11, 2022. She has been working full-time, full duty, as a firefighter/paramedic since that time. (TA 38-39).

Petitioner testified that in the past 15 months of working she notices some pain in extreme cold temperatures, stiffness and a little bit of pain in her right hip. (TA 39).

On cross examination, Petitioner agreed that, per Respondent's policy, she is to report work accidents in a timely or immediate manner. You report to your officer or supervisor. (TA 41-42). She confirmed her right foot slipped out from behind her while shoveling and into the snow with her left foot still on top of the snow mound, probably 2 feet tall. (TA 43-45). She confirmed Lt. Kelly took the photo in PX 1 on a camera phone on February 10, 2021. These daily reports with photographs are done in the regular course of business and sent to the Battalion Chief (TA 44-47). The location of the photo was the industrial park near Station 53, off Lunt or other streets South of the firehouse. (TA 47-48). Petitioner restated she told Lt. Kelly of the right groin pain following shoveling, he had knowledge of her complaints, but he did not ask her to complete an incident report. (TA 50-51). She reiterated she continued to report pain

symptoms of the right groin/hip to her coworkers from February 10, 2021 through May 13, 2021 and worked at full duty during this time. (TA 51).

Personal issues kept her from filling out an accident report due to worsening symptoms, and the February 10, 2021 incident started her symptoms. (TA 52). She agreed her first treatment for the right hip was February 17, 2021 at ANEW Chiropractic. She goes there, tells the chiropractor what are her symptoms and what hurts; if she explained the work injury or not, she does not remember. (TA 52-54). On March 23, 2021, she saw Dr. Shah-Rhodes, she reported the shoveling snow incident causing hip pain, that's when the pain started. (TA 55-56). If the record reflected right hip and groin pain since January. Petitioner testified: "Yeah, I didn't have a specific date at the time, I knew roughly when it was, I told her the end of January, beginning of February. Petitioner's memory was refreshed to fill out the accident report as to the February 10, 2021 incident when Lt. Kelly found the picture of her shoveling hydrants in the industrial district. (TA 56). She recalled that Dr. Kim did not want to perform a replacement right away and referred her to Dr. Ward to see if it could be repaired. It was decided it had to be replaced. The surgery was successful. (TA 61-62). She confirmed she was examined by Dr. Shadid on July 8, 2021 and she provided him the same history to which she testified. (TA 63-63).

On re-direct examination, Petitioner indicated minor injuries are common for firefighters. A written report for minor injuries is not common. The reason is that we'd be doing paperwork daily [on minor injuries], it's not something we do, we just work through things. Following the February 10, 2021 injury, her perception at that time was it was a pulled muscle and would heal quickly on its own. Further, at that time she was going through a DCFS complaint with her two 11 year old children and a guardian ad litem. The powers of a guardian ad litem can affect her visitation and the custody of her children. This was her major concern at the time of her injury. She had verbally informed Lt. Kelly of the injury on the date of injury and kept other people at work aware of her ongoing right hip pain. The worsening pain and physical limitations of being unable to put her foot on the brake pedal without extreme discomfort, convinced her it was more than a pulled muscle and motivated her to finally fill out the formal accident report on April 5, 2021. (TA 65-69).

**Testimony of Eric Vitols**

Petitioner presented the testimony of Eric Vitols, who appeared pursuant to Commission subpoena. He is a firefighter/paramedic for Respondent. (TA 72-73). Firefighter Vitols has worked with Petitioner in the past and was working with her on the same shift in January, February & March of 2021. They work on the same rotation of ambulance and engine in whatever capacity they are assigned. Together, they would travel in the ambulance. Vitols testified the injury reporting protocol for Respondent was to verbally report to an officer you had an injury, then you can decide whether you want to file paperwork at that time or not. Further, you let your officer know if you want to seek treatment at that time or not. He agreed paperwork is filled out by the supervising officer, any witness that has any information and the injured party. (TA 74-78). Firefighter Vitols identified Petitioner's Exhibit #2 (Accident Report Documents) and was directed to page five entitled Employee Witness Statement. Firefighter Vitols read his statement:

> " On February 10, 2021, Firefighter/Paramedic Cheryl Rawski mentioned to me after lunch that she felt something pull in her hip and groin area on her right side from shoveling hydrants out earlier that morning. On multiple occasions after this date, she mentioned how this area was still sore while getting into and out of the ambulance"

That's the entirety of his statement, with his signature at the bottom. The statement was solicited by Lt. Kelly, who asked him to write it. It is an accurate reflection of his understanding of Petitioner's injuries and the communications he had with Petitioner on February 10, 2021. Vitols recalls what Petitioner told him and that on that day, in snowy February, Lt. Kelly, Petitioner and whomever else was on the engine were out shoveling hydrants. (TA 79-82). On that day they were talking after lunch, the entire crew ate lunch together, including Lt. Kelly. Firefighter Vitols believes Lt. Kelly was present during Petitioner's conversation regarding her hip injury (TA 83). Vitols recalled that he and Petitioner were working out of the same house. He was aware of what was going on with Petitioner and her kids. On numerous days, he recalls witnessing her having difficulty getting up and down the steps of the ambulance. Towards the end, before she was getting evaluated, it was bothering her so much she was having a hard time using the pedals to drive the ambulance. He thought that increasing difficulty led Petitioner to fill out the report documents. (TA 85-86). As far as he understood, the rest of our company knew of the Petitioner's right hip condition. (TA 88).

On cross examination, Vitols confirmed that he believes Lt. Kelly was present when Petitioner mentioned her groin/hip on February 10, 2021. Kelly asked Vitols if he "remembered" and that is why Vitols filled out the report. (TA 93). There are a lot of minor injuries experienced by firefighters and the practice seems to be tell your supervisor and fill out a report, if you wish to seek treatment. (TA 94-97). Vitols knew of no prior injuries for Petitioner. (TA 99).

Petitioner's Exhibit #1 was photo showing Petitioner shoveling on the date of the accident and the tip of the fire hydrant visible above the snow. It also reflected the height of the Petitioner, standing at ground level, and the height of the snow, approximately at the height of Petitioner's belly. (PX 1).

**Medical Records**

The records of ANEW Chiro Care show that Petitioner had been treating there since August 15, 2017 for neck pain, low back pain and other assorted conditions. There is no mention of right hip or groin pain prior to February 10, 2021. On February 17, 2021, she complained of right hip pain and anterior (front per the chart) thigh pain when she bends her knee and brought her right leg across. Further, she is in the midst of a custody battle and is very stressed. She presented with tenderness to palpation anterior right hip and rectos femoris, (center top right thigh), right greater trochanter tenderness to palpation, internal hip rotation reduced to 20 degrees and +Yeoman's sign right hip. (PX 12, p14).

The records of Duly, Dr. Shah-Rhodes, on March 23, 2021 reflect a right hip X-ray for right hip pain and a history of complaining of right hip and groin pain radiating into right thigh since January. Moving her leg from accelerator to brake with pain, saw chiro and massage

therapist without improvement. She is a firefighter and nervous about strength in her right leg, denies trauma. Her list of medications includes Wellbutrin and Trazadone for depression as well as Norco (PX 4, 36-40, 72-73, 87). Dr Shah-Rhodes is Petitioner's primary care doctor and the list of problems as of March 23, 2021 does not reflect any prior condition of the right hip. (PX 4, 37-38). Further, there are prescriptions for physical therapy from March through May 5, 2021 for the right hip. (PX 4, 51, 67). The April 8, 2021 records of Dr Shah-Rhodes reflect may return to work with no restrictions. (PX 4, 75). The May 14, 2021 records reflect a note from Petitioner that her right hip pain has gotten worse and she would like to be referred to Dr LaReau of Hinsdale Orthopedics and a referral to surgery, Orthopedic. (PX 4, 43, 45).

The records of Duly physical therapy on March 24, 2021, reflect Petitioner was referred for physical therapy for her right hip pain by Dr. Sonal Shah Rodes. (PX 7, 459-460). Her initial physical therapy evaluation reflected acute right hip pain. X-Rays of the hip reflected perhaps mild developing osteoarthritis of the right hip joint. The history documented symptoms beginning in January, right hip pain beginning after digging up around a hydrant. She describes pain around the whole hip and in the groin. Generally, it has been dull and achy but can be sharp with certain sharp motions. Pain wakes her up at night. Patient has pain to lift leg to stand up from the chair. At times, the hip will pop when she gets out of the truck. Hip pain has been worsening over the past few months. Has tried Aleve, Advil, muscle relaxants, ice and heat; doesn't help. Side sleeping with leg propped up seems to be the most tolerable sleeping position. On review of functional activities, dull aching with walking and sitting, prior had no limitations. Stairs hurt 8/10 on ascent. Pain with donning shoes and socks, can't reach my feet to don pants. Unable to squat or bend to lift. When driving has to pick up leg to move across her body. Difficulty with squatting/lifting and stair climbing. Has to modify ladder climbing. Objective function assessment has to maintain the right hip in flexion when moving to stand; slowly lowers to neutral. When squatting, lumbar flexion dominant. Antalgic gait, decreased hip extension and weight shift onto the right lower extremity. Strength is performed with pain; Gluteus maximus 4+ and L1,2 Psoas 4+ in thigh, Hip ER 3+, Hip IR 4+ and HIP ABD 4+. AROM of the hip is limited right compared with left. + Active SLR, + Faber, + FADIR, + SCOUR testing. Assessment is % right hip pain with occasional clicking. Physical examination indicates the following impairments: decreased right hip AROM, decreased LE strength, impaired gait mechanics, + pain provocation testing of right hip. These symptoms appear to be consistent with an intra articular hip joint pathology. Her impairments affect her functional ability to perform ADL's, and participation in work and household responsibilities. Physical therapy is medically necessary to address these limitations. (PX 7, 439-444). The March 29, 2021 record reflects patient presents with changing symptoms of clicking and locking when performing sit to stand. She demonstrates increased hip IR and ER ROM, but has pain when performing active hip external rotation. Demonstrates increased hip flexor strength, IR and ER and no pain with that. She demonstrates pain and positive findings on Scour, FADIR and FABER testing. She has a dull ache with walking, pain with donning socks and shoes and pain with lifting her leg into the car. Recommendation 2x per week for 3 weeks, total 12 visits.(PX 7, 427-431). On April 6, 2021, the same presentation and Scour, FADIR and FABER positive testing as in March 29, 2021. (PX 7, 410-414). On April 9, 2021, the same presentation and Scour, FADIR and FABER positive testing as in March 29, 2021. (PX 7, 394-398). On April 13, 2021, the same presentation clicking and locking but less pain but Scour, FADIR and FABER positive testing as on March 29, 2021. (PX 7, 378-382). Throughout the remainder of April through May 24, 2021,

the same presentation with complaints of clicking and locking, but less pain and Scour, FADIR and FABER positive testing as in March 29, 2021. The therapist continues to note acute right hip pain as of May 24, 2021. (PX 7, 332-368 and 312).

The records of Northwest Community Hospital reflect visits prior to February 10, 2021 for Covid vaccinations, with no other conditions mentioned. (PX 3, 6-7, 22). The April 5, 2021, records of Northwest Community Hospital reflect a work-related injury of February 2021. Patient, back in February, was shoveling snow and injured her right leg, was sent by work for work injury. Patient complained of right groin injury in February while shoveling a fire hydrant of snow at work. States her right leg sank into snow while her left leg stayed on top of snow thus resulting in injury. Patient reports seeing her primary medical doctor with "normal" x-rays of the right hip, completed a course of steroids and muscle relaxants, currently doing PT with three weeks of PT left. Patient has been doing full duty (work) with gear, reporting pain with an occasional twinge but cannot identify a specific trigger that consistently reproduces her pain. She is requesting a clearance to return to full duty and does not feel any limitations or difficulties with her job. Case discussed with DER, unclear extent of ongoing symptoms as patient may be communicating to coworkers re: ongoing symptoms, however, she denies pain to this provider. Dr. Perumal recommends light duty until fully cleared from physical therapy. Lengthy discussions with patient as well, given ongoing PT (visit notes from 3/29/21 suggest Patient still with discomfort), physically demanding and rigorous position where safety of herself and those around her may be compromised in the event she experiences a twinge of pain or strength not fully restored. I will provide work restrictions until she is fully recovered and cleared by PT and her PMD, who has been overseeing her care. Right hip pain is diagnosis. (PX 3, 8-11).

The April 29, 2021 records of Hinsdale Orthopedics reflect first visit presentation to Dr. Lareau for right hip pain following a February 21, 2021 fall during digging out a hydrant buried in the snow while standing on a snow pile, her right leg sunk into snow pile causing her to do the splits. This caused injury to her right hip. Initially, she noted severe groin pain that has not improved. Complaints of groin, buttock and thigh pain. She has done PT with minimal change in her symptoms. She has remained working without restrictions attempting to self modify her activities. Pain is localized to anterior groin, posterior buttocks and anterior thigh, quality sharp, dull and burning. Aggravating factors are walking, climbing stairs, getting up from chairs, twisting leg and laying on her side. A large fire recently had her walking in gear on uneven ground for several hours causing a significant flare up of pain. Upon examination of the right hip: internal rotation limited to 10 degrees, external rotation to 40 degrees, Abduction to 30 degrees, pain with ROM of hip, Labral impingement test is positive with pain, Faber's test is mildly positive, pain with compression of hip. X-Ray reading reveals small foci of calcification of superior hip musculature, slight joint space narrowing, CAM deformity, perhaps a small femoral head neck osteophyte with a small amount of heterotrophic bone on the abductor insertion. A non-contrast MRI was ordered to further evaluate the possibility of labral tear. The chart note was faxed to Dr. Shah-Rhodes. (PX 10, 4-6).

The May 7, 2021 right hip MRI reflected focal signal undercutting the anterior labrum consistent with focal labral tear. Undersurface fraying is noted along the anterosuperior acetabular labrum with focal tear at the superolateral acetabular labrum. This tear extends into the posterosuperior acetabular labrum. CAM-type cystic changes are noted along the anterior

femoral head/neck junction perhaps indicative of femoral-acetabular impingement. Focal subchondral cystic changes along the antero lateral aspect of the acetabulum is likely due to high grade chondromalacia. Mild reactive edema is also noted. Impression is Anterior acetabular labral tear with undersurface fraying along the anterosuperior acetabular labrum. Tear at the superolateral chondrolabral junction with extension into the posterosuperior acetabular labrum. Cam Type two femoro-acetabular impingement. (PX 10, 4-9).

On May 13, 2021 the records of Hinsdale Orthopedics reflect her symptoms are much worse since last visit and here for review of MRI. Dr. LaReau reads the MRI as reflecting an acetabular labral tear and high-grade chondromalacia. He'd recommend a labral repair, but for the amount of degenerative change that would not provide long-term relief. On examination, painful impingement test, internal rotation to 10 degrees and external rotation to 20 degrees and positive Patrick's test. He notes her significant discomfort and limitation of daily activities, recommends she be off work with four additional PT sessions. Discussed hip replacement. On June 9, 2021, she was excused from work until June 28, 2021. (PX 10, 10-11, 13).

On May 25, 2021 Petitioner was evaluated by Dr. Andrew Kim at Duly Orthopedics. The record reflects that on February 10, 2021 she fell "into the splits" while shoveling snow. She experienced immediate right groin pain. She assumed she had pulled a muscle and initially didn't think much of it. She visited her primary care doctor in March, who recommended physical therapy. She states the physical therapy had offered improvement in range of motion but the pain has persisted and is worsening. Pain is gripping in nature and she sleeps in a recliner. Her hip clicks when she attempts to enter and exit her vehicle and this is painful. Her pain compromises her quality of life. She denied prior right hip injury or pain/discomfort prior to this incident. She visited a Dr. LaReau who obtained radiographs which revealed osteoarthritis. He ordered an MRI which revealed an anterior labral tear. Following his review of the MRI he recommended a THR. She explained she is a firefighter and a single mom who does not get financial assistance from her child's father. She insists she must return to work as soon as possible due to financial constraints. She is interested in discussing a total hip arthroplasty. Upon examination groin tender to palpation, worsens with hip flexion to 90 degrees coupled with internal/external rotation. FABER testing reproduces groin pain. Review of radiographs 3.23.21 reveal mild superior joint space narrowing, marginal acetabulum osteophytosis. Right hip MRI dated 5.7.21 reveals anterior labral tear, mild/moderate OA changes including joint space narrowing and osteophytosis. Assessment and plan: On February 10, 2021 she fell into the splits while shoveling at work, PCP ordered x rays and PT, radiographs revealed mild to moderate OA, per patient. Dr. Justin LaReau who initially evaluated her, obtained an MRI and ultimately recommended a THR(between arthroscopy vs. THR), 5.7.21. MRI reflects anterior labral tear. Patient adamantly defers corticosteroid injection and would like to discuss hip replacement, Norco and Advil provide limited relief, participation in several months of PT without improvement in discomfort, pain described as "gripping" and severe, pain is compromising her quality of life, denied prior right hip injury or pain/discomfort prior to this incident, firefighter, paramedic, and single mom who does not get financial assistance from her child's father. Therefore is adamant that she return to work as soon as possible with the fewest amount of limitations. Long discussion and she understands the presence of labral tear may be causing additional discomfort along with baseline osteoarthritis. The incident at work likely resulted in a labral tear and had led to an acute exacerbation of osteoarthritis related pain. Osteoarthritis is a

preexisting condition. Degree of osteoarthritis is mild. She understands given her age and circumstances a labral repair will most likely not be successful. She adamantly opposes corticosteroid as it'll cause a 3 month delay, and may not cause relief. Given her life constraints she desires to proceed with replacement surgery so she can resume her usual activities. Patient is a reasonable candidate for total hip replacement and wants to proceed. DMG Surgery scheduled. (PX 6, 136-140).

As an interesting aside, the admitting H&P for the THA procedure dictated by Dr. Kim says that "Patient presents for left THR". (PX 6, 68) Happily, Dr. Kim performed a right THR on October 12, 2021 at Edwards Hospital (direct anterior right total hip replacement). (PX 5, 74-76).

On January 4, 2022, Dr. Kim released Petitioner to full duty work as of January 12, 2022. (PX 6, 22-23)

**Testimony of Section 12 examiner Hythem Shadid, M.D.**

Dr Shadid examined Petitioner at the request of Respondent on July 8, 2021. His Evidence Deposition took place on November 30, 2022. (RX 1). He is a board certified orthopedic surgeon and has been practicing for 29 years. He authored 2 reports, which were tendered but not admitted into evidence as being hearsay.

Dr. Shadid did not think that the act of sinking in the snow caused or aggravated Petitioner's hip osteoarthritis (OA). (P. 13). He thought that Petitioner exhibited non-physiologic pain behavior. There was guarding. There was inconsistency in the pain complaints regarding passive and active movements. It would be expected that they would be consistent. (P. 19). The physical exam documented an antalgic gait. She had a positive impingement sign. The diagnostic films exhibited degenerative changes, labral tears and osteophytes, consistent with an arthritic hip. (P. 21). There was no evidence of an acute injury on the MRI. (P. 75-76). Dr. Shadid did not endorse causation. He did think that Petitioner could have suffered a hip flexor muscle strain pulling her leg out of the snow. (PP. 24-27). The treatment was reasonable and necessary for an arthritic hip, but was not related to the work accident. (PP. 28-29). As there was no work injury and Petitioner lost no time from work due to the flexor strain, MMI was not addressed. (P. 24). The work incident was a hip strain, not an aggravation of the OA condition. (P. 39)

On cross-examination, Dr. Shadid said that Petitioner's not having much pain at the inception of the injury was significant because one would expect intense pain at the onset of an aggravation of OA, which gradually improves over time. (P. 40). If a patient has a CAM deformity, they are more likely to sustain an acetabular labral tear. (P. 58). The x-ray findings were not consistent with advanced OA of the hip. (PP. 53-54). Dr. Shadid did say there could have been an exacerbation of the OA, but there was no labral tear associated with the work accident and it could have been an injury to the flexor muscles. (P. 65). Dr. Shadid last performed a THA procedure about a month before the deposition. (P. 46).

Neither Party submitted the testimony of Lt. Kelly.

## CONCLUSIONS OF LAW

The Arbitrator adopts the Findings of Fact 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)

Petitioner's testimony is found to be credible.

**Regarding Issue (C), Did an accident occur that 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 her employment by Respondent on February 10, 2021.

The Arbitrator bases this finding on the credible and unrebutted testimony of Petitioner and Eric Vitols, PX 2 (Accident Report Documents), the medical records and the fact that Respondent did not call Lt. Kelly to rebut the testimony submitted by Petitioner.

The accident of February 10, 2021, as described by Petitioner, occurred. Firefighters, police officers, steelworkers, heavy manufacturing workers, mechanics, construction workers, and countless other workers suffer small, seemingly insignificant, injuries on the job on a daily basis. As Petitioner and Vitols testified (and the Arbitrator is sure Kelly would have as well), such injuries are not reported via a formal accident report process because the reporting of such events would be too burdensome. Sometimes these injuries do turn out to be serious, such as what happened in this case.

Respondent submitted no evidence that Petitioner had any hip problems before February 10, 2021 and the accident investigation documents do not show any basis for questioning that the work accident occurred as stated. Petitioner was performing "acts that the employee might reasonably be expected to perform incident to his or her assigned duties." McAllister v. Illinois Workers' Compensation Comm'n, 2020 IL 124848 ¶46. In fact, Petitioner was assigned to the hydrant clearing task. The slip that Petitioner experienced clearly arose out of and in the course of her employment by Respondent as a firefighter. Sisbro, Inc. v. Industrial Comm'n, 207 Ill. 2d 193, 203 (2003).

Any defects in the histories given by Petitioner and any delay in aggressively seeking medical treatment for what was thought to be a minor injury were explained by the testimony of Petitioner and Vitols. They are not fatal to Petitioner's claim.

**Regarding Issues (E), Was timely notice of the accident given to Respondent?, The Arbitrator Finds:**

Timely notice of the accident was given to Respondent.

The unrebutted testimony of Petitioner and Vitols establishes that on the date of accident, February 10, 2021, Petitioner told Lt. Kelly, her CO, that she injured her right groin shoveling snow

**Regarding Issue (F), Is Petitioner's current condition of ill-being causally related to the injury?, The Arbitrator Finds:**

Petitioner's current condition of ill-being regarding her right leg, to wit: status post right hip total hip arthroplasty, October 12, 2021, is causally related to the injury.

The Arbitrator bases this finding on the finding above on the issue of accident, the testimony of Petitioner and the medical records.

Petitioner's testimony, which has been found to be credible and the medical records establishes that before the injury of February 10, 2021, she had no prior right hip problems and was able to perform her work duties as a full-time, full duty firefighter. Thereafter, she noticed continued pain and problems with her right hip. She believed that she had suffered a strain and she was focused on family issues until it worsened to a degree that she had difficulty performing her job and sought active medical care. The chain of events establishes causation. International Harvester v. Industrial Comm'n, 93 Ill. 2d 59 (1982).

Of course, the OA condition in Petitioner's hip preexisted the February 10, 2021 work accident. It is well established that an accident need not be the sole or primary cause – as long as the employment is a cause – of a claimant's condition. Sisbro, Inc. v. Industrial Comm'n, 207 Ill. 2d 193, 205 (2003).

Dr. Kim documented causation. Dr. Kim charted that the labral tear may be causing additional discomfort along with baseline OA. The incident at work likely resulted in a labral tear and had led to an acute exacerbation of osteoarthritis related pain. The OA is a preexisting condition. Degree of OA is mild. Both Drs. Kim and LaReau thought that a labral repair would not be successful. Given Petitioner's circumstances, she elected to proceed with a THA (a procedure that was offered by Drs. Lareau and Kim and not criticized by Dr. Shadid.. The Arbitrator finds the opinions of Drs. Kim and LaReau to be persuasive and to best comport with the evidence adduced.

It is axiomatic that the existence of a preexisting condition is not a bar to recovery under the Act. So long as employment is a cause of an employee's condition of ill-being, an award is appropriate. Sisbro at 205.

The Arbitrator does not find the opinions of Dr. Shadid to be persuasive. First, he commented on Petitioner's non-physiologic pain behavior. Some guarding with a painful hip that is in need of an arthroplasty when presenting to an examining physician is expected. No other physician documented non-physiologic pain behavior and the Arbitrator doubts that Drs. Kim and Lareau (associated with first class orthopedic practices) would offer a hip arthroplasty to a young patient, such as Petitioner, if pain behavior issues were noted. Dr. Shadid did not disagree with the proposed THA. He disputed causation (the work injury did not cause the OA, the work injury did not aggravate the OA), but he conceded exacerbation in his deposition.

Petitioner's asymptomatic right hip OA condition was aggravated, accelerated or exacerbated by the work accident of February 10, 2021, such that she underwent the THA procedure performed by Dr. Kim in October of 2021. Causation has been established.

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

PX 9 was Petitioner's Bills Exhibit. ArbX 1 noted that Petitioner claimed $20,801.34 in medical expenses and a Blue Cross/Blue Shield Lien of $69,307.00, per PX 9. Respondent claimed no §8(j) credit for bills paid by group.

The Arbitrator finds that the medical services rendered to Petitioner were reasonable and necessary to cure or relieve the effects of the work injury and are causally related to the work injury of February 10, 2021.

Based upon the tender of the claimed medical expenses and the Arbitrator's findings above on the issues of accident and causation, the following expenses are awarded:

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| **Laura Earnest, PA, Andrew Kim, MD:** | **$9,677.00** |
| **Hinsdale Orthopaedic Assoc.:** | **$2,486.34** |
| **DMG/Dr. Shah-Rhodes:** | **$7,524.00** |
| **TOTAL:** | **$19,687.34** |

Further, Respondent shall hold Petitioner harmless and indemnify her from any collection proceedings brought by Blue Cross/Blue Shield for paid expenses related to the work injury of February 10, 2021, in an amount not to exceed $69,307.00.

This award is pursuant to §§8(a) and 8.2 of the Act and the awarded amounts are subject to the Medical Fee Schedule.

**Regarding Issue (K), What TTD benefits are due?, The Arbitrator Finds:**

Based upon the Arbitrator's findings above on the issues of accident and causal connection and the testimony of Petitioner, Respondent shall pay Petitioner temporary total disability benefits of $1,316.53/week for 25-4/7 weeks, commencing May 13, 2021 through November 7, 2021, as provided in Section 8(b) of the Act.

**Regarding Issue (L), What is the Nature and Extent of the Injury?, The Arbitrator Finds:**

Petitioner was diagnosed with a right hip labral tear and acute exacerbation of OA by Dr. Kim, for which she underwent right total hip replacement on October on October 10, 2021. She was discharged from care by Dr. Kim on January 4, 2022, with a release to full-duty work as a firefighter, effective January 12, 2022. She has had no treatment after January 4, 2022 and is capable of performing her work duties as a firefighter.

In determining PPD, the Arbitrator is required to consider the five factors set forth in §8.1b(b) of the Act. The relevance of the five factors considered is obvious, because they are mandated to be considered by the Act.

The Arbitrator assigns weight to the requisite Section 8.1b(b) factors as follows:

(i) An AMA rating was not submitted into evidence. Therefore, the Arbitrator assigns no weight to this factor in determining PPD.

(ii) Petitioner worked as a firefighter at the time of the work injury and she was able to return to work in this job. The Arbitrator assigns significant weight to this factor in determining PPD.

(iii) At the time of the injury, Petitioner was 48 years old. Petitioner will likely have to live and work with the residual effects of the injury for a several years. The Arbitrator assigns moderate weight to this factor in determining PPD.

(iv) Petitioner has not alleged, nor is there evidence to indicate, any decrease in future earning capacity. The Arbitrator assigns appropriate weight to this factor in determining PPD.

(v) Petitioner has some residual symptoms in her hip, due to the work injury and the THR procedure. Petitioner testified that she has a little bit of pain and stiffness in her right hip and experiences some pain in extremely cold temperatures. The Arbitrator assigns substantial weight to this factor in determining PPD.

After due consideration of the above factors and the entirety of the evidence adduced, the Arbitrator finds that, as a result of the injuries sustained, Petitioner suffered the 40% loss of use of her right leg, in accordance with §8(e)12 of the Act.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 22WC024017 |
| Case Name | Kendra Gaines v.<br>Brookwood Middle School |
| Consolidated Cases | |
| Proceeding Type | Petition for Review under 19(b)<br>Remand Arbitration |
| Decision Type | Commission Decision |
| Commission Decision Number | 24IWCC0589 |
| Number of Pages of Decision | 24 |
| Decision Issued By | Raychel Wesley, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Myles Maltz |
| Respondent Attorney | Justin Schooley |

DATE FILED: 12/9/2024

/s/Raychel Wesley,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 causal connection | ☐ Second Injury Fund (§8(e)18) |
| | ☐ PTD/Fatal denied |
| ☐ Modify | ☒ None of the above |

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KENDRA GAINES,

Petitioner,

vs. NO: 22 WC 24017

BROOKWOOD MIDDLE SCHOOL,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) and §8(a) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, prospective medical care, temporary disability, and evidentiary rulings, and being advised of the facts and law, reverses the Decision of the Arbitrator as stated below, but incorporates the Decision of the Arbitrator for the Findings of Fact, 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).

CONCLUSIONS OF LAW

**I. Causal Connection**

The Arbitrator concluded Petitioner sustained a right knee contusion during the stipulated accident for which she had reached maximum medical improvement. However, the Arbitrator also concluded Petitioner failed to establish a diagnosis of Complex Regional Pain Syndrome ("CRPS") or any additional conditions of ill-being which were causally related to the accident. The Arbitrator relied on the opinions of Respondent's §12 examining physicians, Dr. Brian Cole

and Dr. Richard Noren, which he found more credible than the opinions of treating physicians Dr. George Branovacki and Dr. Nicholas Kondelis. The Commission disagrees.

Petitioner offered unrebutted testimony that prior to the instant accident, she had no right knee or right leg issues and had never undergone any medical treatment for her right knee or right leg. She had also never been diagnosed with complex regional pain syndrome ("CRPS") or reflex sympathetic dystrophy. After the accident, Petitioner exhibited ongoing and consistent complaints of pain, discomfort, and burning sensations in her right knee, along with discoloration, swelling, decreased range of motion ("ROM"), and difficulty walking. She was eventually diagnosed with CRPS by Dr. Kondelis. Her complaints are ongoing to date.

Upon examining Petitioner at Respondent's request, both Dr. Cole and Dr. Noren opined that Petitioner's subjective complaints were not corroborated by any objective findings. Dr. Cole found no color changes or temperature changes in Petitioner's leg, and opined there was no need for further orthopedic treatment. He also opined Petitioner was capable of returning to work—albeit with restrictions on squatting, keeling, and climbing—which were causally related to the accident. Likewise, Dr. Noren found no objective findings of CRPS, and also opined Petitioner had reached maximum medical improvement ("MMI"). However, in contrast to Dr. Cole, Dr. Noren opined Petitioner could return to full duty work.

The Commission observes that, not only do the opinions of Respondent's physicians contradict each other, but they also contain indices within their reports that Petitioner was in fact suffering from an ongoing condition that was causally related to the accident. Dr. Cole examined Petitioner on two occasions. Yet, despite opining that Petitioner's symptoms were well out of proportion with objective findings, he never released Petitioner to full duty. In fact, at the conclusion of each of his examinations, Dr. Cole recommended additional treatment for Petitioner's symptoms, including a cortisone injection, treatment with a physiatrist, and pain management. Moreover, after his second §12 examination, Dr. Cole opined that Petitioner's restrictions on squatting, kneeling, and climbing were causally related to the work accident.

Similarly, after his §12 examination, Dr. Noren found symptom magnification and malingering, opined that Petitioner had no subjective complaints consistent with neuropathic pain, and opined that there were no CRPS symptoms warranting treatment. The Commission finds these opinions to be at odds with the evidence. Dr. Noren admitted that Petitioner exhibited decreased ROM and flexion in her right knee, which treating physician Dr. Kondelis noted fit the Budapest criteria for CRPS. Further, Dr. Kondelis also highlighted additional symptoms supporting a CRPS diagnosis in Petitioner, including burning, numbness/tingling, sensitivity to touch, color changes, and increased temperature with touching. Petitioner also complained of limited ROM with increased symptoms while traversing stairs, bending, and walking. The Commission finds there is more than a modicum of truth in Petitioner's complaints in order for Respondent's physicians to keep Petitioner on restricted duty and recommend additional treatment (Dr. Cole) and admit that Petitioner exhibited symptoms consistent with a diagnosis of CRPS (Dr. Noren).

The Commission finds that the totality of Petitioner's complaints, Dr. Cole's recommended treatment, and findings of Dr. Noren and Dr. Kondelis all merge to support a finding that Petitioner was suffering—and continues to suffer—from a CRPS condition which was causally related to the

instant accident. Further supporting a diagnosis of CRPS was Petitioner's primary care physician, Dr. Daniel Desimone, who suggested the possibility of CRPS when he referred Petitioner to neurology to rule out CRPS. Moreover, orthopedist Dr. Kevin Luke suggested Petitioner see a neurologist or physiatrist, as he also had concerns about CRPS due to Petitioner's complaints of burning. See *PX 1, p.8-10*; *PX 2, P.45-47*. In the case of Dr. Luke, the Commission finds that his opinion that Petitioner's pain was out of proportion with the mechanism of injury is outweighed by his concerns of CRPS.

The Commission also finds that the opinions of Dr. Cole and Dr. Noren (i.e., Petitioner's symptom magnification and her complaints being out of proportion with the mechanism of injury) are irreconcilable with the evidence. After a valid functional capacity evaluation ("FCE") it was found that Petitioner exhibited full and consistent biomechanical and evidence based effort, which was limited by her pain. Additionally, treating physician Dr. George Branovacki opined on April 8, 2022 that Petitioner's symptoms were related to her work accident.

In addition to the above, the Commission relies on the chain of events analysis to find causation in the instant case. 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 record reflects Petitioner had no right knee symptoms—nor had she undergone any right knee treatment—prior to the work accident. She also had never been diagnosed with CRPS, and was working full duty with no restrictions.

Petitioner testified that after the stipulated accident, she sought treatment the next day and has been engaged in a continuous course of conservative and surgical care ever since, with no abatement of symptoms. The medical records detail Petitioner's treatment for nearly two years, which had failed. Petitioner's eventual CRPS diagnosis was corroborated by findings from Respondent's own doctors (finding decreased ROM and flexion), as well as (*in the case of Dr. Cole*) recommendations for additional pain management and restricted work duty. While treating physician Dr. Branovacki did not specifically diagnose CRPS, he was clear in his opinion that Petitioner suffered from nerve damage, an inherent feature of CRPS. 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).

To be clear, although the chain of events analysis is sufficient to support a finding of causation, in this case it is secondary to the causation opinions of both Petitioner's treating physicians and Respondent's Dr. Cole. Accordingly, the preponderance of evidence supports a finding that Petitioner's current right knee condition is causally related to the stipulated accident.

Regarding the inconsistencies in the evidence, the Commission finds them to be minor and inconsequential to Petitioner's claim. The Commission is not bound by the Arbitrator's findings. It is the Commission's province "to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the

evidence. *City of Springfield v. Industrial Commission*, 291 Ill. App. 3d 734, 740 (1997). Interpretation of medical testimony is particularly within the province of the Commission. *A.O. Smith Corp. v. Industrial Commission*, 51 Ill. 2d 533, 536-37 (1972).

Here, we find that Petitioner's testimony that she tries "to get groceries delivered" did not contradict Dr. Noren's report noting that she experienced severe pain walking in the grocery store for 45 minutes. Petitioner did not indicate that she never drives to the grocery store, and in fact suggests that she has done so, which is the reason she is even able to note the severe pain derived from walking in the store. *Transcript, p.36; RX 4, p.3*. Additionally, her admission to driving her daughter to school and driving herself to Dr. Noren's §12 examination present as necessities rather than an indication of inauthenticity or deception.

Lastly, Petitioner's testimony regarding the reason her nerve block was re-scheduled from August 16, 2023 to November 2023 does nothing to contradict the medical records, nor Petitioner's pain complaints. Her initial mischaracterization at trial of the reasoning her nerve block was re-scheduled reads more as a confusion of the timeline rather than intentional dishonesty. *See Transcript, p.36-39*. This is especially true considering Petitioner had already undergone arthroscopic surgery and knee injections. The Commission sees no benefit in Petitioner intentionally mischaracterizing the reason her nerve block was re-scheduled, especially considering she still wishes to have the procedure performed.

Based on the totality of evidence, the Commission finds that the opinions of Petitioner's treating physicians are more supported by the facts and are thus more persuasive. The medical records and opinions of treating physicians Dr. Branovacki and Dr. Kondelis, in conjunction with the chain of events analysis, effectively rebut the opinions of Dr. Cole and Dr. Noren, and prove by a preponderance of evidence that Petitioner's current right knee condition is causally related to the instant accident.

## II. Medical Expenses

§8(a) of the Act states a Respondent is responsible…"for all the necessary first aid, medical and surgical services, and all necessary medical, surgical, and hospital services thereafter incurred, limited, however, to that which is reasonably required to cure or relieve from the effects of the accidental injury…" A claimant has the burden of proving that the medical services were necessary, and the expenses were reasonable. See *Gallentine v. Industrial Commission*, 201 Ill. App. 3d 880, 888 (2nd Dist. 1990). Consistent with the causal connection ruling above, the Commission finds that all expenses related to Petitioner's right knee condition were reasonable, necessary, and causally related to the instant work accident. Consistent with the causation analysis, the Commission finds all treatment provided by Dr. Branovacki and Dr. Kondelis to be medically necessary. We disagree with the Arbitrator's insinuation that the viscosupplementation treatment by Dr. Branovacki was not medically necessary because it provided no benefit, as no case law was brought forth to support this finding.

Despite the Arbitrator's denial, we find that the medical expenses award should also include expenses related to the FCE, as on its' face the record indicates Dr. Kondelis referred Petitioner for the examination. Pursuant to §16 of the Act, this referral should be deemed true and

correct, and thus medically necessary. Additionally, the Commission awards Petitioner medical expenses for her February 22, 2022 visit with primary care physician Dr. Desimone. The Arbitrator found no medical necessity for this visit. However, we find that on November 1, 2021, Dr. Desimone recommended that Petitioner follow up with him after being worked up by an orthopedist. This record is that follow-up visit and is thus medically necessary. *PX 1, p.3, 8-10*.

The Commission does, however, affirm the Arbitrator's denial of medical expenses in the record that were incurred prior to the instant accident. *PX 1, p.13-14*. Further, the Commission also affirms the denial of medical expenses for treatment at Ingalls Memorial Hospital on October 19th, 21st, and 26th of 2021, as no actual medical records accompany these bills in evidence. The Commission also notes that, regardless of the aforementioned, these bills each show an outstanding balance of $0.00. *PX 8, p.2-7*.

Lastly, although Petitioner did not specifically address the denial of medical expenses line by line, she did generally address the denial of expenses in her statement of exceptions by requesting payment for medical bills housed in Petitioner's Exhibit #8. Accordingly, her argument for these expenses has not been forfeited. As such, the Commission finds Respondent liable for all medical expenses related to the treatment of Petitioner's right knee condition, including all related expenses in Petitioner's Exhibit #8, and including expenses related to the FCE, the viscosupplementation injection, and the February 22, 2022 visit with Dr. Desimone. Excluded from this award are the bills incurred prior to October 18, 2021, and bills for treatment on October 19th, 21st, and 26th of 2021, which are not accompanied by medical records. Respondent shall receive credit for any medical expenses previously paid.

**III. 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. Industrial Commission*, 294 Ill. App. 3d 705, 711-12 (2d Dist. 1997). This includes treatment required to diagnose, relieve, or cure the effects of the claimant's injury. *F&B Mfg. Co. v. Industrial Commission*, 325 Ill. App. 3d 527, 534 (1st Dist. 2001).

Consistent with the causation finding above, the Commission reverses the Arbitrator's denial of prospective medical care recommended by Dr. Kondelis in the form of a sympathetic nerve block. This recommendation was not objected to by Dr. Branovacki, who during his last treatment with Petitioner, indicated Petitioner would attempt another injection at her pain clinic (Dr. Kondelis), and then return to treat with Dr. Branovacki. *PX 3, p.79-81*. Although Dr. Branovacki had previously recommended a Triad 3LT low-light therapy device and a samPRO 2.0 device, these treatments were not mentioned during his last appointment with Petitioner on September 22, 2023. Accordingly, the Commission finds that the sympathetic nerve block recommended by Dr. Kondelis is the best course of action to relieve or cure the effects of Petitioner's condition.

## IV. Temporary Total Disability

The Arbitrator terminated temporary total disability ("TTD") benefits as of the April 5, 2023 §12 report from Dr. Noren, adding that he gave no weight to the FCE report, as the job title and job duties listed were not consistent with the evidence at hearing. Even arguendo if no weight is granted to the FCE (save for the validity of Petitioner's effort) due to inaccurate job description, we find that TTD benefits should still be extended and awarded through the hearing date of October 24, 2023. Due to restrictions of seated duty with no lunch or bus duty, Petitioner was terminated by Respondent on November 14, 2022, as Respondent was unable to accommodate said restrictions. Subsequent to Dr. Noren's §12 report, Petitioner was either kept off work by treating physicians, or kept on restricted work duty due to the instability of her right knee. There is no credible evidence in the record indicating Respondent was ever capable of accommodating Petitioner's restrictions. Accordingly, consistent with the causal connection ruling above, Petitioner continued being entitled to TTD benefits subsequent to April 5, 2023, and through the hearing date. The Commission notes that subsequent to April 5, 2023, at no time did Petitioner work, nor was she capable of working for Respondent within her restrictions. See *Rambert v. Industrial Commission*, 133 Ill. App. 3d 895, 903 (2nd Dist. 1985) (In order to prove temporary total disability, the employee must demonstrate not only that he did not work, but also that he was unable to work).

In calculating TTD benefits, the Commission finds that, although Petitioner testified her last day of work was October 26, 2021, there is no accompanying medical record on that date taking her off of work. The record reflects she was not taken off work until her November 1, 2021 visit with Dr. Desimone. Therefore, TTD benefits accrue from November 2, 2021.

Accordingly, based on the totality of evidence, the Commission finds that Petitioner is entitled to TTD benefits from November 2, 2021 through October 24, 2023. Respondent shall be entitled to a credit for TTD paid, with any overpayment to be applied to future awarded benefits.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 25, 2024, is hereby reversed for the reasons stated above.

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner's current right knee condition of ill-being is causally related to the instant work accident.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay all medical expenses incurred in the care and treatment of Petitioner's right knee condition, including expenses related to the FCE and the February 22, 2022 visit with Dr. Desimone, pursuant to §8(a) and subject to §8.2 of the Act. However, we affirm the denial of all medical expenses incurred prior to the date of accident. We also affirm the denial of expenses for treatment on the dates of October 19, 2021, October 21, 2021, and October 26, 2021. Respondent shall be given a credit for all medical expenses previously paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall provide and pay for the sympathetic nerve block recommended by Dr. Kondelis, as provided in §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $430.99 per week for a period of 103 & 1/7ths weeks, representing November 2, 2021 through October 24, 2023, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b), this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any. Respondent shall receive credit for TTD benefits previously paid.

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.

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

**December 9, 2024**

/s/ *Raychel A. Wesley*

RAW/wde

O: 10/9/24

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/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 22WC024017 |
| Case Name | Kendra Gaines v.<br>Brookwood Middle School |
| Consolidated Cases | |
| Proceeding Type | 19(b) Petition |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 16 |
| Decision Issued By | Charles Watts, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Myles Maltz |
| Respondent Attorney | Justin Schooley |

DATE FILED: 3/25/2024

/s/Charles Watts, Arbitrator
Signature

**THE INTEREST RATE FOR THE WEEK OF MARCH 19, 2024 5.13%**

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)**

**Kendra Gaines**
Employee/Petitioner

v.

**Brookwood Middle School District 167**
Employer/Respondent

Case # **22** WC **24017**

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 **10/24/23**. 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, **10/18/21**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**24,111.00**; the average weekly wage was $646.46.

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

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

Respondent shall be given a credit of $**33,738.79** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $0.00 for other benefits, for a total credit of $**33,738.79**.

Respondent is entitled to a credit of $**6,180.08** under Section 8(j) of the Act.

**ORDER**

Petitioner's condition of ill being related to her alleged work accident is limited to a right leg contusion for which she has reached maximum medical improvement. Petitioner has failed to establish a diagnosis of CRPS and that that her current condition of ill-being is otherwise related to her alleged work accident.

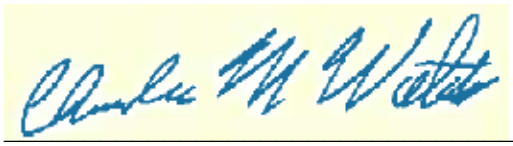
Petitioner's request for prospective medical care is denied.

Liability for medical expenses submitted by petitioner is denied.

Petitioner is entitled to TTD benefits from 10/27/21-4/5/23 (75-1/7 weeks, $32,384.32). Respondent shall be given a credit of $33,738.79 for previously paid TTD and is entitled to a remaining credit of $1,354.47 against any future benefits that might be owed to petitioner.

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

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



Signature of Arbitrator

March 25, 2024

ICArbDec19(b)

Gaines, Kendra vs. Brookwood Middle School District 167
IWCC No. 22 WC 24017

## STATEMENT OF FACTS

On October 24, 2023, the parties proceeded to hearing under Section 19(b) and 8(a) before Arbitrator Watts. Issues in dispute included causation, medical bills, TTD, and prospective medical care. (Arbitrator's Exhibit 1).

Petitioner testified that on October 18, 2021, she was employed by Brookwood Middle School District 167 as a paraprofessional. (T. p. 5-6). She testified that her job duties included assisting teachers, taking children out of the classroom when they needed extra help with their work, and performing lunch and bus duty. (T. p. 6). Petitioner testified that on October 18, 2021, when performing bus duty, she saw two children fighting; went over to separate the children; and hit her right knee and shin on the bleachers. (T. p. 7). Petitioner testified to "excruciating" pain right after striking her knee, which intensified when she stepped down from the bleachers. (T. p. 8). Petitioner testified that the following day, she was in even more pain. (T. p. 9). Petitioner testified that she continued working from October 19th through October 26th, but last worked on October 27th. (T. p. 11).

Petitioner testified to seeking initial treatment at Ingalls Hospital, with follow up on October 21st and October 26th. (T. p. 10). However, corresponding records were not offered as evidence.

On November 1, 2021, petitioner then presented to Dr. Daniel Desimone of MIINE Doctor (P. Ex. 1, p. 2-5). She reported that on October 18, 2021, she broke up an altercation between two students and, in the process, hit her right shin and knee on the bleachers. She reported shooting pain in the entire leg and inability to weight bear or bend the knee without severe pain. Petitioner reported inability to work due to pain. She was diagnosed with a right knee contusion, referred to orthopedics, and ordered off work.

On November 8, 2021, petitioner underwent an MRI of the right knee that revealed that tendons and ligaments were intact. There was a small full-thickness cartilage defect to the lateral posterior aspect of the lateral foraminal condyle with underlying subchondral cysts. There was trace knee joint effusion and mild focal soft tissue edema over the lower patellar facet and proximal patellar tendon representing mild bursitis or even a small hematoma in proper clinical setting. (P. Ex. 1, p. 6-7).

On November 15, 2021, petitioner then obtained an orthopedic opinion from Dr. Kevin Luke of Parkview Orthopedic Group (P. Ex. 3, p. 2-3). Dr. Luke indicated that examination was consistent with traumatic patellofemoral chondrosis, right knee strain, and contusion. X-rays did show some bone-on-bone changes in the patellofemoral region with osteophytes. Dr. Luke diagnosed right knee traumatic patellofemoral chondrosis, right knee strain and contusion, and patellar bony bruising. Recommendations included physical therapy, use of a knee sleeve as necessary, Meloxicam, topical and local gel, and remaining off work.

Petitioner began physical therapy at Parkview Orthopedic Group on December 2, 2021 and attended 9 sessions through December 22, 2021. (P. Ex. 1, p. 10-37).

During follow up with Dr. Luke on January 26, 2022, petitioner advised that she had not started physical therapy until mid-December and had not followed up since November 15, 2021 despite being told to follow up in 2 weeks (P. Ex. 2, p. 38). Petitioner also indicated she had a COVID infection in the end of December 2021, which stopped physical therapy for a while. Petitioner reported persistent pain and disability about her knee. She reported that anti-inflammatories, topical, and local modalities were not helping. She described burning, dysesthesias, pain, and disability about her right knee which, per her report, had worsened compared to her first evaluation. Objectively, Dr. Luke noted that petitioner's examination was somewhat improved compared to her last visit. Recommendations included an MRI scan to rule out internal derangement of the knee, continuing topical modalities versus Meloxicam, use of anti-inflammatories or Tylenol, and holding physical therapy. Dr. Luke indicated that potential referral to a physiatrist may be necessary. Petitioner was released to sedentary desk work.

On January 27, 2022, petitioner underwent a Section 12 examination with Dr. Cole. (R. Ex. 1). Petitioner denied any numbness, tingling, or weakness in the right lower extremity, and her pain, although somewhat generalized, was focused anteriorly. On physical examination, Dr. Cole documented that petitioner was ligamentously stable and neurovascularly intact with manual muscle testing at +5 out of 5. He documented petitioner had no hair pattern change, no color change, and no trophic changes in her lower extremity. Dr. Cole highlighted that petitioner's MRI of the right knee showed soft tissue fluid consistent with a contusion, but no other traumatic findings or structural changes. He outlined that petitioner's subjective complaints far outweighed any objective findings and indicated her regional pain was of unknown etiology. He found that petitioner demonstrated significant signs of symptom magnification, and her symptoms could not be explained given the level of subjective pain and the absence of any legitimate objective findings. Dr. Cole limited petitioner's diagnosis to a contusion. Dr. Cole recommended a trial cortisone injection. He indicated that if petitioner did not garner any significant measurable relief of right knee pain with injection, then he would submit that this is not a primary orthopedic condition, and the right knee was more likely to be at MMI and need for ongoing treatment would be more of a pain management issue regarding the right lower extremity as a whole. Dr. Cole noted that he could not address what might be necessary from a pain management standpoint, however. If petitioner garnered temporary relief with the injection, there would be merit in discussing an arthroscopic evaluation of the knee, but he strongly discouraged that from being a priority. In the meantime, he recommended seated/desk work.

On January 27, 2022, Dr. Cole also prepared an IME addendum (R. Ex. 1). He agreed with obtaining an MRI as recommended by Dr. Luke, as well as a cortisone injection in the knee to help discriminate between pain generators coming from a source within the knee and pain management referral to address pain generators other than the knee.

Additional MRI of the right knee on February 1, 2022 revealed Grade 2 patellar chondromalacia, tiny baker's cyst, but no evidence of meniscal tear or ligamentous tear (P. Ex. 2, p. 42-43).

On February 11, 2022, Dr. Luke noted the petitioner's repeat MRI scan was essentially unremarkable and showed evidence of Grade 2 patella chondromalacia at best. (P. Ex. 2, p. 45-46). Dr. Luke found no apparent orthopedic cause for petitioner's pain and disability. He indicated that petitioner's pain and discomfort was definitely out of proportion to the length of time of her reported injury as well as the findings noted on her MRI scan. He found a concern for complex regional pain syndrome and referred petitioner to a physiatrist or a neurologist. Otherwise, he discharged petitioner to follow up with workers' compensation for an ultimate referral to a neurologist and physiatrist for further workup. Petitioner was released to sedentary work with no prolonged walking or prolonged standing.

Petitioner testified that she was then provided a document that stated the District could not accommodate her restrictions and that they would move to termination because of not being able to accommodate restrictions. (T. p. 17-18). The actual letter from the District is dated November 10, 2022. The letter reflects that petitioner's job was a full-time job, requiring attendance each day, and included escorting students and supervising on buses and during lunches. The letter reflects that because petitioner's restrictions at the time did not allow her to perform the essential functions of her job, the District would proceed with termination. (P. Ex. 6). Petitioner testified that after her termination she went back to her primary care physician who referred her to another orthopedic specialist, Dr. George Branovacki. (T. p. 18).

Petitioner's medical records reflect that she in fact returned to Dr. DeSimone on February 22, 2022, almost 9 months prior to her termination (P. Ex. 1, p. 8). Petitioner was referred to neurology and also referred back to her orthopedic doctor and ordered off work.

Petitioner then presented to Midwest Orthopedic Consultants/Dr. George Branovacki on April 8, 2022. (P. Ex. 3, p. 2). She reported ongoing and worsening right knee symptoms. Examination revealed no swelling, ecchymosis, or deformity. There was no palpable effusion or crepitus, but moderate medial joint line tenderness. Range of motion was full. Strength was 5/5. Sensations were intact. Gait pattern was normal. There was no gross instability. X-rays of the bilateral knees on April 8, 2022 did not show any significant abnormalities. (Id. p. 3). Dr. Branovacki diagnosed bilateral knee pain worse on the right, administered the right knee injection, and recommended Lidoderm patches, remaining off work, and follow up in 4 weeks.

During follow up with Dr. Branovacki on May 13, 2022, petitioner reported worsening symptoms since her last visit. (Id., p. 10). Examination revealed no changes or positive findings. (Id. p. 11). Dr. Branovacki indicated that petitioner's two prior right knee MRIs showed no major structural pathology requiring surgery. Petitioner was provided a Medrol dose pack. It was recommended that petitioner try additional physical therapy, remain off work, and indomethacin as well.

Petitioner subsequently resumed physical therapy at Midwest Orthopedic Consultants (Id. p. 14). On June 24, 2022, Dr. Branovacki then recommended a diagnostic arthroscopy with possible chondroplasty and any related procedures depending upon intraoperative findings. Petitioner was ordered off work. (Id. p. 33).

On August 9, 2022, Dr. Cole prepared an additional IME addendum (R. Ex. 2). He outlined he agreed with the radiologist's findings with respect to petitioner's February 1, 2022 MRI of the right

knee which showed minimal patellar chondrosis, no other articular or bony damage, and was essentially normal. He did not identify any tears and further indicated that any seen on MRI would not be related to petitioner's alleged work injury. He indicated that the likelihood that petitioner would obtain any measurable relief of her severe right knee pain with arthroscopic surgery was less than 20%, as petitioner did not demonstrate any subjective relief after cortisone injection and the severity of petitioner's symptoms was well out of proportion to what one would expect given the contusion mechanism of her injury. While he did not suggest an arthroscopic surgery, he recommended further evaluation and treatment with a physiatrist to try to treat her pain from another pathway. He reserved from further commenting on MMI until petitioner was seen by a pain management and rehabilitation specialist/physiatrist.

On September 27, 2022, Dr. Branovacki performed a right knee arthroscopy with loose body removal. Post operative diagnosis was right knee pain and loose body. It was indicated that the entire knee joint looked normal except for three to four loose cartilage fragments 0.5 x 0.5 cm in the lateral gutter. Otherwise, there was no chondral damage; no meniscus tears; no synovitis; very small plica bland; and no meniscus pathology. (P. Ex. 3, p. 40-41).

On October 7, 2022, Dr. Branovacki outlined that surgery found petitioner's knee essentially normal. (Id., p. 42-43). He noted there were some loose bodies present in the lateral gutter that were removed, but otherwise, there were no signs of meniscal tear, ligament injury, synovitis, or chondral injury. Petitioner was referred to physical therapy and was ordered off work. It was indicated petitioner would likely be at maximum medical improvement at her next visit.

During presentation to Dr. Branovacki on November 5, 2022, petitioner reported no change in her right knee symptoms. (Id. p. 54-56). Petitioner was released to light duty work Monday, Wednesday, and Friday, but was to avoid any physical exertion with the recommendation for desk work only and avoiding the lunch line and school bus line and avoiding stairs. Dr. Branovacki recommended a pain management evaluation to consider nerve blocks and follow up in 2 months.

Petitioner then underwent an IME reevaluation with Dr. Cole on December 9, 2022 (R. Ex. 3). She reported no change in symptoms after right knee surgery. She reported temperature changes and skin color changes as well as hypersensitivity over the right knee and lower extremity to touch. She also reported burning around her knee. Dr. Cole's examination noted no skin color change; no hypersensitivity, and no temperature difference in the right versus left lower extremity. He again found pain out of proportion with minimal objective findings. Dr. Cole did not recommend any further orthopedic care. Orthopedically, he found petitioner capable of returning to a job with limited squatting, kneeling, and climbing. He recommended evaluation with a pain management specialist.

During follow up with Dr. Branovacki on January 6, 2023, petitioner again reported no change in symptoms. It was indicated that all of petitioner's workup had been negative to find the source of her pain and no treatments had helped her. (P. Ex. 3, p. 63-65). Examination of the knee again revealed no swelling, ecchymosis, or deformity. There was no evidence of crepitus or effusion, but moderate peripatellar tenderness. Range of motion was full. Strength was 5/5. Sensations were intact. Special tests were all negative. Now, however, Dr. Branovacki suggested likely nerve

damage. Petitioner was referred to a pain clinic for possible service blocks and was ordered off work. It was indicated that if nerve blocks failed, there was no option other than MMI.

Petitioner was then evaluated by Dr. Nicholas Kondelis on February 28, 2023 (P. Ex. 4, p. 2-6). She described burning and sensitive pain to touch with numbness and tingling. Petitioner reported color changes and increased temperature with touch. She reported that wearing compression sleeves or tight clothing caused skin irritation and increased pain. She reported limited range of motion and worsening symptoms with stairs, bending, and walking. She reported sleep disturbances due to pain. It was indicated that petitioner met the Budapest criteria for CRPS including reports of hyperesthesia "and/or" allodynia, reports of temperature asymmetry "and/or" skin color changes "and/or" asymmetry, reports of edema "and/or" sweating changes "and/or" asymmetry, and reports of decreased range of motion "and/or" motor dysfunction "and/or" trophic changes. Petitioner was diagnosed with complex regional pain syndrome of the right lower extremity, intractable neuropathic pain of the right knee, post-traumatic osteoarthritis of the right knee, right knee pain, and chronic pain. She was to begin Gabapentin and undergo a lumbar sympathetic nerve block.

At follow up with Dr. Branovacki on March 10, 2023, petitioner indicated her pain clinic physician told her she has CRPS. At this point, Dr. Branovacki noted that petitioner was rather apprehensive to light touch and deep knee bending caused severe anterior knee pain. However, examination otherwise revealed no change or positive findings. (P. Ex. 3, p. 67). Petitioner was to remain off work until completion of nerve blocks and follow up in 2 months. A SAM Pro 2.0 device and Triad 3LT were also ordered by Dr. Branovacki.

On April 5, 2023, petitioner then underwent a Section 12 examination with Dr. Noren. (R. Ex. 4). In conjunction with the examination, petitioner completed a pain diagram reflecting pain in the anterior, posterior, and lateral areas of her right knee and right below the knee only. There was no other demarcation of pain or numbness. Petitioner reported that she drove to the examination herself. She reported that following her work accident, she experienced bruising and swelling and was also limping the following day. Petitioner reported that the prior knee arthroscopy she underwent resulted in no change in her symptoms. Petitioner was taking gabapentin but had stopped it 2 days prior to the IME per the recommendation of Dr. Kondelis. She reported that Norco, Naprosyn, and topical creams did not provide any benefit. She reported that right knee pain extended slightly above to her upper thigh and occasionally to the foot and would move up and down randomly with burning pain during the day and pain worse at night. She reported feeling hot to touch with turning red and swelling. Petitioner reported increased temperature, worse at night. She reported that when her knee swells, it sometimes sweats. Petitioner used an assistive device to ambulate. She denied any hair or nail changes.

Dr. Noren found no objective findings of complex regional pain syndrome on examination. He provided ten photographs to support no objective findings of a neuropathic pain syndrome. He further outlined that petitioner does not have allodynia or hyperalgesia on examination or subjective complaints consistent with CRPS or neuropathic pain. Dr. Noren opined that petitioner does not have complex regional pain syndrome as it was not supported by her physical examination. Dr. Noren opined that no further pain management was warranted as petitioner's examination has no findings of neuropathic pain.

Dr. Noren opined that a Sam Pro 2.0 and Triad 3LT devices are an ultrasound and infrared-type treatment indicated for musculoskeletal pain which is consistent with petitioner's subjective complaints, but noted that petitioner's reported impairment and pain complaints were suggestive of symptom magnification and probable malingering with no evidence of neuropathic pain. He further indicated that the devices were meant for treatment of a soft-tissue injury, and there was no evidence of any current soft-tissue injury present. He found that there was no indication for use of the Sam Pro 2.0 and Triad 3LT devices for CRPS, and he indicated he did not believe those devices were medically indicated for treatment of petitioner's subjective pain. Dr. Noren outlined the petitioner was currently at maximum medical improvement and capable of returning to work as a classroom aide.

On May 12, 2023, petitioner returned to Dr. Kondelis. She reported no benefit from Gabapentin, oxycodone, naproxen, acetaminophen, or amitriptyline. (P. Ex. 4, p. 7). Dr. Kondelis suggested allodynia to light touch, hyperalgesia to pin prick, local skin and regional color changes, temperature differences, edema, sweating changes, and sweating differences. He also suggested decreased range of motion and trophic changes. However, other portions of the record reflect no changes in hair and nails. He recommended stopping gabapentin and starting pregabalin and undergoing sympathetic nerve blocks. Petitioner was advised to follow up in 4 weeks.

Petitioner also presented to Dr. Branovacki on May 12, 2023. She reported that gabapentin from her pain physician was not helping. In contrast to Dr. Kondelis' suggestion of CRPS, Dr. Branovacki's right knee examination revealed no swelling, ecchymosis, or deformity. There was no evidence of crepitus or effusion but moderate peripatellar tenderness. Strength testing was 5 out of 5. Sensations were again intact, and provocative tests were all negative. (P. Ex. 3, p.70). X-rays were unremarkable. Nonetheless, Dr. Branovacki suggested that that petitioner's knee was not stable enough to allow her to return to work without restrictions. She was advised to follow up in 2 months. Dr. Branovacki ordered petitioner completely off work.

On June 21, 2023, petitioner underwent an FCE at Team Rehabilitation Orland Park (P. Ex. 5). It was indicated that this was ordered by Dr. Kondelis. However, the Arbitrator notes that at no point do the records of Dr. Kondelis include an FCE referral. Petitioner's occupation was noted to be an "assistant teacher." During the FCE, petitioner demonstrated consistent effort throughout only 84.6% of the test and only presented reliable pain ratings of 77.8%. It was suggested that petitioner met 52.1% of the physical demands of her job as an assistant teacher, but was unable to achieve return to work items for occasional squat lifting, occasional power lifting, occasional shoulder lifting, occasional bilateral carrying, occasional unilateral carrying, occasional pushing, occasional pulling, bending, squatting, kneeling repetitively, walking, stair climbing, and standing. It was suggested that petitioner's job required unilateral carrying of 15 pounds and bilateral carrying with lifting of 30 pounds. It was also suggested petitioner had occasional stair climbing requirements, frequent bending and squatting requirements, occasional repetitive kneeling requirements, and frequent walking requirements.

Petitioner was questioned about the FCE at hearing. She initially testified that she received a phone call from Team Rehabilitation; was told that she was recommended for an FCE and that she needed to do it; but they did not tell her who recommended the FCE. (T. p. 39). Petitioner then

testified that she asked who recommended the FCE, but Team Rehabilitation was not aware of that. (T. p. 40). Then, after being further confronted about who had recommended the FCE, petitioner wanted to "re-answer" her question. (T. p. 41). She then testified that she did not ask who recommended the FCE. (T. p. 41).

On July 14, 2023, Dr. Branovacki then suggested petitioner had nerve damage and possible synovitis. However, examination was noted to reveal no change with no new problems or positive findings. (P. Ex. 3, p. 72-74). Recommendations included follow up with the pain clinic and hyaluronic acid shots/viscosupplementation for her knee. Petitioner was to remain off work.

On July 18, 2023, Dr. Kondelis noted Dr. Branovacki recommended a lubricant injection. Dr. Kondelis recommended starting pregabalin and recommended a lumbar sympathetic nerve block. He noted that he would not do a lubricant injection. Petitioner was to schedule a lumbar sympathetic nerve block. (P. Ex. 4, p. 10-13).

Petitioner then presented to Dr. Kondelis on July 28, 2023 via Telehealth with audio only. (Id. p. 14-16). Petitioner indicated that she was able to obtain pregabalin yesterday, but only 60 tabs not 90. She was to pick up the medication and trial as directed. At this point, petitioner indicated that she was apprehensive about a scheduled lumbar sympathetic nerve block with sedation on August 16, 2023 due to concerns about receiving injection and inability to attend the procedure due to her child's school schedule. The recommendations included pregabalin with the lumbar sympathetic nerve block.

Petitioner then presented to Dr. Kondelis on August 4, 2023, again via Telehealth with audio only. (Id. p. 17-24). Petitioner reported taking Pregabalin with side effects and noted no change in symptoms. Petitioner again expressed concerns about the ability to undergo an injection on August 16, 2023 due to her children's school schedule. Pregabalin was discontinued, and petitioner was prescribed Duloxetine HCL with ongoing recommendations for a lumbar sympathetic nerve block, which the doctor indicated he would try to schedule.

Petitioner testified that Dr. Kondelis did schedule a lumbar sympathetic block, but in contrast to the July 28, 2023 and August 4, 2023 medical records, denied that she chose not to undergo it. (T. p. 36-37). Petitioner testified that Dr. Kondelis informed her that the injection was not approved, so it was rescheduled. (T. p. 37). When confronted with the July 28, 2023 medical record of Dr. Kondelis outlining apprehension due to concerns about receiving the injection, petitioner then conceded she was apprehensive about undergoing the injection and suggested she wanted more information on it. (T. p. 38).

On August 11, 2023, petitioner then received a viscosupplementation injection. (P. Ex. 3, p. 75-78). During follow up with Dr. Branovacki on September 22, 2023, petitioner reported that the viscosupplementation injection did not help at all and actually made her worse for the first few days. (Id. p. 79). She reported that she went to a hot tub at the gym, and the hot water jets helped her knee somewhat. She reported seeing a pain management specialist who had tried a block for her, but it did not help. Impression included right knee pain after blunt trauma injury from 2 years ago with likely RSD nerve damage type symptoms. It was noted petitioner had difficult flexing the knee due to pain but had no structural damage based on imaging studies or prior knee

arthroscopic surgery. Examination again revealed no swelling, ecchymosis, or deformity. There was no evidence of crepitus, effusion, or tenderness. Strength testifying was 5/5. Sensations were intact. All special tests were negative. (Id. p. 80). Recommendations included trying to get another pain clinic injection and returning for follow-up in 2 months at which time petitioner may be at maximum medical improvement.

Contrary to Dr. Branovacki's September 22, 2023 record, petitioner testified that she had never received a block from the pain management specialist. (T. p. 28).

On October 6, 2023, petitioner then again presented to Dr. Kondelis via Telehealth. (P. Ex. 4, p. 26-30). At hearing, respondent objected to the introduction of this record, as Dr. Kondelis elaborated on CRPS and neuropathic pain; elaborated on his opinions regarding the necessity of additional treatment; for the first time commented on an FCE report from June 2023; commented on whether petitioner could perform the physical demands of her job; cited to ODG Guidelines; and recounted petitioner's prior treatment and IME opinions. The Arbitrator sustains respondent's objection, and all these statements are stricken from the record as they go beyond a treating record.

On October 6, 2023, petitioner reported taking Topiramate titration without benefit. Petitioner was advised to stop Topiramate and start Oxcarvazepine as she did not have any benefits from Topiramate. Petitioner would also proceed with scheduling of the right lumbar synthetic nerve block and also discussed an RBA with the associated procedure.

Petitioner testified that none of the treatment she has received since October 2021 has helped her at all. (T. p. 35).

Petitioner testified to a burning sensation pain that intensified at night, but was still present during the day. (T. p. 14). Petitioner also testified to a temperature change in her knee, sensitivity, and weakness in motion as well as a color change at different times throughout the day. (T. p. 14). Petitioner reported being barely able to walk 30 minutes per day due to her pain. (T. p. 31).

On cross examination, petitioner testified that she was physically not capable of driving, but then conceded that she drives her daughter to school every day and picks her daughter up from school every day. (T. p. 35-36).

Petitioner testified that she sees Dr. Kondelis in person and that all of her appointments with Dr. Kondelis were in person besides her most recent appointment. (T. p. 41-42). The Arbitrator notes that 3 of the 6 medical records of Dr. Kondelis reflect that they were telehealth presentations, with the July 28, 2023 and August 4, 2023 records reflecting that they were "audio only."

**Testimony of Lena Ayala-Martinez**

Respondent presented the testimony of Lena Ayala-Martinez, Director of Student Support Services at Brookwood School District 167. (T. p. 47). Ms. Martinez testified that paraprofessionals help students with any kind of modifications with work in the classroom under the direction of the special education and general education teacher. (T. p. 48). She testified that that would include helping break down specific information for students into smaller chunks so

they could understand the work they were doing. (T. p. 49). She testified petitioner also performed bus supervision, lunch supervision, and hallway supervision, which included making sure that children were seated in the bus and taking attendance prior to getting on the bus. (T. p. 48). She testified that during lunch supervision, job duties would include making sure children were seated in the lunchroom, assisting with opening lunch boxes, throwing out lunch, and providing oversight of all students in the lunchroom. (T. p. 50). During hallway supervision, paraprofessionals would make sure students get to their next class on time. (T. p. 50). Ms. Martinez testified that hallway supervision would run anywhere between two and five minutes; lunchroom supervision lasting anywhere from 20 minutes to half an hour; and bus supervision lasting from 20 to 40 minutes of the day. (T. p. 51).

Petitioner testified that her job duties at the beginning of the school year required her to lift various boxes and books, which required her to squat. (T. p. 42-43). In contrast, Ms. Martinez testified that petitioner would not be required to lift as part of her job. She testified that petitioner would not be required to go up and down any ladders, perform any squatting, or perform any kneeling. She testified that while the building where petitioner worked did have stairs, petitioner would have been able to utilize an elevator. (T. p. 51-52).

With respect to a job description introduced at hearing (R. Ex. 6), Ms. Martinez testified that individuals would not necessarily perform all the job duties listed. It would just depend on the needs of the students at the time. (T. p. 53-54). She further testified that petitioner would not have been required to perform job duties listed in number 4 of the description, as the District did not have any students enrolled that had any kind of physical limitations. (T. p. 54). She also testified that providing physical support to students would include hand over hand assistance, such as with writing and guidance using their hands, but petitioner similarly would not have been required to perform that aspect of the job. (T. p. 54-55). She testified that additional job duties that may be assigned by the principal and/or superintendent might have included office duties such as taking phone calls. (T. p. 56). Ms. Martinez testified that any cleaning duties would have been limited to cleaning a pencil or tabletop. (T. p. 57-58). She testified that custodians were responsible for cleaning any floors. (T. p. 60).

**Findings of Facts and Conclusions of Law:**

**In support of the Arbitrator's Decision relating to causation ("F"), the Arbitrator finds the following facts and makes the following conclusions of law:**

The Arbitrator finds that petitioner sustained a right knee contusion for which she has reached maximum medical improvement. The Arbitrator further finds that petitioner has failed to establish a diagnosis of CRPS or any additional conditions of ill-being related to her work accident.

In reaching such conclusion, the Arbitrator relies upon the opinions of Dr. Cole and Dr. Noren, which he finds more credible than the opinions of Dr. Branovacki and Dr. Kondelis.

Both Dr. Cole and Dr. Noren credibly document that petitioner's examinations and objective findings fail to corroborate her subjective complaints.

Dr. Cole specifically documented that petitioner presented ligamentously stable; neurovascularly intact; and had 5/5 strength. Dr. Cole documented that petitioner had no hair pattern change; no color change; no trophic changes; no hypersensitivity; and no temperature difference in her right lower extremity. Dr. Cole outlined the petitioner's MRIs of the right knee showed soft tissue fluid consistent with a contusion, but no other traumatic findings or structural changes. Dr. Cole did not see any avenue for further intervention from an orthopedic and surgical standpoint for the right knee and found petitioner orthopedically safe to return to work at a job with limited squatting, kneeling, and climbing.

Similarly, Dr. Noren found no objective findings of complex regional pain syndrome on examination. He provided ten photographs to support no objective findings of a neuropathic pain syndrome. He further outlined that petitioner does not have allodynia or hyperalgesia on examination or subjective complaints consistent with CRPS or neuropathic pain. Dr. Noren opined that petitioner had reached MMI and could return to her pre-accident job.

Although Dr. Cole discussed a referral to a pain management physician, he further noted that he could not address what might or could be necessary from a pain management standpoint. Dr. Noren then credibly outlined that other than Dr. Kondelis suggesting petitioner meets the historical diagnosis of CRPS, there was in fact is no other history recorded over multiple visits with Dr. Luke, Dr. Branovacki, or multiple evaluations with Dr. Cole. Dr. Noren also outlined that his examination of petitioner did not support a finding of CRPS. To the contrary, he documented that petitioner would repeatedly scratch the medial aspect of her knee during the examination consistent with the absence of allodynia. Dr. Noren also documented that both of petitioner's legs were shaved, again consistent with the absence of allodynia.

The Arbitrator also notes that the records of Dr. Luke and Dr. Branovacki do not corroborate a diagnosis of CRPS. The Arbitrator further notes that Dr. Kondelis himself does not delineate what specific findings he suggests petitioner had, and rather lists the criteria for CRPS and includes "and/or" throughout his records, based on petitioner's "reports," which as discussed below, the Arbitrator finds not credible.

In further support of the Arbitrator's conclusion, the Arbitrator relies upon that fact that petitioner's own treating physical, Dr. Luke also indicated that petitioner's level of pain and disability was in excess of what would be expected given her injury. He similarly did not find any orthopedic cause for petitioner's pain and disability.

Petitioner's operative report also outlines that petitioner's knee joint looked normal except for three to four loose cartilage fragments, but otherwise, there was no chondral damage; no meniscus tears; no synovitis; very small plica bland; and no meniscus pathology. On October 7, 2022, Dr. Branovacki further outlined that surgery found petitioner's knee essentially normal.

In support of the Arbitrator's conclusion, the Arbitrator also relies upon petitioner's lack of credibility at hearing, particularly in light of reports of symptom magnification and malingering from Dr. Noren and Dr. Cole.

Specifically, petitioner testified that on the date of accident she experienced "excruciating" pain that then worsened the following day; which again worsened after seeing Dr. Branovacki. Petitioner further testified that after receiving an injection on April 8th, it made her symptoms increasingly worse. (T. p. 20). Petitioner further testified that as of June 24, 2022, she was even worse. (T. p. 21). Petitioner then testified that when she saw Dr. Kondelis on February 28, 2023, she was even worse. (T. p. 23). Petitioner then testified that her symptoms had "drastically gotten worse over the past two years." (T. p. 30). She then testified that her burning was now "excessive" compared to before. (T. p. 30). If petitioner's pain was initially excruciating, and progressively worsened as testified to by petitioner, the Arbitrator is hard pressed to find any word that would define the level of and progression of her symptoms.

Petitioner also testified that she was physically not capable of driving, but then conceded that she drives her daughter to school every day and picks her daughter up from school every day. (T. p. 35-36). Petitioner also reported to Dr. Noren that she drove to his examination herself.

Petitioner also testified that she has her groceries delivered. (T. p. 36). In contrast, when presenting to Dr. Noren, reported that her activities included driving for grocery shopping.

Petitioner also initially denied that she chose to not undergo a lumbar sympathetic block scheduled by Dr. Kondelis. However, when confronted with the July 28, 2023 medical record of Dr. Kondelis, petitioner then testified that she was apprehensive about undergoing the injection and suggested she wanted more information on it.

Petitioner also testified that she sees Dr. Kondelis in person, and that all of her appointments with Dr. Kondelis were in person besides her most recent appointment. (T. p. 41-42). This testimony is directly contradicted by petitioner's medical records introduced at hearing, which reflect that 3 of the 6 presentations Dr. Kondelis were telehealth presentations, with the July 28, 2023 and August 4, 2023 records reflecting that they were "audio only."

Petitioner's lack of credibility is also demonstrated by the fact that she put forth consistent effort throughout only 84.6% of her FCE, and only presented reliable pain ratings of 77.8%.

Petitioner's testimony with respect to the time frame as to when she was terminated and sought medical care was also not true.

The Arbitrator concludes that petitioner's work-related diagnosis is limited to a right knee contusion.

**In support of the Arbitrator's Decision relating to whether respondent has paid all appropriate charges for all reasonable and necessary medical services ("J"), the Arbitrator finds the following facts and makes the following conclusions of law:**

The Arbitrator incorporates the findings of fact and conclusions of law from "F" above and reiterates that petitioner's work-related diagnosis is limited to a right knee contusion. As such, the Arbitrator denies liability for medical expenses submitted as petitioner's Exhibit 8.

In further support of the Arbitrator's denial of liability for medical bills, the Arbitrator also finds the opinions of Dr. Branovacki about the necessity of additional orthopedic treatment lacking in credibility. On January 6, 2023, after petitioner failed to report any improvement post-surgery, Dr. Branovacki indicated that if nerve blocks failed, there was no option other than MMI. However, he then later contradicted his prior statements, suggesting that petitioner needed viscosupplementation injections. Notwithstanding the opinions of Dr. Cole indicating that no further orthopedic treatment was necessary, petitioner's own pain management physician, Dr. Kondelis, also indicated that he would not do a lubricant injection. Furthermore, the Arbitrator notes that the treatment provided petitioner no benefits whatsoever. As such, liability for bills associated with Dr. Branovacki for treatment after December 9, 2022 is denied.

With respect to the FCE petitioner underwent on June 21, 2023, respondent objected to the introduction of record at trial. The arbitrator overruled that objection. However, in further denying liability for the medical bill associated with that FCE, the arbitrator notes that medical records reflect that no treating physician ever recommended the study. As such, there is no basis to find the study was reasonable or medically necessary, and therefore liability is denied.

Petitioner offered medical bills related to treatment at Ingalls Memorial Hospital on October 19, 2021, October 21, 2021, and October 26, 2021. The arbitrator notes that each bill reflects an outstanding balance of $0.00. Nonetheless, corresponding records were not offered into evidence. As such, notwithstanding an outstanding balance of $0.00, the Arbitrator is unable to address causation and the reasonableness and necessity of these bills. Therefore, respondent's liability for the corresponding bills is denied.

Petitioner also submitted medical bills for treatment prior to October 18, 2021 (P. Ex. 1, p. 14-15). Liability for any bills prior to petitioner's alleged work accident is denied.

As petitioner failed to establish the medical necessity of returning to her primary care physician on February 22, 2022, liability for that bill is denied as well.

**In support of the Arbitrator's Decision relating to prospective medical treatment ("K"), the Arbitrator finds the following facts and makes the following conclusions of law:**

The Arbitrator incorporates the findings of fact and conclusions of law from "F" and "J" above and reiterates that petitioner's work-related diagnosis is limited to a right knee contusion for which she has reached maximum medical improvement. As such, the Arbitrator denies liability for prospective medical care being sought by petitioner.

In further support of the denial of liability for prospective medical care, petitioner's own testimony and the medical records reflect that petitioner has received no benefit from any medical care to date. As such, the Arbitrator cannot continue to impose liability on respondent for further treatment given a lack of any foreseeable benefit.

The Arbitrator also specifically denies liability for a Triad 3LT low light therapy device and SamPro 2.0 as being neither reasonable nor medically necessary. In further support of that denial, the Arbitrator relies upon the opinions of Dr. Noren, who found no evidence of any current soft tissue injury for which those devices would be utilized. Furthermore, Dr. Noren outlined that there is no evidence for use of those devices for CRPS, which again, the Arbitrator finds petitioner does not have. Dr. Noren also outlined that physical therapy has included similar types of modality treatments that petitioner had undergone, which provided no benefit.

In further support of the Arbitrator's reliance on the opinions of Dr. Noren and Dr. Cole, the Arbitrator notes that petitioner's course of medical care played out directly as predicted by Dr. Cole.

The arbitrator also finds that any opinions from Dr. Branovacki regarding the necessity of additional medical care lacking credibility, as petitioner herself testified to errors in his records regarding the treatment she had undertaken through September 22, 2023.

**In support of the Arbitrator's Decision relating to TTD ("L"), the Arbitrator finds the following facts and makes the following conclusions of law:**

The Arbitrator incorporates the findings of fact and conclusions of law from "F," "J," and "K" above and reiterates that petitioner's work-related diagnosis is limited to a right knee contusion for which she has reached maximum medical improvement. As such, the arbitrator denies liability for any TTD benefits after April 5, 2023.

In reaching that conclusion, the Arbitrator further relies upon the opinions of Dr. Cole and Dr. Noren regarding petitioner's return to work capabilities, in conjunction petitioner's pre-accident job description and the testimony of Lena Ayala-Martinez. In sum, the opinions of Dr. Cole and Dr. Noren reflect that petitioner would be capable of returning to her pre-accident job as reflected in the job description and testified to by Ms. Ayala-Martinez.

The Arbitrator also provides no weight to petitioner's June 21, 2023 FCE, as petitioner's job title and job duties outlined in that report are not consistent with the evidence presented at hearing.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 11WC045764 |
| Case Name | Jeff Hyser v.<br>Cassens Transport Company |
| Consolidated Cases | |
| Proceeding Type | Petition for Review<br>Remand Arbitration |
| Decision Type | Commission Decision |
| Commission Decision Number | 24IWCC0590 |
| Number of Pages of Decision | 36 |
| Decision Issued By | Marc Parker, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Mitchell Horwitz |
| Respondent Attorney | Matthew Terry |

DATE FILED: 12/10/2024

/s/Marc Parker,Commissioner

Signature

STATE OF ILLINOIS )
) SS.
COUNTY OF WILL )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jeff Hyser,

Petitioner,

vs. NO: 11 WC 45764

Cassens Transportation Company,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, temporary total disability, permanency, whether Respondent was entitled to a credit for maintenance benefits paid to Petitioner because he failed to cooperate with vocational rehabilitation, whether Respondent should undergo additional vocational rehabilitation, causation for Petitioner's SI joint disorder, medical expenses related to his SI joint treatment, and prospective medical treatment and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Arbitrator determined the Petitioner failed to prove he had SI joint dysfunction/pathology and, therefore, causation of the condition to the work accident was moot. The Commission views the evidence differently and concludes that Petitioner did sustain injury to his SI joint, which is causally related to the February 15, 2010 work accident.

RELEVANT FACTS

This case was previously tried as a 19b on July 13, 2012. The Arbitrator found Petitioner sustained an accident that arose out of and in the course of his employment, and that his lumbar spine condition was causally related to the work accident. The Arbitrator awarded prospective medical for Petitioner's lumbar spine.

On February 4, 2013, Petitioner underwent an L3/4, L4/5, and L5/S1 posterior spinal fusion and decompression, with removal of previously implanted hardware. (PX2 at 749). By July 2, 2013, SI joint tenderness was noted on physical exam with Dr. McNally, along with positive Faber's, Gaenslen's, and Forth signs. Dr. Kelley administered bilateral SI joint injections on July 29, 2013, which provided pain relief for two weeks. (PX4 at 861-864). On September 17, 2013, Dr. McNally diagnosed Petitioner with sacroiliac joint dysfunction, and recommended a possible SI joint fusion.

Petitioner attended pain management with Dr. Alzoobi, who recommended an SI fusion on one side to address SI joint dysfunction. (PX4 at 86). Petitioner also attended pain management with Dr. Patel, who administered a left sided SI joint injection on September 17, 2015. (PX6 at 933). Petitioner sustained significant pain relief for nine days following the injection. Dr. Patel believed the SI joint injection was diagnostic given Petitioner's response. (PX6 at 950).

Petitioner attended physical therapy for chronic SI joint pain, failed back syndrome, and lumbar pain. (PX11). Petitioner continued to treat with Dr. Alzoobi, who consistently noted positive SI joint testing. Petitioner returned to Dr. McNally on May 8, 2018, who continued to recommend a possible fusion at L2/3 and SI joint fusion. Petitioner presented to Dr. Frank Marden in May 2018 with positive SI findings, including Gaenslen's test and SI joint pain. In 2019, Petitioner began pain management with Dr. Novoseletsky, who diagnosed Petitioner with a sacroiliac disorder, along with other conditions. Dr. Novoseletsky noted SI joint pain, ongoing tenderness, and positive exam findings for SI joint pain throughout his treatment. On April 13, 2021, Dr. Novoseletsky performed bilateral SI joint injections. Petitioner reported an 80% improvement in pain for three days. (PX12 at 1295).

Petitioner continued treatment with Dr. Novoseletsky and Dr. McNally. Dr. McNally ordered and reviewed an MRI from August 19, 2021, where he noted significant L2/3 stenosis. On May 17, 2022, Dr. McNally continued to recommend possible surgery at L2/3 and SI joint fusion. (PX3 at 841; PX2 at 209; 199).

Dr. McNally testified Petitioner's SI joint degeneration was causally related to the work accident. According to Dr. McNally, SI joint degeneration may occur in post-fusion patients from the change in forces transmitted from the spine to the SI joint. (PX19 at 1417). Dr. McNally also appreciated continued degeneration in Petitioner's SI joints when comparing his 2012 and 2014 CT scan. Dr. McNally further believed Petitioner' SI joints were one of his pain generators because

he had almost complete relief from the SI joint injections. Petitioner also had a positive EMG that correlated with his right sided leg complaints.

Respondent's Section 12 examiner, Dr. Lanoff, testified Petitioner had no evidence of SI joint pathology. He had no positive objective testing, no positive findings on CT or MRI, and his short-term response from the cortisone injection was not diagnostic. Petitioner had no significant findings on physical exam, had diffuse pain complaints, had positive Waddell signs, underlying psychosocial issues, and significant substance abuse issues. Dr. Lanoff disagreed with various providers who recorded positive SI joint testing because they were incorrectly recorded. (RX5 at 2395). He testified the only way to use diagnostic injections to determine SI joint pathology was to administer three injections: one with a placebo, one with a short acting anesthetic, and one with a long-lasting corticosteroid. (RX5 at 2357). Dr. Lanoff agreed Petitioner's EMG was abnormal but disagreed with Dr. McNally the EMG showed active pathology. (RX5 at 2388-2391). Dr. Lanoff confirmed he had not reviewed the 2014 CT scan. He testified if the CT showed degeneration and Petitioner had positive diagnostic injections, it may alter his opinion on whether Petitioner had SI joint dysfunction. (RX5 at 2403-2404).

At trial, Petitioner testified he continued to have pain in his low back down into his hips.

**ANALYSIS**

I. Causation- SI Joint

To recover compensation under the Act, an employee must prove by a preponderance of the evidence all elements of his claim, including a causal connection between the injury and his employment. *Boyd Electric v. Dee*, 356 Ill. App. 3d 851, 860, 826 N.E.2d 493, 292 Ill. Dec. 352 (2005). An occupational activity 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, 797 N.E.2d 665, 278 Ill. Dec. 70.

The Arbitrator found Petitioner did not have SI joint pathology based on the opinions of Dr. Lanoff, Dr. Patel, and Dr. Singh. The Commission views the evidence differently and finds more persuasive the causation opinion of Dr. McNally and the multiple treating providers who diagnosed Petitioner with SI joint dysfunction.

Dr. McNally testified, and his records support, that Petitioner began exhibiting SI joint pain and positive exam findings a few months after his multilevel fusion procedure in February 2013. By July 2013, Petitioner had bilateral SI joint injections. By October 2013, Dr. McNally was recommending a possible SI joint fusion. Petitioner continued to have SI joint symptoms and Dr. McNally continued to recommend an SI joint fusion through 2022. Dr. McNally testified Petitioner had SI joint dysfunction causally related to the work accident. According to McNally, it is fairly accepted in the medical community for SI joint dysfunction to arise after a multilevel lumbar fusion due to the change in forces transmitted across the spine to the pelvis. In support of his causation

opinion, Dr. McNally testified Petitioner had clear degeneration of his SI joint from his February 23, 2012, CT to his April 29, 2014, CT scan; he had significant pain relief following his diagnostic injections; and he had positive EMG results that correlated with his right sided complaints.

In addition to Dr. McNally's opinion, the Commission relies on the medical records of Petitioner's treating providers, including Dr. Patel, Dr. Alzooby, Dr. Novoseletsky, Dr. Marden, and the providers at Marionjoy Rehabilitation Clinic, all who recorded positive SI exam findings and diagnosed Petitioner with SI joint dysfunction or sacroiliac disorders from 2013-2022. Dr. Kelley, Dr. Patel, and Dr. Novoseletsky administered SI joint injections over the course of several years, all of which provided temporary but significant pain relief. Contrary to the Arbitrator's express finding, in Dr. Patel's post injection medical record dated January 4, 2016, he wrote "I do feel the SI joint injection was diagnostic given he had significant relief for 9 days." (PX6 at 950).

While the Arbitrator gave significant weight to Dr. Lanoff's opinion, the Commission finds that weight misplaced. Dr. McNally is board-certified in orthopedic surgery while Dr. Lanoff is board certified in physiatry/pain management and performs non operative treatment. On direct examination, Dr Lanoff testified Petitioner had no radiological evidence of SI pathology; however, when presented with Dr. McNally's 2012 to 2014 CT comparisons during cross examination, Dr. Lanoff confirmed he had not reviewed the films. He further testified his opinions may change if there was evidence of degeneration on imaging. Additionally, Dr. Lanoff dismissed years of positive exam findings and SI diagnoses from several treating providers; his explanation being every other provider failed to test correctly. He also disagreed with Dr. McNally and Dr. Patel's opinion Petitioner's SI injections were diagnostic for SI joint pain. He testified one injection was "pointless/non-diagnostic," and Petitioner should undergo a series of three injections to properly diagnose SI joint pain. Dr. Lanoff did not cite any authority or medical studies to support his testimony. According to Dr. McNally, doctors use "diagnostic injections all the time." The Commission agrees with Dr. McNally's conclusion that Petitioner's positive responses after multiple injections were indicative of SI joint pathology.

In conclusion, Petitioner developed SI joint pain shortly after his multi-level lumbar fusion in 2013. Multiple treating doctors diagnosed Petitioner with bilateral SI joint dysfunction. Petitioner underwent conservative treatment for his SI joint pain over the course of several years. Petitioner sustained significant pain relief following multiple SI joint injections. Petitioner had radiological evidence of SI degeneration when comparing his 2012 to 2014 CT scan. Petitioner continued to treat his SI joint pathology through 2022. At trial, Petitioner continued to have significant low back pain down into his hips and functional impairments. Accordingly, the Commission finds Petitioner has SI joint pathology causally related to the work accident.

II. Medical Expenses

Under the Act, the employer is liable for all medical care that is causally related to the injury, that resulted in the claim that is required to diagnose, relieve, or cure the effects of the injury. *Palmer House v. Industrial Comm'n*, 200 Ill. App. 3d 558, 558 N.E.2d 285 (1st Dist. 1990).

Consistent with the foregoing causation analysis, the Commission further modifies the decision of the Arbitrator by awarding additional medical expenses pursuant to Sections 8(a) and 8.2 of the Act totaling $14,968.00 for bilateral SI injections administered by Dr. Novoseletsky, enumerated in Petitioner's Exhibit 28.

Finally, should Petitioner seek treatment for the conditions of ill-being found causally related to his work-related accident, such request is properly made before the Commission under Section 8(a) of the Act as Petitioner's medical rights remain open following the Arbitrator's decision on permanency which the Commission has affirmed.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 10, 2023, is modified as stated herein.

IT IF FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical expenses to Dr. Novoseletsky, pursuant to Sections 8(a) and 8.2 of the Act, for bilateral SI injections totaling $14,968.00, as enumerated in Petitioner's Exhibit 28, and otherwise affirms the Arbitrator's award of all reasonable and necessary medical expenses pursuant to Section 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner permanent and total disability benefits of $1,226.38 per week for life, commencing March 6, 2021, 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 for the Rate Adjustment Fund, as provided in Section 8(g) of the Act.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

**December 10, 2024**

/s/ *Marc Parker*
Marc Parker

MP:ns
o 10/24/24
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/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

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

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 11WC045764 |
| Case Name | Jeff Hyser v. Cassens Transport Company |
| Consolidated Cases | |
| Proceeding Type | |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 29 |
| Decision Issued By | Paul Cellini, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Mitchell Horwitz |
| Respondent Attorney | Matthew Terry |

DATE FILED: 4/10/2023

**THE INTEREST RATE FOR THE WEEK OF APRIL 4, 2023 4.70%**

/s/ Paul Cellini, Arbitrator

Signature

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

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

**ILLINOIS WORKERS' COMPENSATION COMMISSION**
**ARBITRATION DECISION**

**JEFF HYSER**
Employee/Petitioner
v.
**CASSENS TRANSPORTATION CO.**
Employer/Respondent

Case # **11** WC **45764**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Cellini**, Arbitrator of the Commission, in the city of **Joliet**, on **December 16, 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. ☒ Is Petitioner entitled to any prospective medical care?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Vocational Rehabilitation; Evidentiary Issues**

**FINDINGS**

On **February 15, 2010**, 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 lumbar spine condition of ill-being ***is*** causally related to the accident; Petitioner has failed to prove that any sacroiliac joint pathology exists at this time.

In the year preceding the injury, Petitioner earned $**95,657.64**; the average weekly wage was $**1,839.57**.

On the date of accident, Petitioner was **46** years of age, ***married*** with **1** dependent child.

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

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

Respondent shall be given a credit of $**821,148.99** for TTD and/or maintenance benefits, $**0** for TPD, and $**0** for other benefits.

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

**ORDER**

The Arbitrator finds that the Petitioner has shown by the preponderance of the evidence that his lumbar condition of ill-being remains causally related to the February 15, 2010 accident. The Arbitrator further finds that the

Respondent shall pay Petitioner temporary total disability benefits of **$1,226.38 per week** for **451 weeks**, commencing **February 16, 2010 through October 10, 2018**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner maintenance benefits **of $1,226.38 per week** for **125-1/7 weeks**, commencing **October 11, 2018 through March 5, 2021**, as provided in Section 8(a) of the Act.

Respondent shall be given a credit of **$821,148.99** for temporary total disability, maintenance and/or permanent disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services of **$23,622.90**, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay reasonable and necessary vocational rehabilitation expenses of **$3,333.43**, as provided in Section 8(a) of the Act.

Respondent shall be given credit for any awarded medical and/or vocational expenses that have been paid by Respondent prior to the hearing, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner permanent and total disability benefits of $**1,226.38** per week for life, commencing **March 6, 2021**, 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.

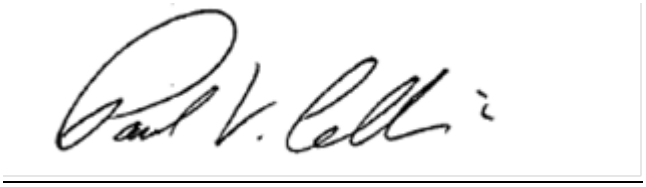
Further vocational rehabilitation benefits are denied.

No specific prospective medical treatment is awarded.

Respondent shall pay Petitioner compensation that has accrued from **February 15, 2010** through **December 16, 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.



Signature of Arbitrator

APRIL 10, 2023

## STATEMENT OF FACTS

This matter was previously heard on 7/13/12 by Arbitrator Dollison pursuant to Sections 19(b)/8(a) of the Act and a decision was issued on 10/11/12. Arbitrator Dollison found that Petitioner sustained an accident which arose out of and in the course of his employment on 2/15/10 and that Petitioner's current lumbar condition of ill-being was causally related to the accident. Arbitrator Dollison awarded TTD benefits through the hearing date, past medical bills, penalties and fees, and prospective medical care consisting of a multi-level lumbar fusion from the L3 to S1 levels. Petitioner had previously undergone a posterior lumbar interbody fusion at L5/S1 on 6/15/10. (Px1).

On 2/4/13, Petitioner underwent surgery with Dr. McNally consisting of decompression and posterior fusion from L3 to S1, including removal of the previously implanted hardware. (Px2). Following surgery, Petitioner testified he was in the ICU for 4 days before spending 3 weeks in a nursing home (St. Anne's). Leading up to the surgery, Petitioner was in pain management services with Dr. Alzoobi, including medication management and discussion of a spinal cord stimulator for failed back syndrome, and this treatment continued post-surgery. On 7/29/13, Dr. Alzoobi performed bilateral sacroiliac ("SI") joint injections, diagnosing post-laminectomy low back pain and bilateral sacroiliitis. (Px4).

On 8/6/13, Dr. McNally believed Petitioner was doing remarkably well overall considering the significant revision surgery but was complaining of SI joint pain. Given the duration and severity of symptoms, Dr. McNally believed he would likely need lifelong pain management and possible further surgery in the future. He also opined that Petitioner was not likely to return to unrestricted work. Work conditioning and, depending on his response, a functional capacity evaluation (FCE) was recommended to determine permanent work restrictions. (Px2).

Petitioner testified that he had about six or seven months of improvement with the surgery but reinjured himself while undergoing physical therapy. On 9/16/13, Dr. Alzoobi noted ongoing pain over the SI joints bilaterally and that Petitioner remained off work. (Px4). On 9/17/13, Petitioner advised Dr. McNally that the SI injections provided no relief until 9 days later, but then lasted for 4 weeks before he started to feel pain again to the SI joints, mostly on the right, which started when lifting a 45 pound basket from the floor to his waist in physical therapy. (Px2). On 10/7/13 and 12/9/13, Dr. Alzoobi continued to note positive provocative testing on exam. (Px4).

On 1/17/14, Petitioner was evaluated by orthopedic surgeon Dr. Singh (Midwest Orthopaedics at Rush) at Respondent's request pursuant to Section 12 of the Act. Dr. Singh recommended lumbar CT scan and MRI before proceeding with further intervention of the SI joint. Dr. Singh stated Petitioner could work in a light duty capacity of lifting no more than 10 pounds, pulling/pushing no more than 10 pounds, and minimal bending, kneeling, stooping, or squatting. (Rx3). The Arbitrator notes that Arbitrator Dollison in his decision specifically took issue with some of the findings and conclusions of Dr. Singh at previous exams.

On 3/4/14, Dr. Alzooby indicated that Petitioner had positive straight leg testing with mixed picture of severe sacroiliac joint pain and that all provocative testing of SI joint on the right side mainly and to some extent the left side as well was positive for severe discomfort. On 4/1/14, Dr. Alzoobi noted provocative testing was positive for SI joint mainly right sided with minimal radicular symptoms. Straight leg raise was still positive on both sides. (Px4).

On 7/29/14, Dr. Singh reviewed the lumbar CT and MRI films and authored an addendum report, opining that Petitioner appeared to have a solid fusion from L3 to S1. He opined that Petitioner's fusion was solid and did not believe there was any SI joint pathology based on the radiographic studies and examination. Dr. Singh recommended an FCE and a work conditioning program for two to four weeks to determine Petitioner's level of functioning. He opined Petitioner could work light duty with less than 10 pounds lifting, less than 10 pounds pulling/pushing, and minimal bending, kneeling, stooping, or squatting. (Rx3).

On 12/18/14, Petitioner had a spinal cord stimulator implanted for failed back syndrome. On 12/23/14, Dr. Alzoobi noted that Petitioner had more than 60% to 70% pain reduction when moving around following the implantation of the trial spinal cord stimulator. On 2/12/15, Petitioner underwent implantation of a permanent spinal cord stimulator. (Px4). He testified that while this implantation helped, it didn't help as much as the 12/18/14 trial implantation had.

On 2/16/15, Petitioner was examined by orthopedic surgeon Dr. Ghanayem at Respondent's request. His exam found that Petitioner was neurologically intact. His review of Petitioner's radiographic studies indicated Petitioner's fusion from L3 to the sacrum was solid and healed but that there was some lucency at the L3 screws. He opined that Petitioner would never be able to return to his job as a car hauler for Respondent, and that a return to the light physical demand level would be reasonable, though an FCE after he healed from his spinal cord stimulator placement would also be reasonable to determine restrictions in greater detail. From a spine surgery standpoint, Dr. Ghanayem believed Petitioner was at maximum medical improvement ("MMI"). (Rx4).

Petitioner returned to Dr. McNally on 6/16/15. He advised Petitioner to hold off on an FCE, noting he wanted to review Dr. Ghanayem's report, and referred Petitioner to Dr. Marden for a left SI injection. (Px2). On 9/17/15, Dr. Patel administered the left SI joint injection. At a 10/15/15 follow up, Petitioner reported 100% improvement following the injection which lasted about 10 days. (Px6). Petitioner testified he had relief for approximately 13 days.

On 10/14/15, Petitioner was examined by physiatrist Dr. Lanoff pursuant to Section 12. Petitioner complained of mostly low back pain, mainly on the left where he received an SI joint injection, as well as right leg pain (and numbness with sitting), which Dr. Lanoff opined was in a non-dermatomal distribution. Dr. Lanoff indicates: "He states the spinal cord stimulator gave him 20% improvement at most and he states that is probably inflated." Dr. Lanoff noted Petitioner had a prior cervical fusion in 2007. Following examination and review of medical records, Dr. Lanoff opined that Petitioner did not have an SI joint pathology which supported his continued symptomatology. He noted that Petitioner reported multiple pain complaints, that none of the surgeries helped him much at all, and the only thing that really helped was the SI injection with 80% improvement for 9 days (the doctor stated: "This, of course, is far from diagnostic and is certainly not evidence based in the least."). He believed Petitioner needed immediate help with substance abuse, given he was taking six tablets of Norco and drinking between 12 and 18 beers per day. He further opined that Petitioner had reached MMI and had a permanent lifting restriction up to 50 pounds, based solely on the spinal structure post-3 level fusion. He recommended cessation of all pain management, especially SI joint injections, pending the performance of appropriate diagnostic studies. (Rx5).

On 11/24/15, Dr. McNally reexamined Petitioner. Diagnosing the development of multifactorial chronic pain syndrome, he referred Petitioner to Marianjoy Rehabilitation Center for pain management. He also opined that Petitioner was a candidate for left SI joint fusion based on his positive response to injection, which was expected to be temporary, and noted that Petitioner wanted to undergo this surgery. (Px2).

On 1/14/16, Dr. Patel noted Petitioner complained of 8/10 level pain, and indicated that he did not believe the SI joint injection had been diagnostic given that Petitioner had significant relief for 9 days. At 2/19/16 and 3/10/16 follow ups Petitioner continued to have significant pain and findings with Dr. Patel. On 4/7/16, Dr. Patel agreed Petitioner might be a candidate for a pain rehabilitation program at Marianjoy where he could be weaned off of Norco. (Px6).

On 4/18/16, vocational counselor David Patsavas (Independent Rehab Services) issued an Initial Vocational Assessment Report. He opined that Petitioner was a candidate for vocational rehabilitation services but first needed to obtain his GED before job placement services. (Rx9).

On 5/5/16, Dr. Patel referred Petitioner to a pain psychologist, Dr. Brown, as he believed Petitioner had chronic pain but noted he may have had some issues with alcohol abuse in the past. Petitioner stated that he did not drink alcohol and take Norco at the same time. (Px6). This appears to be in contradiction to his testimony.

On 5/31/16, Independent Rehab Services issued a Labor Market Research Report (LMS). The LMS covered both the medium category, per Dr. Lanoff's opinion, and the sedentary to light categories per the opinions of Dr. Ghanayem and Dr. Singh. Counselor Patsavas believed Petitioner's earning capacity in either of these categories would be approximately $9.00 to $15.00 per hour given his transferrable skills and lack of GED/diploma. (Rx21).

While Petitioner testified he did not recall seeing Dr. Brown, the records in evidence support that he saw him on 7/6/16 for evaluation of Petitioner for medication management. Dr. Brown noted that Petitioner drank alcohol

with Norco for pain management purposes and concluded that Petitioner had a substance abuse disorder. Dr. Brown thought Petitioner should see an addictionologist until it was determined whether he would be having any additional surgery. (Px8).

Petitioner testified he was consuming 8 to 10 beers per day along with hydrocodone and agreed to the inpatient treatment at Marianjoy.

Following an initial 9/7/16 evaluation, Petitioner began comprehensive pain management on 9/17/16 at the Marianjoy Clinic. He testified the treatment was 8 hours per day, 5 days per week. Petitioner reported he was gradually improving with therapy but began to have SI joint pain in October 2013, and examination findings supported SI joint dysfunction. Upon his 11/16/16 discharge, Petitioner was noted to have had improvement in pain levels, sleep, physical function, and coping strategies. He was discharged with several restrictions on his physical function. Petitioner was discharged from Marianjoy with the following physical functions: 1) sitting for 60 minutes without any rests or equipment; 2) standing for 34 minutes with no rests in a 45-minute session; 3) walking 1.25 miles with one rest; 4) lifting from floor to waist 3 pounds for 3 repetitions, lifting from midbody 9.5 pounds for 10 repetitions, and lifting from waist to overhead 9.5 pounds for 10 repetitions; 5) carrying 7 pounds for 600 feet; and, 6) pushing 700 pounds for 600 feet. Dr. Katta noted that Petitioner had significant improvement in pain levels, physical function, and coping strategies. He was advised to continue physical therapy and was provided, at his request, one month of Norco with a need to decrease use or discuss with his primary provider about a local referral. (Px9; Px9a).

On 12/7/16, it appears Petitioner's counsel first advised Respondent's counsel via correspondence that counselor Patsavas had prepared a vocational report and labor market survey. It noted that Petitioner had not yet reached MMI and that any permanent restrictions would be pending completion of the Marianjoy program (Px22; Px21).

Petitioner then underwent therapy at Ortho Illinois from 1/19/17 to 3/7/17 for SI joint pain. While improvement was noted, Petitioner continued to have difficulties and the therapist recommended further therapy. (Px11)

On 3/27/17, Petitioner was reexamined by Dr. Ghanayem. He reported that the trial implantation provided transient relief, but the permanent one did not really help. Dr. Ghanayem believed that Petitioner had residual low back pain, as he did at the February 2015 evaluation, and continued to opine that Petitioner could return to work at the light demand level. (Rx4).

On 4/6/18, Petitioner advised Dr. Alzoobi his low back pain was worse since his spinal cord stimulator (SCS) stopped working over two years prior. Examination continued to be positive for SI joint (Faber, compression, Gaenslen, thigh thrust, etc) pathology. Dr. Alzoobi believed Petitioner would need revision of the leads and replacement of the stimulator. (Px5).

On 5/8/18, Petitioner followed up with Dr. McNally for the first time in almost three years, noting he had not improved in that time and was possibly worse. His treatment at Marianjoy helped mostly "at the moment", though he had learned some techniques to deal with his pain and was off all pain medication. Petitioner reported low back pain which increased with prolonged positions. He denied leg pain and reported the stimulator was providing 20-25% relief ("He has been told the left sided leads have migrated"). Dr. McNally opined that Petitioner was permanently disabled and could not return to work in even a sedentary job due to his work related chronic pain syndrome. While he noted there was no cure for Petitioner's pain, he opined he still might benefit from surgery, specifically referencing that he had "broken down" at the L2/3 level and the SI joint and that surgery might be appropriate at these levels. Dr. McNally recommended Petitioner follow up Dr. Alzooby for SCS management and Dr. Marden for diagnostic SI joint injection. (Px2).

At AMITA Health Medical Group on 5/16/18, Petitioner presented with low back and discussion of a left SI joint injection. Dr. Marden noted he'd had a long history of back pain following a work injury and underwent fusion surgeries, followed by placement of a spinal cord stimulator in 2015. He rated his pain at a 6/10 severity level across the low back/sacral region, left greater than right, stating: "The etiology of the pain is unclear." Petitioner reported his pain was significant with many of his usual activities of daily living, such as prolonged standing or sitting. He had taken Norco for years without significant relief. It was noted that there was not a clear source for his pain based on prior diagnostic testing. Exam noted multiple positive findings on the left. It was noted that Dr. McNally was considering the left SI joint as a potential source for much of Petitioner's pain and that he had been referred for a diagnostic left sacroiliac joint injection, noting if it provided significant relief, he might be an SI joint fusion candidate. However, while Petitioner testified he underwent an SI joint injection at this visit, the report indicates Dr. Marden first wanted a lumbosacral CT scan to assess for any definitive pain generator. If a source was found, it would be discussed with Dr. McNally, and if not, he would proceed with a diagnostic left SI joint injection. (Px10).

Petitioner obtained a medical marijuana card on 6/29/18. (Px25).

On 9/17/18, Respondent authorized vocational rehabilitation with counselor Patsavas for purposes of moving the case forward while preserving the right to challenge the Respondent's liability for payment of such rehabilitation, as counselor Patsavas was chosen unilaterally by Petitioner. (Rx6). On 10/1/18, counselor Patsavas noted Dr. McNally's 5/8/18 determination that Petitioner was permanently disabled due to his work injury, and that he therefore was no longer a candidate for vocational rehabilitation. On 10/16/18, counselor Patsavas noted that the parties reached an agreement in lieu of a scheduled deposition that the restrictions identified in the Marianjoy discharge report, which he opined were "less than sedentary", would be utilized for vocational services. Approval was provided for Patsavas to assist Petitioner in registering for a GED program through Rock Valley Community College. (Rx9). On 2/6/19, Respondent's counsel reiterated that liability for the costs of vocational rehabilitation with Patsavas was being preserved by Respondent. (Rx6).

On 3/12/19, Dr. McNally noted that Dr. Alzooby was leaving his practice, that Respondent would not authorize an SI injection with Dr. Marden, and that he had been prescribed medical marijuana. Dr. McNally reiterated that Petitioner was permanently disabled and referred Petitioner to Dr. Novoseletsky for SCS management as "leads have migrated." Dr. McNally again referenced possible further surgery. (Px2).

On 3/21/19, Petitioner saw Dr. Novoseletsky and reported constant sharp, shooting low back pain that radiated to the bilateral buttocks and right hip with some numbness below the right knee. Later in the report he notes Petitioner continued to have numbness and tingling radiating down both legs to the calves and feet. He was taking oxycodone and nortriptyline. The doctor recommended removal the SCS leads and consideration of different SCS model following an MRI. (Px2).

On 4/18/19, Dr. McNally noted low back pain with no leg pain but right hip pain and numbness to the right shin area. He noted Petitioner wanted a replacement SCS and was advised to follow through with Dr. Novoseletsky's plan. On 7/31/19, Dr. McNally removed the original Medtronic stimulator and leads. Following 9/26/19 thoracic and lumbar MRIs, which reflected worsening throughout the lumbar spine versus 2014 films, Dr. McNally on 10/1/19 recommended SCS replacement with Dr. Novoseletsky, noting Petitioner had completed a psychological evaluation and it had been determined that his pain was not psychological in origin. The Arbitrator did not locate such report in the evidentiary record. On 12/17/19, Petitioner underwent a trial implantation of the new Boston Scientific thoracic spinal cord stimulator with Dr. Novoseletsky. (Px2). Petitioner testified the leads were put in higher in the spine based on assistance from the Boston Scientific

representative. On 12/23/19, Petitioner reported he was doing very well, and his minimum pain relief was 50%, and often better than that. The temporary leads were then removed. (Px2).

On 2/14/20, Respondent agreed to pay for a laptop and keyboard recommended by Mr. Patsavas for Petitioner's vocational rehabilitation. (Px6).

On 3/9/20, Petitioner saw Dr. Pelinkovic on referral from Dr. Novoseletsky for a spine surgery consultation. Petitioner reported 75% reduction in his low back pain with the trial SCS, and his pain returned to baseline when it was removed. It was his recommendation that Petitioner follow up with Dr. Novoseletsky for a permanent thoracic spinal cord stimulator implant, noting this is what Petitioner wanted to pursue and that since it worked well for him on the right the last time, it should probably be implanted on the right side again. (Px2). On 5/19/20, Petitioner had the permanent thoracic stimulator implanted by Dr. Novoseletsky. (Px2; Px16). Petitioner testified this did help and he does get relief from it, keeping I activated 24/7.

On 5/28/20, while Petitioner reported improvement with the SCS implantation, Dr. Novoseletsky opined for the first time that Petitioner was permanently and totally disabled due to his work-related injury. This was reiterated by the doctor on 6/18/20, 7/16/20, 8/13/20, and 9/10/20. Petitioner reported he was taking minimal to no medications at this point, and it appears that SCS reprogramming took place during these visits. On 7/16/20, Petitioner reported the SCS worked well for 4 to 6 weeks but was becoming less effective. On 8/13/20 and 9/10/20, Petitioner reported worsening pain and he didn't understand why the SCS wasn't working despite the reprogramming. (Px2).

On 8/31/20, Respondent agreed to pay for Petitioner's home internet on a temporary basis as part of his vocational rehabilitation. (Px6).

On 1/28/21, Petitioner reported to Dr. Novoseletsky that he was getting less relief from the SCS and that his pain was worse than prior to having the implantation. Medical marijuana wasn't helping, and he requested a psychiatry referral since he was miserable and irritated and was getting depressed and anxious. The doctor reiterated Petitioner was permanently and totally disabled. (Px2).

On 2/22/21, psychologist Dr. Andrise evaluated the Petitioner. She indicated that Petitioner suffered from anxiety and depression related to his pain and failed medical treatment and recommended that he participate in a course of psychotherapy for cognitive and behavioral pain management program. Dr. Andrise wanted to review Petitioner's records from Marianjoy. She also noted that Petitioner reported he did not recall any feedback he received during psychological treatment at Marianjoy, and he denied having any psychological evaluation prior to his current SCS implantation. It was noted that Petitioner was supposed to take a battery of tests following the visit but instead went home because it was two hours away and he didn't think he could sit for the testing due to pain, so it was rescheduled and Dr. Andrise subsequently noted that the testing indicated no evidence of malingering or feigning symptoms. He was diagnosed with severe depression, as some of his scores were in the 98$^{th}$ percentile or more. Dr. Andrise recommended adjustment counseling (Px17).

On 2/25/21, Dr. Novoseletsky noted worsening pain and advised Petitioner to continue with Norco, to follow up with Dr. McNally for potential surgical treatment, and to undergo cognitive behavioral consultation and treatment. (Px2). At the hearing, Petitioner could not recall if Dr. Novoseletsky advised him to see a psychiatrist in February 2021 but agreed that he did not really want psychological treatment.

On 3/5/21, counselor Patsavas issued a Vocational Progress/Closure Report. He noted that Petitioner had secured a tutor to help complete the Language Arts section of his GED program and was continuing to look for work. He had a job opportunity at Lucky 7's, but it was only two days a week, so Patsavas indicated this was

not a stable labor market job. He stated the following: "Per Dr. Novoseletsky's most recent Work Duty Status report of 2/25/21, this consultant is closing the file of (Petitioner) from any further Vocational Rehabilitation Services based on his treating physician indicating that he is permanently disabled due to his work related injury." (Rx9).

On 3/19/21, Respondent's attorney advised Petitioner's attorney that counselor Morgan would be taking over as Petitioner's vocational rehabilitation counselor, indicating the basis for this was the Commission decision *Broner v. Saks Fifth Ave*., 15 IL.W.C. 03903, 20 I.W.C.C. 0187, 2020 WL 6140877 (Ill.Indus.Com'n 2020). On 4/5/21, Petitioner's attorney agreed that Morgan could interview Petitioner, but advised Petitioner would not be working with Mr. Morgan as a vocational counselor. That same day, Respondent's attorney confirmed that Mr. Morgan is not a "litigation retained expert" and reiterated that counselor Morgan would be taking over, citing a 3/5/21 report of Patsavas "essentially stated . . . he wasted several months and years of vocational rehabilitation." (Rx6).

On 4/16/21, Respondent obtained an opinion from vocational counselor David Morgan. The Arbitrator notes that the Petitioner indicated to Morgan, per the report, that he was receiving Social Security disability benefits. This included meeting with the Petitioner. Counselor Morgan determined that Petitioner was still a vocational candidate and should complete his GED, which would improve his probability of getting a job. (Rx8, Depx2).

On 4/28/21, Respondent's attorney notified Petitioner's attorney that he received the message that counselor Patsavas would be contacting him directly, and that he was unwilling to discuss the case with Patsavas. (Px26).

On 5/11/21, Petitioner followed up with Dr. Andrise who opined that Petitioner suffered from severe depression and anxiety. She further opined that she believed the Petitioner's psychological condition was directly related to his injury from "February 20, 2020." Dr. Andrise again recommended a course of adjustment counseling and education and coping skills strategies. (Px17).

At multiple further visits with Dr. Novoseletsky throughout 2021, the doctor continued prescribe Norco and to opine that Petitioner remained permanently and totally disabled from employment. On 4/13/21, Dr. Novoseletsky administered bilateral SI joint injections, and on 4/22/21 Petitioner reported he had 80% improvement for about three days before his pain returned to baseline. On 6/15/21, Dr. McNally noted complaints of low back and bilateral hip pain, and that he was taking Norco and medical cannabis for pain. Petitioner told Dr. McNally his pain gradually worsened after initial improvement with SCS implantation despite multiple adjustments. He reported he developed a stabbing pain in the left low back seven months ago that would "paralyze" him for 20 to 30 seconds. Lumbar MRI was requested. (Px2). On 8/16/21, Dr. Novoseletsky noted that Petitioner did not undergo the MRI due to claustrophobia and would have to undergo anesthesia. On 9/20/21, Petitioner reported no radiating pain, numbness, or tingling, but did note occasional right leg numbness on 10/21/21. He also noted the new 8/19/21 MRI findings, which included moderate to severe neuroforaminal stenosis throughout the lumbar spine. He did begin to indicate Petitioner should follow up with Dr. Pelinkovic for surgical evaluation following the MRI instead of Dr. McNally. (Px2). It appears this likely was based on Dr. McNally moving on to a different medical office.

Petitioner saw Dr. McNally on 5/17/22 at the doctor's new practice, Chicago Health Medical Group. Petitioner reported low back pain radiating to his bilateral hips but not down his legs. Dr. McNally noted significant L2/3 stenosis and again wanted Petitioner to obtain a closed MRI, but the report also references an 8/19/22 MRI, which the Arbitrator assumes was actually the 8/19/21 MRI. Ultimately, both operative and non-operative options were discussed, and it appears that Dr. McNally's PA also wanted to review Dr. McNally's notes from Suburban Orthopedics as well as the records of Dr. Novoseletsky in terms of the results of any SI joint injections. Work notes that look like they were dated 4/14/22 and 5/12/22 indicate Petitioner remained

permanently and totally disabled. (Px3). Petitioner did not again follow up with Dr. McNally before the hearing, but testified the doctor was continuing to recommend L2/3 surgery.

Petitioner continued to follow up with Dr. Novoseletsky through 2022. On 6/9/22, 7/7/22 and 8/4/22, Dr. Novoseletsky administered trigger point injections in Petitioner's right thoracic paravertebral muscles. On 8/4/22, he advised Petitioner that a UDS test was positive for alcohol and if it occurred again no further pain medications would be prescribed. His impression was chronic low back pain with the following differential diagnoses: 1) Post lumbar fusion surgery; 2) Transitional syndrome at L2/3 with adjacent segment disease post L3 to S1 fusion; 3) Post spinal cord stimulator implantation with leads migrated; 4) Post spinal cord stimulator Boston Scientific implantation in May of 2020; 5) lumbosacral radiculopathy; and 6) chronic pain. He advised Petitioner to continue with Norco due to exacerbation of pain. the doctor noted Petitioner had ongoing symptoms but had improvement in shooting pain after turning his SCS back on. He again strongly advised Petitioner to communicate with his Boston Scientific representative, whom he had not spoken to since October. He also stated: "Continue with Dr. McNally – possible surgical planning – however patient is very hesitant. (Px2).

Petitioner testified that his current pain is primarily in his lower back and through both of his hips. The 2/4/13 surgery with Dr. McNally helped him for about 6 to 7 months before he reinjured his back in physical therapy. He testified the 12/18/14 trial SCS worked well, and that the permanent implantation on 2/12/15 helped relieve his pain by about 25%. He wanted to undergo the surgery at L2/3 recommended by Dr. McNally so he could relieve the feelings of lightning bolt pain he'd been having the last 9 months. While he continued to have significant pain, the treatment he received at Marianjoy was helpful, noting he was with a group of people who all understood his pain. He participated in exercise, group therapy, saw a psychiatrist once a week, and learned other ways to make daily activities easier, including how to deal with his pain through breathing techniques, stretching, ongoing therapy, and how to do things in smarter ways. He testified he was given 100 plus Norco doses at discharge but was aware he was supposed to be weaned off of it, noting he did not drink for 6 to 7 months after discharge. He was aware Marianjoy provided physical restrictions that included carrying no more than 7 pounds for 600 feet. While he explained on cross examination that he could probably lift items up to 10 pounds, "it would not be a good idea." He elaborated on his limitations further on cross examination stating that he can only do minimal bending and that he had a hard time with squatting.

Petitioner discussed the initial SCS removal with Dr. Novoseletsky in 2019 because it was not providing relief. He testified the new Boston Scientific SCS model was implanted higher up towards the thoracic level because the device rep believed it would provide better pain control, and that it provides him with better relief than the previous Medtronic model. He did not have interest in following through with the mental health treatment Dr. Andrise recommended. He is aware that Drs. McNally and Novoseletsky have opined that he is permanently disabled, which he agrees with. Petitioner initially started using medical marijuana in 2018 and it initially provided him a lot of relief, but he stopped using it in June 2022 because he was developing a tolerance and it was expensive. He could not recall which physician originally prescribed it, and the Arbitrator could find no record of such prescription. While he testified counselor Patsavas assisted him in how to address the medical marijuana issue with prospective employers, he could not recall exactly what he had been advised to say. He believed his use would prevent him from being able to get any jobs involving driving. Petitioner still sees Dr. Novoseletsky for pain management and for refills of hydrocodone 325, which he takes 5 times a day. In addition, he also takes Ibuprofen and two daily tablets of Norco. The only things that help minimize his pain is laying down and taking his pain medication, testifying "there ain't no miracle drugs". He wants to continue pain management with Dr. Novoseletsky but also wants to have the surgery recommended by Dr. McNally.

Petitioner testified he finished 9th grade at Belvedere High School and had bad grades, and he dropped out when he wasn't allowed to participate in sports. In 1996, he applied for a job with Respondent, testifying he

obtained the job through someone his mother knew. Petitioner agreed he indicated on his application that he was a high school graduate (see Rx7), as it was a requirement of the job, alleging someone advised him to do this. He described his normal day as getting up, having coffee, watching TV and lying in bed. He does feel depressed. He tries to take care of all his errands in one day. He does cook frozen meals in his oven, but usually eats at his local restaurant or his wife makes dinner. He shops for groceries once a week. As he was instructed at Marianjoy, he does home chores a little bit at a time and doesn't do too much to avoid ramping up his pain, noting he has a small home. His pain is mainly in the low back into both sides of his hips. It increases after doing very little, such as with vacuuming. When his pain increases with such activities, he testified he lies down, does breathing techniques, and stretches to try to calm it down. While he agreed he can perform these activities occasionally, he did not believe he could do so for 8 hours a day, as his pain increases as the day progresses. He walks with a limp due to back pain but chooses not to use a cane. He denied having any new injuries since the 2015 accident date, other than the increased pain he developed in physical therapy. Petitioner has an IPhone and valid driver's license and a vehicle. He drove to Joliet from Delavan the night before the hearing, an approximate 2-1/2 hour drive.

Petitioner did not know why counselor Patsavas indicated he had gone into his junior year in high school. He has never worked a desk job. He denied any prior internet or computer training or skills, so such training was part of the initial process. He did not know how to use the internet prior to meeting with Patsavas, even on his IPhone. Petitioner was going to libraries to use the computer to look for work (Indeed.com) in 2019 and into 2020 and continued with GED training. He did learn to use Zoom for his GED classes. He testified he tried his best but that his pain interferes with his concentration and makes it hard to focus during GED testing. Counselor Patsavas was assisting by filling out applications for him. Part of the GED training required him to meet at libraries to use a library computer and at one point it was recommended that he obtain a computer or laptop but this was not provided until the summer of 2020, and he did not get wi-fi at his home until October 2020. He had completed 3 of the 5 sections of the GED testing when classes were shut down in 2020 due to the Covid pandemic, needing to complete language arts, for which he received Zoom tutoring, and math, but he was unable to pass these. He took the math test sometime in 2021 after Patsavas' services ended but failed. He testified was having difficulty completing his testing on time due to his pain levels, and the challenge of working on the computer made him frustrated. He agreed that he did better with GED preparation and testing while he was getting hands on help than trying to do it on his own.

Petitioner testified that he applied for approximately 340 jobs while working with counselor Patsavas, and ultimately had only four actual interviews. He referenced AutoZone (had interview but never got a call like he was told), Colliers (semi parts), Ford (porter, but the job was taken). He testified a slots parlor, Lucky 7's, offered him a job working two days a week but that he didn't take the job because he didn't have a bartender's license, which he never looked into. He also questioned whether he could do things like lifting of beer cases or kegs or bending. He couldn't recall if he talked to counselor Patsavas about this. He believed he flunked the GED math test in September 2021, which he just did not comprehend. His other interviews were with Truck Country, Auto Zone, and Huntley Ford (porter position). Truck Country did not call him for an interview, Auto Zone did not need him but would give him a call, and the porter position with Huntley Ford was filled. He agreed he has not sought any employment since March 2021.

On cross-examination, Petitioner testified he "unfortunately" has been living at his lakehouse in Delavan, Wisconsin since 2/1/22. He previously lived in Belvedere, Illinois, and prior to 2/1/22 would travel between these locations, a 40 plus minute drive. He has a 24' pontoon boat, which he does maintain himself other than cleaning it up. He uses the boat on weekends, and while he tries to avoid choppy water, it is a busy lake sometimes. He does do yardwork, including using his riding mower and trimming flowers on his hands and knees. He agreed he could physically lift up to 10 pounds but its "probably not a good idea." He has difficulty with bending and squatting, noting he can't kneel unless he is on all fours and then needs help getting back up.

Petitioned did not recall discussing any auto-based jobs, such as UberEats, Door Dash or GrubHub, with counselor Patsavas. They didn't discuss Uber or Lyft either. He noted Delavan is a small town that may not use such services, and that it might require him to go to Milwaukee or Lake Geneva (10 miles away from Delavan). On redirect, Petitioner testified he did not believe he could do these types of jobs driving around and getting in and out of cars as a full time job. On recross he questioned whether he could do it at his own pace such as taking customers only when desired. Petitioner met counselor Morgan "for a brief moment" at a Starbucks. Petitioner testified that he would be willing to try further vocational rehabilitation and would continue to cooperate in obtaining his GED.

Orthopedic surgeon Dr. McNally testified on 2/5/16 that he specializes in treatment of the spine. He explained that the sacroiliac, or SI, joint is the joint between the sacrum and the ileum, and that most of the diagnostic tests used to evaluate SI joint pain come from either an interventional radiologist or evaluation of the patient's responses after treatment with an interventional pain doctor. He performed a second lumbar fusion surgery on 2/4/13 involving the L3/4, L4/5, and L5/S1 levels and opined that the need for surgery was causally connected to the effects of the 2/15/10 work accident. On 3/5/13, the Petitioner complained of low back and leg pain as well as a numbness in his thigh, which was new. The back pain into the buttocks was unchanged with surgery but he did report resolution of his radiating right leg pain, though he was using a cane "mostly for security." Dr. McNally opined that the right leg improvement supported that the surgical nerve decompression was successful at relieving the radicular pain. Petitioner had a little bit of tenderness over the incision and numbness in the left big toe but overall was healing well. Diagnostic studies showed marked improvement in the disc space height at L3/4 and L4/5 and that the instrumentation was in good position posteriorly. (Px19).

Petitioner continued to follow up and on 4/9/13 reported some back and leg pain with right leg numbness, but that he was significantly better than before surgery. On 7/2/13, the SI joint was evaluated as a pain generator for Petitioner, noting tenderness over the left SI joint on exam. On 8/6/13, while Dr. McNally believed Petitioner had a typical post-surgical course, given the ongoing symptoms three and a half years after the injury, Petitioner likely would require lifelong pain management, including injections above or below the fused levels and possible fusion extension. He opined there was a "degenerative cascade" aggravated by the work injury requiring surgery with Dr. Butler and himself, with the now the ongoing cascade above and below the fused levels. On 9/17/13, Petitioner advised Dr. McNally of low back pain, right greater than left, SI joint pain, and continued pain and burning sensations on the anterior of his right leg. As he believed the return of right leg pain and burning could be irritation of the lumbar nerves, Dr. McNally opined these symptoms are causally related to the 2/15/10 accident. Petitioner had injections which provided about a month of relief before his SI joint pain returned. Suspecting a non-union or delayed union, Dr. McNally ordered EMG/NCV testing. (Px19).

Dr. McNally agreed with Dr. Alzoobi's recommendation for a spinal cord stimulator trial as reasonable opined this was causally connected to the 2/15/10 accident. While the device did not provide complete pain relief, it did provide improvement in Petitioner's symptoms. Dr. McNally testified that there are objective bases to demonstrate the source of Petitioner's pain complaints, such as objective evidence of non-union, EMG evidence consistent with the Petitioner's subjective symptoms, the pain physician's interpretation of the results after the SI injections, and the CT evidence of degeneration of the SI joint between 2012 and 2014. Prior to his testimony, Dr. McNally had last seen Petitioner on 11/24/15 and recommended treatment at Marianjoy. Petitioner reported that a left SI joint injection from Dr. Patel provided 10 days of pain relief and, based on this, Dr. McNally opined that the left SI joint was a pain generator. He believed the SI joint degeneration progressed due to the "change in the forces transmitted from the patient's spine across the SI joint to the pelvis in post fusion patient", and that this condition was causally related to the Petitioner's 2/15/10 work accident. Regarding work restrictions, Dr. McNally testified that he would defer to the pain management physician who implanted the spinal cord stimulator. However, he also testified that, without further treatment, Petitioner was

permanently and totally disabled and would not be capable of working an eight-hour day of desk work. Noting the report of Dr. Singh recommended an FCE, Dr. McNally did not believe Petitioner would have good results without first participating in work conditioning, though he also testified that Petitioner had previously failed work conditioning and the spinal cord stimulator was his "best bet" for symptomatic relief. In further support of his opinion, Dr. McNally also noted that the Petitioner had continuing issues in his leg that were not being treated and believed Petitioner had not yet fully healed and had loose screws at right L3 and bilaterally at S1. (Px19).

On cross examination, Dr. McNally indicated that an SI joint fusion was a potential future treatment option for Petitioner. He opined that comprehensive pain management would the next best step and if his pain management physicians thought it would be reasonable, he could perform the fusion. His understanding was that the SCS was implanted for Petitioner's right-sided neuropathic pain as opposed to the SI joint, and he agreed a left SI joint fusion would not resolve any right-sided radiculopathy issues. At the time of his deposition testimony, Dr. McNally did not believe Petitioner was permanently and totally disabled and that additional medical treatment could make Petitioner a candidate to return to work. (Px19).

Physiatrist and pain physician Dr. Lanoff testified via deposition on 6/26/16, noting he specializes in non-operative musculoskeletal and neurologic patient care and pain medicine. He was asked by Respondent to examine the Petitioner on 10/14/15 at the request of the Respondent (Section 12) to evaluate Petitioner's SI joint. He questioned a cortisone injection to the SI joint as diagnostic of SI pathology as such an injection can impact the lumbar spine, and the literature doesn't support this as diagnostic of an SI problem. He opined that injections can be diagnostic for an SI problem is if both the patient and doctor are blind to three performed injections: one a placebo, one a short acting agent, and one a long lasting agent, then determining if the patient has an appropriate response. Even then, he testified it would only be mildly diagnostic without a history, exam, and imaging studies suggestive of SI joint pathology. He noted no diagnostic studies showing SI pathology and opined that other physicians didn't record examination of significance by simply stating a test is positive without specifying what it was positive for. Noting Petitioner was found on 1/7/14 to have a positive Gaenslen's sign, a test for SI joint pathology, Dr. Lanoff testified he wasn't even able to perform this test himself because of Petitioner's pain complaints. Dr. Lanoff testified he "didn't find much" at the time of his physical exam and that the testing of the SI joint he was able to perform did not indicate pathology, noting Petitioner had pain with almost anything that he tried to do and that it was non-specific for any pathology, including SI pathology. Petitioner having 9 days of pain relief following an SI joint injection did not change his opinion, nor would the positive SI exam findings of Dr. Patel (Gaenslen, pelvic rock and Fabere) the day after Lanoff's exam, or the fact that two treating pain physicians and one treating back surgeon believed that he showed signs of sacroiliac dysfunction. Petitioner also had between 3 and 4 out of 5 positive Waddell signs, which is suggestive of psychosocial issues. Petitioner reported very little relief, if any, from the surgeries or the SCS implantation. He was drinking 12 to 18 beers per day. Dr. Lanoff testified that while the Waddell signs don't mean anything in and of themselves, they are a relevant "part of the puzzle." Despite the Waddell's findings, Dr. Lanoff testified that: "to his credit, [Petitioner] is being honest." Dr. Lanoff felt that Petitioner's history was not suggestive of SI joint pathology, so an SI joint fusion was not appropriate. He opined Petitioner's abnormal EMG was consistent with the fact that something happened to those nerves and that it was very likely related to the injury. (Rx5).

Dr. Lanoff testified that Petitioner had no objective abnormalities: "His imaging showed nothing. His exam was nonorganic to negative from an objective perspective. His placebo response, to an injection, is not at all diagnostic." As to the injection, he testified it was a worthless diagnostic tool and "the literature supports that." He opined that Petitioner had significant psychosocial issues, and he questioned how Petitioner's physicians were allowing him to take medication with his level of alcohol use. He testified that the literature supports that chronic narcotic use doesn't work for people with longstanding chronic low back pain. Petitioner's substance abuse is relevant. Dr. Lanoff testified that FCE testing is subjective in nature, based on subjective complaints. It

was his recommendation that Petitioner detox from alcohol and narcotics and that he be released to work with a 50 pound restriction "based on the construct of the (fusion) graft" at 3 levels.

Dr. Lanoff testified that "there is no such thing" as SI joint syndrome. Dr. Lanoff testified that Petitioner said that none of his surgeries had helped him very much and that the only thing that helped him at that time were the SI joint injection, which provided 20% improvement at most. Dr. Lanoff said that Petitioner also stated that the spinal cord stimulator provided "very little, if any, relief and certainly no functional relief." Dr. Lanoff did not believe Petitioner had any objective abnormalities but had continued subjective pain complaints. He did believe Petitioner had significant psychosocial issues, including substance abuse history, and not following his pain doctor's recommendations. He did not believe long-term narcotics were appropriate for chronic low back pain that was not objectively based, and that Petitioner should discontinue taking them. Dr. Lanoff opined that Petitioner had reached MMI as of 10/14/15. He opined that, based on the fusion structure of his spine, Petitioner should not be lifting over 50 pounds, noting this was his opinion and that there is no specific literature to support it. (Rx5).

On cross examination, Dr. Lanoff testified all of his Section 12 exams are performed for Respondents. He agreed his 50 pound restriction was fairly arbitrary but based on the lower end of the medium-to-heavy category. He agreed Petitioner's surgery was significant, but he sees lots of three level fusion patients who have minimal symptoms. He identified the Gaenslen, Patrick's, FABERE's, and pelvic rock exam tests as ways to identify SI joint pathology. He didn't understand how Dr. Patel the day after his exam found a positive Gaenslen test with as much pain as he reported to him with it. He agreed with Dr. McNally that decompression of the nerves was instrumental in the change versus the 1/23/12 EMG findings, but that the 1/6/15 EMG study did not show any acute nerve issue to explain Petitioner's right leg pain at that time or at the time of the deposition, and that Dr. McNally therefore was incorrect in saying that it did ("my advice would be for him to call the person who did the EMG and ask them what it means. . ."). The most recent EMG is "hard and fast evidence of lack of any neurologic input now because he has no spontaneous activity. The spontaneous activity means there is something happening here and now that hurts. The polyphasic activity just means at one point in his life he has it." Dr. Lanoff testified that typically an SI joint pathology occurs in one of three ways: significant force trauma, postpartum, and due to spondyloarthropaty, an autoimmune disorder – "short of that, the SI joint, as an objectively proven pain generator, is, pretty much, nonexistent in the literature." Failed low back is not a diagnosis, "it means he's been through a whole bunch of stuff and he's no better." As to Dr. McNally noting the halos around the screws at L3 s a source of pain, Lanoff notes that Dr. Ghanayem did not indicate it was the source of pain. Dr. Lanoff was not saying the lumbar spine isn't the source of the pain, but that he has never seen the level of pain Petitioner has with the condition he has. (Rx5).

Dr. Lanoff was advised by Petitioner's counsel that Dr. McNally found CT scan evidence of degeneration of the SI joint between 2012 and 2014 and testified that he was not aware of this and that it could lead to trying the three injections he noted, but also testified his opinion was not likely to change that it was not a pain generator. Degeneration on its own does not mean something is a pain generator. If Petitioner had evidence of SI joint pathology on film and via the three-injection test, he would say maybe it is a pain generator. In such case, he would plan to burn the nerves to that area rather than a fusion. He still would need to address his psychosocial issues. He agreed that treatment at a multidisciplinary pain clinic would not be unreasonable for Petitioner, noting such facilities can help a patient who "wants to be helped." He did not, however, prefer Marianjoy for this treatment as over the years he has seen people go through their program and remain on medications. He recommended RIC. He questions, however, whether the Petitioner wants to be helped. Whether Petitioner has degeneration of the L2/3 level is not really relevant and should not be operated on – Petitioner had degeneration at the other levels and prior surgeries have not helped. Dr. Lanoff agreed that Petitioner's psychosocial issues could be a conscious or unconscious process. (Rx5).

Vocational counselor David Patsavas testified via deposition on 9/8/21. In his initial vocational assessment in 2016, he opined that, under the guidelines of the *National Tea* case, Petitioner had sustained a loss of trade. He didn't begin vocational services with Petitioner until October 2018. Following a meeting with both attorneys, counselor Patsavas testified that Petitioner was initially to enroll in a GED program. His understanding of Petitioner's physical restrictions at that time was "less-than-sedentary" based on Marianjoy's final release and the opinion of Dr. Singh, noting that Dr. McNally and Dr. Lanoff had also opined as to what Petitioner's restrictions should be. Petitioner began GED classes in January 2019 and job placement activities began in the Fall of 2019. Petitioner has passed the Constitution, social studies, and science portions of the GED, the latter completed in February 2020, but had not yet completed the language arts and math portions prior to GED classes being suspended in March 2020 due to Covid. He returned to GED classes when they reopened for the fall semester in October 2020, however it was only available online versus in-person. Petitioner had difficulties with the language arts portion of the GED program and was unable to pass the pre-test because he ran out of time before he could write the essay. Counselor Patsavas agreed Petitioner was not making any progress with the math portion, so he didn't take the math test. Petitioner was provided with job leads and he had 6 to 12 interviews, none of which offered employment. Petitioner informed him in January/February of 2001 that Dr. Novoseletsky also opined he was permanently and totally disabled. At that point he prepared a closure report, testifying: "I tried to identify that made to my awareness later that Dr. Novoseletsky had already indicated that he was permanently and totally disabled." [sic] (Px21).

Taking everything into account up to that point, he opined that there was no viable stable labor market available to Petitioner. This included Petitioner's efforts to obtain his GED, with no end in sight, 340 different job applications with no job offer, increasing medical difficulties, medication, SCS, and the opinion of Dr. Novoseletsky that Petitioner was permanently and totally disabled. He opined that vocational services up to that point had been appropriate and that Petitioner cooperated with the process. He acknowledged that while Drs. McNally and Novoseletsky opined Petitioner was permanently disabled, the rehab plan utilized the less-than-sedentary restrictions from Marianjoy. Even if Petitioner could function at the sedentary exertional level, as opposed to "less than", counselor Patsavas still opined that a viable and stable labor market does not exist for Petitioner. A review of the report and deposition of counselor Morgan did not change his opinions, noting Morgan was utilizing the light work level restrictions that were beyond the restrictions set forth by Dr. Singh and Marianjoy. In addition to the opinions of Drs. McNally and Novoseletsky, Petitioner had additional vocational barriers, including unsuccessful efforts to pass the GED, work restrictions that placed him at an exertion level less than sedentary, and his lack of serviceable computer skills. Counselor Patsavas did not believe Petitioner would ultimately be able to pass the math portion of the GED. (Px21).

On cross-exam, Patsavas agreed he didn't discuss Petitioner's potential in obtaining his GED with his GED instructor. With language arts, Petitioner's difficulty was with the time restraints and the essay portion. He could not say exactly when he determined Petitioner was unlikely to succeed in getting his GED but agreed that on 2/24/21 he noted Petitioner had obtained a tutor for language arts meaning he believed he still could pass the GED. On 3/2/21 and 3/4/21, Patsavas noted Petitioner was bringing a form from Dr. Novoseletsky that would allow him to extend the time limit on the GED language test and agreed he felt this was appropriate. Math is the hardest part of the GED and counselor Patsavas agreed he didn't know if Petitioner could ultimately pass that portion of the test. He agreed his initial impression was it would take Petitioner 18 to 24 months to complete the GED, and that because of Covid Petitioner hadn't yet used that full period of time, but also agreed he was capable of study and reviews during the shutdown. (Px21).

A point of contention during cross-exam was counselor Patsavas's testimony that ultimately Dr. Novoseletsky's 3/5/21 opinion regarding permanent disability "in the end" played no part in his determination that Petitioner was no longer a candidate for vocational rehab. He did agree that his 3/5/21 report specifically stated he was closing his file and referenced Dr. Novoseletsky's 2/25/21 report and did not reference there being no stable

labor market or the other factors he referenced on direct as why he closed the file. The records of Patsavas and the statements of the parties on the record makes it clear to the Arbitrator that, prior to beginning vocational services, Petitioner and Respondent's counsel met with Patsavas in lieu of his scheduled deposition in 2018 and agreed that the Marianjoy restrictions and those of Dr. Singh would be utilized as the Petitioner's physical parameters. Ultimately, Patsavas admitted that many of the factors he pointed out in support of terminating vocational counseling in March 2021, outside of Dr. Novoseletsky's opinion, had existed prior to March 2021 while he was continuing to opine that vocational services were appropriate. As to one factor, Petitioner undergoing psychological treatment, Respondent's counsel pointed out that there was only a single examination, while counselor Patsavas noted that psychological treatment had been recommended. He testified that Illinois law prohibits an employer from rejecting a medical marijuana user for work unless it's a federal position. In January 2021, after having submitted 300 plus applications, Petitioner remained a viable employment candidate, and that there is no set number of failed applications that leads to termination of vocational services. Counselor Patsavas has placed "less-than-sedentary" workers into jobs before, but with additional education and training and/or more transferrable skills than Petitioner had. Respondent's counsel then presented a Commission decision from 10 plus years prior which referenced counselor Patsavas placing a sedentary to light candidate in a job despite a 4th to 6th grade education. (Px21, RDepx1). Patsavas responded that each case is different as to each individual's histories and skills. He agreed that after Covid the U.S. has the highest level of unfilled jobs in history, though he could not say what the specific situation was in Petitioner's geographical area. Counselor Patsavas was also questioned regarding a code of ethics for vocational counselors, (see Px21, RDepx2) and he testified that he follows the code. (Px21).

Counselor Patsavas was aware Dr. McNally had determined Petitioner was permanently totally disabled when he prepared his initial May 2016 labor market survey, yet subsequently started vocational rehabilitation services. This led to more conflict at the deposition between the parties, and the Arbitrator notes the evidence again supported that the parties agreed utilize the restrictions issued by Marianjoy in lieu of Dr. McNally's permanent and total disability opinion. Patsavas indicated his role was to provide vocational services, not to determine the restrictions to utilize, which in this case the parties agreed to utilize. While Respondent did provide Petitioner with a computer and wifi services, the authorization for both were delayed. Asked about Petitioner working as a cab driver, counselor Patsavas testified he possibly could do it if he could get in and out of the vehicle every 15 to 20 minutes and didn't have to lift luggage. Patsavas agreed he never looked into whether any such jobs were available to Petitioner. Weekly job leads were provided to Petitioner, and he agreed that some of the leads were determined to be appropriate even if somewhat in excess of Petitioner's restrictions, as sometimes employers can accommodate such restrictions and there is no way to find out but to apply to them. He would not advise Petitioner to take a job beyond his restrictions. As to his potential job with Truck Company, counselor Patsavas testified that Petitioner did follow up with that employer, at one point doing so while Patsavas was present. As to the part time job at Lucky 7's, counselor Patsavas agreed he has advised clients in the past to accept part time jobs in hopes they can move into a full time position. His 3/5/21 report did provide additional job leads despite it being a "closure report." When Petitioner advised him in March 2021 that Dr. Novoseletsky had opined he was permanently and totally disabled, Patsavas contacted Petitioner and his attorney trying to verify this and also tried to contact Respondent's counsel. His 3/1/21 and 3/5/21 reports made no reference to a plan to close Petitioner's file. Again, he didn't terminate vocational services while he was waiting for Novoseletsky's report. He agreed that the report of Dr. Andrise he read made no specific recommendations regarding Petitioner's ability to work. As to counselor Morgan's vocational plan for Petitioner, he testified: "I can't say it's inappropriate. I can't say that I agree with it." He was not aware of whether Petitioner was continuing to work on his GED or not and agreed he would be more likely to succeed with simultaneous vocational assistance. (Px21).

Vocational counselor Morgan testified via deposition on 8/5/21. To look for prospective jobs, he uses the online search engine Indeed and also speaks to prospective employers directly. On 4/6/21, counselor Morgan was

asked by Respondent to perform a vocational assessment and evaluation of Petitioner. He met with Petitioner and reviewed records from Dr. Singh, Dr. McNally, and Dr. Novoseletsky, testifying he was aware that Drs. McNally and Novoseletsky had concluded that Petitioner was medically permanently disabled. He was aware Petitioner had not gone beyond the 9th grade and had passed three out of five GED sections. His understanding was that Petitioner had been doing a little typing practice and but indicated he had issues due to problems with his hands, including a claimed right small finger injury at work he did not report to Respondent. While Petitioner had been attending some computer skills training classes but was not working on computer skills training at the time of their meeting. They discussed Petitioner's past interviews while working with Independent Rehab Services (Patsavas) and Petitioner indicated he had "a couple" of interviews and that those interviews required a drug test, noting when he was asked, he would state to prospective employers that he could not pass a drug test because of medical marijuana usage. Petitioner indicated his interview with Lucky 7's went well, but that the job was just two days a week and required a bartending license. Petitioner told him that when he was asked why he had been out of work for 10 years he would advise regarding his back injury and would note his SCS implantation. (Rx8).

Counselor Morgan utilized computer program to perform a transferable skills analysis based on experience and abilities, and the list of occupations appropriate identified were: dispatcher, driving instructor, driver's license examiner, traffic clerk, guard gate and security guard. Morgan acknowledged that he was utilizing a "light" physical work level as defined by the Department of Labor, per Dr. Singh, noting on cross-exam that he understood he was utilizing the same restrictions as counselor Patsavas based on review of his report. Some of the jobs in the transferable skills analysis were at the sedentary level. He performed a work readiness assessment, which indicated assets and barriers to returning to work, determining that there were negative vocational factors/barriers regarding Petitioner. He pointed to the fact Petitioner had not worked in 11 years and that he could only type 12 words per minute as examples of such barriers. Petitioner hadn't had any formal education after leaving high school until starting GED classes. Counselor Morgan still opined that a reasonably stable labor market existed for Petitioner based on his transferable skills and his "pretty positive" interview experience thus far. He believed the Petitioner was making progress in his vocational rehabilitation program and increasing the skills that he could offer to potential employers. He testified that he has placed people in jobs with restrictions similar to the restrictions given by Dr. Singh on 1/27/14 and 7/29/14. Morgan testified that he does not agree that no stable labor market would exist for Petitioner at the sedentary level but recommended Petitioner continue the GED program, resume some computer and typing skills training, additional job seeking skills training, completing job applications online independently, and interview skills training. He stated that his recommendations differed from Patsavas' in that Morgan believed job seeking skills training would be helpful especially with interviewing and maybe some mock interview and additional training. He advised that he would be willing to provide vocational rehabilitation services to the Petitioner. On cross-examination, counselor Morgan testified that he did not know what a less than sedentary demand level is under the Department of Labor standards. He testified he has been involved in Illinois workers' compensation matters since 2006 and that the vast majority of his referrals come from the respondent side. His understanding was that Petitioner's main difficulties completing the GED involved technology issues, such as speed of typing. He reiterated that he understood that Drs. McNally and Novoseletsky had opined that Petitioner was permanently and totally disabled. However, he testified and his report notes that Petitioner had been undergoing vocational rehabilitation services subsequent to both of their opinions being known. (Rx8).

Petitioner presented evidence of marijuana charges totaling $9,101.21 from 7/12/18 through 8/22/21. (Px15; Px28). The Arbitrator notes that Petitioner presented the 4/9/19 deposition of Luanne Hughes as Px20. This exhibit essentially involves a foundation for presentation of Petitioner's medical marijuana charges at Hughes' facility, MedMar, which are attached to the deposition. Charges were incurred between 7/12/18 and 3/21/19. (Px20).

The parties agreed that if Petitioner had continued to work for Respondent, as of the date of the trial he would be earning $2,045.90 per week. (Px27).

As of the trial date, the parties stipulated that Respondent paid $821,148.99 in TTD/maintenance benefits. (Arbx1; Rx1). The period to which Petitioner is entitled to TTD and/or maintenance benefits is in dispute, as well as whether Petitioner is permanently and totally disabled.

# CONCLUSIONS OF LAW

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

Based on the evidence presented and the proposed decisions submitted by the parties, it appears that there are two key issues of causation: the lumbar spine and the SI joint or joints.

As to the lumbar spine, the Arbitrator initially reiterates that Arbitrator Dollison previously determined that Petitioner's lumbar condition of ill-being was causally related to the 2/15/10 work accident. That is the law of the case. The Respondent would need to provide a basis for a finding that the previously determined causal connection should be found to have been terminated since the last hearing date.

The Arbitrator finds that the Petitioner's lumbar condition of ill-being remains causally connected to the noted 2/15/10 work accident. Arbitrator Dollison as part of his Section 19(b)/8(a) decision awarded Petitioner prospective lumbar fusion surgery as recommended by Dr. McNally. The doctor performed this surgery on 2/4/13. The Petitioner has had ongoing lumbar complaints since that time. While he initially reported improvement, he indicated that months after the surgery he sustained an increase in pain while in physical therapy. His most recent objective MRI testing of the lumbar spine indicated that his ongoing degenerative lumbar condition has continued to deteriorate. Dr. McNally has opined that this involves a cascade of worsening that was initially brought on and triggered by the work accident. This would include Petitioner's ongoing chronic pain in the lumbar spine area and into the buttocks and legs. He has had two separate spinal cord stimulators implanted into his spine.

The Arbitrator here just does not see any significant evidence which would cut off an ongoing causal relationship to the 2/15/10 work accident. Issues have been raised by Dr. Singh and Dr. Lanoff as to the objective basis for Petitioner's ongoing symptoms. However multiple other physicians have determined that the objective status of the lumbar spine, per diagnostic films, supports the credibility of Petitioner's subjective symptoms. Nothing was indicated by Dr. Ghanayem in this regard, and Dr. Singh has advised a 10 pound restriction.

With regard to the alleged SI joint dysfunction/pathology, the Arbitrator finds that the Petitioner has failed to prove, at least as of the time of trial, that he has an SI joint pathology. Based on this finding, the causal relationship of such condition to the 2/15/10 accident is obviously moot. This case is about as complicated as a case can be on a medical basis. There are many physicians involved in the case, including many Section 12 examiners, and thus many opinions. Drs. Alzooby and McNally have opined that there is an SI joint syndrome/pathology. Drs. Singh, Patel and Lanoff have opined that there is no sufficient evidence of an SI joint pathology.

Dr. Alzooby, who left his prior practice and has not seen the Petitioner in many years, was relying on a diagnostic injection into the joint and Petitioner's subjective response. While he diagnosed an SI joint pathology, Dr. Patel also provided a diagnostic SI joint injection on 1/14/16 and opined that he did not believe

the injection was diagnostic for SI joint dysfunction, recommending he participate in a pain program. Dr. Singh opined that he saw no evidence of a problem following 2014 CT scan, while Dr. McNally opined that he saw advancement of SI degeneration in what appears to be the same films (versus 2012 films). Dr. McNally also in one of his reports relied on the improvement Petitioner had with Dr. Patel's injection to diagnose an SI joint condition, which, as noted, Dr. Patel himself did not even find to be supportive of such a diagnosis. Dr. McNally testified that Dr. Patel's injection was diagnostic for SI pathology when Dr. Patel himself indicated that it was not diagnostic.

Dr. Lanoff, in the Arbitrator's view, provided the most thorough explanation of the basis for his opinions on this issue, as he was the only doctor deposed who discussed the evaluation an SI joint condition. While he does not cite any specific articles he relied on in providing his opinions, he does specifically reference medical literature on several issues that he indicated did not support the basis for other medical opinions finding an SI joint pathology. He noted that evidence of pathology via diagnostic testing is one of three key factors in making a determination regarding the existence of SI joint pathology as a pain generator. As noted above, there is a difference of opinion on whether there is any such finding in the CT scan. He also opined that an injection into the SI joint area is not diagnostic because, first, the Petitioner is aware of what is being done and why and thus a bias can come into play, and secondly because injecting a significant amount of cortisone could impact other areas including the lumbar spine. Further, he noted that there is a psychosocial overlay at play in this case. He testified that SI joint pathology typically occurs mainly in three different scenarios, none of which apply in this case. Under the circumstances of this case, the Arbitrator believed that the diagnostic injection protocol indicated by Dr. Lanoff makes good sense, and his testimony that this is consistent with the medical literature is unrebutted at this point. Dr. Lanoff has provided the most informed and informative opinions in this case on this issue, and the Arbitrator finds his opinions to be the most persuasive on the issue of SI joint pathology.

Dr. Novoseletsky's determination that Petitioner may have an SI joint pathology is not sufficiently explained in light of Dr. Lanoff's testimony. The Arbitrator also notes that Dr. McNally referred Petitioner to Dr. Marden for a diagnostic SI injection, and Dr. Marden indicated that he would first need to see a CT scan, and it is not clear if this was ever done. Dr. Lanoff backpedaled somewhat when he was advised that CT scan was positive for an SI joint pathology, but as noted there is a difference of opinion on this in terms of Dr. McNally versus Dr. Singh. The Arbitrator also notes with interest that in discussing SI joint issues in this case, very often in the medical records the doctors involved do not specify if it is mainly left sided, right sided or a bilateral problem.

Overall, while the Arbitrator cannot state whether Petitioner may ultimately be able to show an SI joint pathology in the future. However, at this point, considering the totality of the evidence presented, the preponderance of that evidence does not support the finding that such SI joint pathology exists at this time, and the Arbitrator finds that the Petitioner has failed to prove same. Given this finding, as noted above, the issue of causation is moot.

**WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:**

In light of the Arbitrator's finding that Petitioner's current condition of ill-being is causally related to the work accident on 2/15/10, the Arbitrator finds that medical care provided to Petitioner following that accident, namely Elite Pain, Forest City Diagnostic Imaging, Hinsdale Psychological, IWP, Medorizon, Pain & Spine Institute, Persistent Toxicology, Suburban Orthopedics, Swedish American, X-stream, Brownstone Inc., and Independent Rehabilitation Services was reasonable and necessary to cure or leave the effects of the injuries sustained in the work accident on 2/15/10.

The following bills are awarded pursuant to Sections 8(a) and 8.2 of the Act, and Respondent shall pay the bills calculated pursuant to the fee schedule contained in Petitioner's Exhibit 28. The amounts are at the Illinois Fee Schedule if the Fee Schedule is applicable:

The bill of Elite Pain for treatment with Dr. Alzoobi totaling $642.25 is awarded.

The bill for Forest City Diagnostic Imaging for diagnostic imaging totaling $2,155.00 is awarded.

The bill for Hinsdale Psychological for psychological treatment with Dr. Andrise totaling $4,250.00 is awarded.

The bill for IWP for medications totaling $5,104.15 is awarded.

The bill for Medorizon totaling $850.00 is awarded.

The bill for Pain & Spine Institute totaling $4,960.00 is awarded.

The bill for Persistent Toxicology for urine testing totaling $3,905.00 is awarded.

The bill for Suburban Orthopedics for ongoing treatment with Dr. McNally and Novoseletsky totaling $1,217.50 is awarded. The Arbitrator notes that the Respondent objected to a 12/1/22 charge based on the fact that the report from this visit is not in the evidentiary record. The Arbitrator notes that this date is only two weeks prior to the hearing date and the report from the visit may not have been available. If the Petitioner is able to provide this report subsequent to the hearing, the bill remains awarded. If the Petitioner is unable to produce this report, the billing from that date of service would then be denied.

The bill for Swedish American for diagnostic imaging totaling $444.00 is awarded.

The balance of $2,896.62 of Independent Rehabilitation Services is awarded as reasonable and necessary vocational rehabilitation services.

The charges for X-Stream for internet services as part of his vocational rehabilitation plan is reimbursed to the Petitioner in the amount of $436.81.

The charge for Brownstone (Dr. Brown) totaling $95.00 is awarded.

The Arbitrator notes that while he has determined that the Petitioner has failed to prove an SI joint pathology, the testing performed to date for diagnostic purposes has been reasonable to date. No significant treatment appears to have been directed specifically to the SI joints other than such diagnostics. The exceptions to this are the injections performed by Dr. Novoseletsky on 4/13/21 (Px13). The charges totaling $14,968.00 for these injections are denied.

The Petitioner also is seeking reimbursement of his payments towards medical marijuana. As of the hearing date, while Illinois has passed laws to legalize both medical and recreational marijuana, the Federal government continues to identify marijuana as a Schedule 1 controlled substance under the Controlled Substances Act (Controlled Substance Act, 21 U.S.C. 801) and continues to prohibit the possession and/or sale of cannabis. As such, the Arbitrator does not believe it is currently appropriate to award expenses for the purchase of marijuana in the workers' compensation setting, as such would essentially require the Respondent to potentially violate federal law. While the Arbitrator recognizes that the federal government continues to discuss the potential

legalization of marijuana nationally, as of the date of hearing, the Arbitrator believes there is no latitude to make such an award unless and until federal law changes or a court of higher authority dictates that such an award is proper. Therefore, the charges from Px15 (Sunnyside) are denied. The Arbitrator also notes for the record that no prescription was located in the evidentiary record of such a prescription.

The Respondent is entitled to credit for any awarded medical and/or vocational expenses that Respondent has paid prior to the hearing, pursuant to Sections 8(a) and 8.2 of the Act, and Respondent shall hold the Petitioner harmless with regard to same. The Respondent has presented evidence of the expenses paid prior to hearing as Respondent's Exhibit 2. The Petitioner is not entitled to a double recovery of expenses. The Respondent shall pay the outstanding awarded expenses directly to Petitioner, not the providers, again pursuant to Sections 8(a) and 8.2 of the Act.

The Arbitrator makes no specific findings as to the Petitioner's determinations of the Fee Schedule amounts due and owing pursuant to Section 8.2 of the Act, other than to note that the actual billing of the providers is subject to Section 8.2 and that the actual amounts due and owing are based on the Medical Fee Schedule.

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

The Arbitrator first references the findings above with regard to causation.

The Arbitrator finds that the Petitioner is entitled to temporary total disability (TTD) benefits from 2/16/10 through 10/10/18, the day when vocational services with counselor Patsavas were authorized by Respondent.

Petitioner is then entitled to maintenance from 10/11/18 through 3/5/21, the day that vocational services were terminated. At that point, as noted below, the Arbitrator finds that the Petitioner has been permanently and totally disabled since 3/6/21 on an ongoing basis.

Respondent agrees with the TTD period from 2/16/10 through 2/16/15, and agrees Petitioner is entitled to maintenance from 2/17/15 through 4/5/21, the date the Petitioner turned down vocational services offered by Respondent with counselor Morgan.

It was on 10/11/18 that the attorneys met with counselor Patsavas to evaluate vocational rehabilitation. On 3/5/21, counselor Patsavas concluded there is no viable and stable labor market for Petitioner.

The parties have stipulated that the Respondent has paid $821,148.99 in weekly benefits in this case. The parties indicated prior to the start of the hearing that if the Arbitrator awarded the entire period of requested TTD/maintenance/PTD benefits, that based on this stipulated credit, the Petitioner's benefits through the 12/16/22 hearing date have been fully paid by Respondent with no overpayment or underpayment claimed by either party.

It should be noted that Petitioner was previously awarded the TTD period from 2/16/10 through 7/13/12, and a $131,197.45 credit to Respondent. The Arbitrator has included this period and the credit as part of the award in this case as that is what was stipulated on the Request for Hearing form, and both are incorporated as part of the total award and credit in this matter.

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

Pursuant to case law, in a case with applicable facts, the Act prefers an initial analysis as to whether the evidence in a case has shown that a Section 8(d)1 award is applicable. In this case, there is no dispute that the Petitioner is unable to return to the usual and customary employment he was in at the time he was injured, a semi-truck driver. However, the Arbitrator finds that the evidence presented fails to show that the Petitioner is employable in a stable labor market and thus does not provide persuasive evidence of "the average amount which he is earning or is able to earn in some suitable employment or business after the accident." While both parties provided initial vocational expert opinions that the Petitioner is employable, as noted above, this evidence remains speculative at this point, and counselor Patsavas, following approximately two years of vocational assistance, now opines that Petitioner is not employable in a stable labor market. The testimony and report of counselor Morgan has identified only a few potential job titles for Petitioner. Petitioner has submitted numerous job applications and has had interviews but has not been hired. His restrictions from Marianjoy have been described as "less than sedentary." The Arbitrator believes the Marianjoy restrictions are the most applicable given the fact that Petitioner underwent comprehensive testing and evaluation at the facility. The Arbitrator finds that the parties have not proven that Section 8(d)1 of the Act is applicable here by the preponderance of the evidence.

The current restrictions of Petitioner are the 11/16/16 restrictions imposed by the Marianjoy Pain Clinic. Additionally, two of Petitioner's treating physicians, spinal surgeon Dr. McNally and pain physician Dr. Novoseletsky, have opined that the Petitioner is permanently disabled. The Arbitrator finds that the Petitioner is permanently and totally disabled. The Arbitrator acknowledges there are multiple opinions regarding wat Petitioner's work restrictions should be, from the Marianjoy restrictions to the 10 pound restriction of Dr. Singh to the 50 pound restriction of Dr. Lanoff. No FCE was ever performed in this case. Thus, the Arbitrator believes the restrictions issued by Marianjoy are the most objectively determined of the group. Petitioner spent two months at this facility, 8 hours per day, 5 days per week. The Arbitrator cannot imagine another medical provider in this case with as intimate of knowledge of the Petitioner's capabilities.

A person is totally disabled when he can perform no services except those so limited in quantity, dependability, or quality that no reasonably stable labor market exists for them. *E.R. Moore Co. v. Industrial Comm'n*, 71 Ill.2d 353, 376 N.E.2d 206 (1978); *Illinois Mut. Ins. Co. v. Industrial Comm'n*, 201 Ill.App.3d 1018, 559 N.E.2d 1019 (1990). Petitioner is not required to demonstrate total incapacity or physical helplessness before a total permanent award may be granted. Rather, total permanent disability should be found where he is "unable to make some contribution to the work force sufficient to justify the payment of wages." *Esposito v. Industrial Comm'n*, 186 Ill.App.3d 728, 542 N.E.2d 843, 849 (1989). Total permanent disability benefits are intended to compensate Petitioner "for the impaired earning capacity resulting from his disability, not necessarily for the disability itself." *Zion-Benton Tp. High School Dist. 126 v. Industrial Comm'n*, 242 Ill.App.3d 109, 609 N.E.2d 974 (1993); see *E.R. Moore*, 376 N.E.2d at 209.

In determining whether an employee is capable of performing useful services, the Commission must consider his age, training, education, skills, the extent of the injury and the nature of the employment. *Caradco Window & Door v. Industrial Comm'n*, 86 Ill.2d 92, 427 N.E.2d 81 (1981); *Hutson v. Industrial Comm'n*, 223 Ill.App.3d 706, 585 N.E.2d 1204, 1214 (1992). Continuing pain due to the injury, coupled with inability to obtain employment, my suffice to support a finding of total permanent disability. *Goldblatt Bros., Inc. v. Industrial Comm'n*, 78 Ill.2d 621, 397 N.E.2d 1387, 1390-1391 (1979). An individual who is "obviously unemployable" or whose "medical evidence [supports] a claim of total disability" need not introduce evidence regarding the available job market for his services. *Valley Mould & Iron Co. v. Industrial Comm'n*, 84 Ill.2d 538, 419 N.E.2d 1159 (1981). An injured worker who is not totally disabled, but whose restrictions preclude the performance of his pre-injury work, falls into an "odd lot" category applicable to those employable in only a limited capacity. In such cases, the employee bears the initial burden of proving by a preponderance of the evidence that no

reasonably stable labor market exists for his services. *Sterling Steel Casting Co. v. Industrial Comm'n*, 74 Ill.2d 273, 384 N.E.2d 1326, 1329 (1979); *Courier v. Industrial Comm'n,* 282 Ill.App.3d 1, 668 N.E.2d 28, 31 (1996). The "odd-lot" analysis focuses upon the degree to which claimant's disability impairs his employability. *E.R. Moore*, at 210; *Courier*, 668 N.E.2d at 31; *Alano v. Industrial Comm'n*, 282 Ill.App.3d 531, 668 N.E.2d 21, 24, appeal denied, 169 Ill. 2d 563; 675 N.E.2d 631 (1996). A claimant may meet his burden of proving prima facie "odd-lot" status by showing that he diligently but unsuccessfully sought work within his medical restrictions. *Hutson*, 585 N.E.2d at 1215. In the absence of a job search, claimant may prove "odd-lot" eligibility by demonstrating that his age, education, training, work experience, transferable skills, and disability, considered together, significantly compromise the availability of work which he can perform without endangering his health, thereby rendering him unable to perform any but the most unproductive tasks for which no stable labor market exists. *E.R. Moore*, at 211. Expert testimony from a qualified vocational rehabilitation professional will suffice to prove the unavailability of suitable work for a person of Petitioner's age, education, training, work experience, skills, and disability. *ABB C-E Services v. Industrial Comm'n*, 316 Ill.App.3d 745, 737 N.E.2d. 682 (2000).

Once claimant demonstrates the absence of a stable labor market, the burden shifts to the employer to show that "suitable work is regularly and continuously available." *Sterling Steel*, 384 N.E.2d at 1329. Where respondent fails to prove the regular and continuous availability of suitable work, claimant need not show "that he unsuccessfully attempted to seek other employment." *Sterling Steel*, at 1329; see *ARA Services, Inc. v. Industrial Comm'n*, 226 Ill.App.3d 225, 590 N.E.2d 78, 83-84 (1992). Moreover, claimant need not prove that "no employment is available for a person with his disability" if he is "obviously unemployable" or if the "medical evidence [supports] a claim of total disability." *Valley Mould*, 419 N.E.2d at 1163.

The Petitioner in this case is now 59 years old. He has been out of work approximately 12 years. He did not complete the 9th grade in high school before dropping out. His only job experience since his teenage years, per the report of counselor Morgan, involved driving a semi or delivery truck. His job with Respondent involved the delivery of automobiles, which at time involved putting himself into awkward positions in order to get cars on and off of the trailer. While he is not totally incapacitated, the only facility that provided him with specific work restrictions based on an extended pain program determined he was at a work level that was less than sedentary.

The Arbitrator believes the Petitioner has sufficiently cooperated with the vocational rehabilitation efforts of counselor Patsavas. Services were provided for over two years, which included attempting to obtain a GED, assistance with job leads and completing applications online, computer training and advice/instruction in the job application and interview process. Though job search logs would have been helpful, counselor Patsavas testified that Petitioner had approximately 340 contacts with prospective employers and was able to obtain 6 to 12 interviews, though the only job offer he received was a part time job at a local slots facility. Petitioner testified to, supported by the records of counselor Patsavas, difficulty concentrating related to subjective pain. He passed 3 of 5 sections of the GED test, with the math and language arts sections remaining. Despite having significant assistance, he still was unable to successfully complete the testing. Given that he passed the first 3 portions of the test, the Arbitrator believes the Petitioner made effort. Unfortunately, the covid pandemic resulted in a period of non-activity followed by a return to classes with significantly more people which were held on the Zoom platform rather than in person. Counselor Patsavas testified that the math portion of the test is the most difficult, and he did not believe Petitioner would ultimately be able to pass. He was close to passing the language arts portion of the test but had difficulty completing the essay portion in a timely fashion. There had been a push to obtain a medical document to present to the GED facility to allow Petitioner more time to complete that portion of the test, but the evidence does not indicate that this was actually obtained from Dr. Novoseletsky. Petitioner continues to utilize a spinal cord stimulator.

Counselor Patsavas opined that, considering everything that had transpired up to March 2021, that there is no viable stable labor market for the Petitioner He noted that he still hadn't passed GED testing and that there was "no end in sight" for completion of the GED, his ongoing medical difficulties and complaints, a recommendation for psychological treatment related to his work injury, and the opinion of Dr. Novoseletsky that Petitioner was permanently and totally disabled. He also cited his restrictions being at the level of less than sedentary, and his lack of serviceable computer skills. Counselor Morgan, it appears, was using light work level restrictions the basis for his opinions, which appears to be based on Dr. Ghanayem. The Arbitrator has already indicated that the Marianjoy restrictions provide the most reasonable restrictions in this case given they were based on interaction with the Petitioner on a daily basis for over a month. As noted, these restrictions were described as "less than sedentary." As sedentary is generally the lowest work level of ability, less then sedentary is obviously a significant restriction.

The Arbitrator also notes that psychologist Dr. Andrise opined that the testing Petitioner participated in with her did not show evidence of malingering or feigning symptoms. She diagnosed severe depression and recommended adjustment counseling. On 8/4/22, Dr. Novoseletsky advised Petitioner that a UDS test was positive for alcohol and if it occurred again no further pain medications would be prescribed. Thus, the Petitioner continues to struggle with what appears to be alcohol and narcotic addiction.

Based on the noted evidence and the failed job search, the Arbitrator believes that the burden then shifted to Respondent to show that Petitioner is, in fact, employable for continuous, suitable work. Counselor Morgan also testified that he believed a GED was key to the Petitioner's employability. It also appears that he was utilizing a different work level than less than sedentary in opining in this matter that Petitioner remains employable. The Arbitrator does not find counselor Morgan's testimony to have been more persuasive or to have fulfilled the shifted burden of proof.

In addition to the above, the Arbitrator also notes that there is significant evidence of a medical permanent total disability based on the opinions of Dr. McNally and Dr. Novoseletsky. The Arbitrator must state that testimony from these physicians would have been helpful in strengthening their positions. That said, taking all of the evidence together, the Arbitrator finds that a solidly greater weight of the evidence supports that the Petitioner is permanently and totally disabled. Based on the opinion of counselor Patsavas, the Arbitrator determines that the date upon which Petitioner became permanently and totally disabled was 3/6/21.

**WITH RESPECT TO ISSUE (M), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS AS FOLLOWS:**

The Petitioner's treatment in this case has been complex. The Petitioner has gone from an initial one level fusion surgery advanced to a three level fusion surgery, and he now has been recommended by his surgeon to add an additional level of fusion at L2/3 and/or a potential SI joint fusion surgery. Dr. McNally did not testify

With regard to the treatment of the SI joint, as noted, the Arbitrator found the testimony of Dr. Lanoff to be the most persuasive. While he consistently testifies on behalf of Respondents by his own testimony, the bottom line is he again is the only physician who fully explained the basis for his opinions regarding the SI joint and referred to medical literature often. In this case, the Arbitrator finds his testimony convincing with regard to the diagnosis of SI joint pathology and the efficacy of SI joint fusion. He also points out a reasonable concern about any additional surgery the Petitioner's ongoing long term use of narcotics along with alcohol. The Arbitrator again believes that Dr. Lanoff made an excellent point in this case that, to date, two surgeries (though he noted he wasn't certain initially whether Petitioner had undergone two or three surgeries) have really provided little relief to Petitioner. He has significant ongoing subjective pain complaints and reports his physical activities are very limited. He continues to take narcotic medication 5 or 6 times per day.

The Arbitrator believes that the preponderance of the totality of the evidence presented leads to the conclusion that the Petitioner has failed to prove that L2/3 fusion and any SI joint fusion would be reasonable and necessary pursuant to Section 8(a) of the Act.

Dr. Alzooby did not testify in this matter. Dr. Lanoff explained his theory of how an SI joint condition is to properly be diagnosed. Dr. Alzooby notes that the diagnosis was based on diagnostic injections, which Dr. Lanoff disputed as being diagnostic. However, Dr. Lanoff testified that he was not aware of ay imaging that may have shown pathology of the SI joint or joints. On 7/29/14, Dr. Singh opined that his review of lumbar MRI and CT revealed no evidence of SI joint pathology.

On 5/16/18, Dr. Marden, to whom Petitioner was referred for the SI joint, stated that the etiology of Petitioner's pain was unclear, that he had taken Norco for years without any significant relief, and that diagnostic testing had not provided a clear source for his pain. In testimony, it appears Petitioner testified that he received an SI joint injection from Dr. Marden pursuant to a leading question from his counsel, but the report of Dr. Marden does not indicate that such injection was performed and that he wanted to first see a lumbosacral CT scan to assess for any definitive pain generator, noting any discovered pain source would be discussed with Dr. McNally, but that otherwise he would proceed with a diagnostic left SI joint injection.

Regarding a chronic pain disorder, Dr. McNally explained that the Petitioner would need lifelong pain management because of the degenerative cascade that was aggravated by the work-related injury and the fusion done by Dr. Butler and the revision extension of the surgery by Dr. McNally above and below the fused levels. His specific statement was that Petitioner would likely need lifelong pain treatment. First of all, the use of the word "likely" means it is speculative, and secondly the doctor does not specify what this treatment would be, again leaving it to be speculative. Dr. McNally did not testify in this matter after 2016, so there was no further explanation other than what was presented in his report.

Based on the above, the Arbitrator finds that the Petitioner has failed to prove entitlement to prospective medical treatment. The Petitioner does have open medical rights and any future treatment recommendations can be addressed in the future. The Arbitrator also notes that any necessary maintenance of the spinal cord stimulator would remain causally related to the 2/15/10 accident.

**WITH RESPECT TO ISSUE (O), IS THE PETITIONER ENTITLED TO FURTHER VOCATIONAL REHABILITATION SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:**

To be appropriate, a proposed vocational rehabilitation plan must be both reasonable and realistic. *National Tea Co. v. Industrial Comm'n.*, 97 Ill.2d 424, 433. Because of Petitioner's limited skills, age, restrictions, and prior unsuccessful attempts at vocational rehabilitation, the Arbitrator finds that the plan of Mr. Morgan is not reasonable or realistic, and as such additional vocational rehabilitation is not awarded.

The Illinois Supreme Court Courts in *National Tea* has set forth a number of factors to consider in determining the reasonableness of a vocational rehabilitation award. This includes: whether a claimant has suffered a reduction in earning power with no evidence rehabilitation will increase his earning capacity; a claimant's potential loss of job security due to a compensable injury; the likelihood the claimant will be able to obtain employment upon completion of his training; whether the claimant has unsuccessfully undergone similar vocational treatment in the past; whether the claimant is "trainable" due to their age, education, training and occupation; whether the claimant has sufficient skills to obtain employment without further training or education; the relative costs and benefits to be derived from the program; the claimant's work-life expectancy;

the claimant's ability and motivation to undertake the program; and the claimant's prospects for recovering work capacity through medical rehabilitation or other means.

The Arbitrator concludes, based upon the totality of the evidence, that further efforts at vocational rehabilitation of Petitioner are not realistic or reasonable at this point per the standards of *National Tea*. First, Petitioner underwent a significant amount of vocational rehabilitation services with counselor Patsavas and still has not obtained his GED nor a reasonable job offer. His restrictions are significant per Marianjoy. The Arbitrator notes that counselor Morgan did not opine that the Petitioner's efforts to obtain a GED or his job search were less than diligent. In fact, he noted that Petitioner actually had done well in getting the number of interviews that he did. It must be kept in mind that the issue is not simply whether jobs are available to the Petitioner, but also whether he is able to obtain such jobs in a competitive work environment.

In the Arbitrator's review of the vocational reports of counselor Patsavas, a few things stand out. The Petitioner was attempting to obtain his GED while also being asked to simultaneously perform a job search. The reports themselves identify a significant number of job leads that were provided. No job search logs were submitted into evidence in confirmation of whether all of the leads were contacted. The reports note that Patsavas or one of his colleagues applied for many jobs on Petitioner's behalf. For a significant period of time in 2019 and into 2020, counselor Patsavas recommended Petitioner be provided with a laptop computer and internet services. The Respondent did not provide these items until months after they had been recommended. It importantly should be noted that the vocational process in this case appears to the Arbitrator to have been significantly impacted by the Covid pandemic, both in terms of vocational services and the GED process.

Respondent argues that there has been a failure to cooperate with vocational rehabilitation by the Petitioner. The Arbitrator notes that the Petitioner's efforts at times toward vocational rehabilitation appear to have been questionable, he also has generally cooperated with what has been asked of him in the process. In his own testimony, the Petitioner appears to be motivated to perform a job search and to obtain his GED to some degree more because he is being asked to do so more than his own desire. However, the Arbitrator notes that the Petitioner was eager and motivated when the process began, as noted in the records of Patsavas, which reference his GED teacher lauding him for his effort, particularly at his age, and he passed three parts of the GED test, in the Arbitrator's view, relatively quickly. It must be kept in mind that the Petitioner is in is late 50's, has less than a 9$^{th}$ grade education, and has spent his life working blue collar jobs. According to the report of counselor Morgan, Petitioner had worked as a truck driver in one form or another since 1990, and prior to that was a line operator/forklift driver, parts deliverer, and a pool builder going back to age 16. (Rx5). All of these jobs appear to involve driving in one form or another. The Arbitrator notes that in viewing the Petitioner's testimony, he is not the most sophisticated or educated individual, and it appears through his behaviors and testimony that his pain level and possibly his medication use impacted his ability to concentrate. Per the report of counselor Morgan, Petitioner also is receiving Social Security benefits, though the evidence does not indicate the basis for this, and the Arbitrator specifically notes that such decision is in no way res judicata as to this matter and is certainly not evidence of permanent total disability in this case. Petitioner's motivation did seem to wane somewhat after the covid pandemic began, which was generally continuing through the 3/5/21 date when vocational services ended. While the Petitioner certainly wasn't perfect in his job search, his actions did not reach a level of a lack of cooperation in the Arbitrator's view. While completing his GED he participated in a job search, but he was also seeking his GED simultaneously and both counselors Patsavas and Morgan agreed that his best job prospects would involve obtaining his GED. The program was shut down for the Spring and Summer of 2020, and further classes required the use of Zoom. Again, Petitioner credibly testified in the Arbitrator's view that he had very limited computer experience prior to the accident and prior to vocational rehabilitation involvement. The Arbitrator's view is that the Petitioner's actions were reasonable under the totality of the circumstances and that he is entitled to maintenance benefits through the 3/5/21 termination of vocational rehabilitation with counselor Patsavas.

Another dispute between the parties in this case was the termination of vocational services by counselor Patsavas on 3/5/21. In the Arbitrator's view, based on the evidence presented, while Dr. Novoseletsky clearly had indicated for several months prior to March 2021 that he believed Petitioner was permanently and totally disabled. There is no indication that, while this was in fact the case, counselor Patsavas knew of this opinion prior to March 2021. Respondent seems to be arguing that Novoseletsky's disability opinion was first presented long before March 2021, and also that Patsavas essentially was working more or less as a Petitioner's expert and unilaterally determined that vocational services should end in consultation with Petitioner's attorney. This seems to ignore that Patsavas specifically attempted to contact Respondent's attorneys to discuss the matter and at that point Respondent's attorneys indicated in writing that counselor Patsavas was considered Petitioner's expert, that they would not speak to him, and that counselor Morgan would be taking over. This seems to ignore the fact that Dr. McNally had already determined that Petitioner was permanently and totally disabled and that it was only the agreement of the parties to utilize the Marianjoy restrictions that vocational services were carried out. Patsavas was asked to ignore a known medical opinion that determined Petitioner was permanently and totally disabled. In light of that agreement, it doesn't make sense to the Arbitrator that Respondent's counsel would not communicate with Patsavas given the opinion of Dr. Novoseletsky to determine if vocational services were to continue and whether they would be authorized by Respondent. The Arbitrator's review of counselor Patsavas' reports showed no indication in the "Medical Status" portions of this opinion of Dr. Novoseletsky prior to 3/5/21 report.

The Arbitrator does believe that the Petitioner's effort in this case was not stellar. There were too many times where it was clear from the vocational reports that he would have to be repeatedly asked to do things he should have understood after previous instructions and attempts. However, again, this is an uneducated man who has only a blue collar history of employment and who has not sought employment in well over 25 years. His restrictions of less than sedentary restrict him from performing virtually any laboring or driving job the Arbitrator could imagine.

The plan for Respondent to provide vocational services with the intention that ultimately Respondent may not pay for such services and challenge them later was not the wise choice here. It seems obvious that there were two possible outcomes: Respondent would be satisfied with the services provided and pay for them, or would not be satisfied, would not pay for them, and leave Petitioner holding the bag for significant vocational services costs. Instead, Commission Rule 9110.10 should have been followed prior to the institution of vocational rehabilitation services given that a conflict existed. Instead, the parties agreed to begin vocational rehabilitation services with counselor Patsavas and agreed to utilize the Marianjoy restrictions in the process.

Given that the parties agreed that Petitioner would participate in vocational rehabilitation with an agreement on what restrictions would be utilized, the Arbitrator finds that vocational services were appropriate, and Respondent is responsible for paying the expenses of counselor Patsavas through 3/5/21. The period of time utilized is all the more reasonable given that the Covid pandemic was happening at the same time.

The Arbitrator concludes further efforts at vocational rehabilitation are not realistic at this time.

**WITH RESPECT TO ISSUE (P), THE ADMISSIBILITY OF PETITIONER'S EXHIBIT 21 AND RESPONDENT'S EXHIBIT 9, THE ARBITRATOR FINDS AS FOLLOWS:**

The parties indicated at hearing that both Px21 and Rx9 were exhibits containing the deposition of vocational counselor David Patsavas. The difference between the two is that Rx9 included four exhibits that Respondent offered into evidence at the deposition. Respondent indicated no objections to Respondent's deposition Exhibits 3 and 4, but did object to Exhibits 1 and 2. Exhibit 1 is an IWCC decision that Patsavas had been involved in

and questioned about at the deposition, and Exhibit 2 is documentation of the Code of Professional Ethics for Rehabilitation Counselors from the Commission on Rehabilitation Counselor Certification.

While the Arbitrator indicated at hearing that one exhibit would be allowed into evidence and the other would not, the Arbitrator admits both Px21 an Rx9 into evidence.

As to the exhibits themselves, the Arbitrator overrules Petitioner's objections. It was fair game for Respondent's counsel to ask questions regarding counselor Patsavas' recollection of his opinions in the prior case and whether they were consistent with his current opinions. That being said, the Arbitrator also notes that the questions asked of Patsavas in this regard are not particularly relevant and carry no weight in the decision. He reasonably responded that each case has its own facts and factors which make it unique, and thus that his opinions in each case stand on their own merits based on the facts of the case. The case cited was a decade old and the questions asked of Patsavas were not in depth as to what may have made that case and the case at bar so identical that Patsavas could be held to hold the same opinions in this case.

As to Deposition Exhibit 2, both counselors Patsavas and Morgan agreed that they are bound by the ethical rules of their profession. As such, the Arbitrator sees no reason to bar this exhibit and overrules the Petitioner's objections. Again, based on the questions asked regarding the ethical rules, there was no evidence presented, in the Arbitrator's view, which support a finding that either counselor violated their ethical rules in this case. Thus, again, this exhibit, while admitted, really doesn't contribute any significant weight to the Arbitrator's decision and findings.

Lastly, the reason both exhibits are being admitted is that while Rx9 is the proper admissible document based on the Arbitrator's rulings, the Arbitrator inadvertently made all rulings on objections made during counselor Patsavas' deposition in Px21 as opposed to Rx9.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 22WC000785 |
| Case Name | Olga Hipolito v.<br>Pepino Robles dba McDonald's |
| Consolidated Cases | 22WC001075; |
| Proceeding Type | Petition for Review under 19(b)<br>Remand Arbitration |
| Decision Type | Commission Decision |
| Commission Decision Number | 24IWCC0591 |
| Number of Pages of Decision | 18 |
| Decision Issued By | Maria Portela, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Adam Rosner |
| Respondent Attorney | Cody Hartman |

DATE FILED: 12/10/2024

/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

OLGA HIPOLITO,

Petitioner,

vs. NO: 22WC000785

PEPINO ROBLES d/b/a MCDONALD'S,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses, prospective medical care, temporary total disability and "chain of doctors," and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, but makes a modification 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).

Regarding temporary total disability (TTD), the Arbitrator awarded benefits from December 24, 2021 through July 24, 2022. However, on the Request for Hearing form, Petitioner claimed TTD through July 23, 2022 and she testified that she returned to work on July 24, 2022. *T.33*. Therefore, we modify the TTD period to December 24, 2021 through July 23, 2022. We note that, although we are modifying the end date to July 23, 2022, the Arbitrator's calculation of 30-2/7 weeks is correct.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 4, 2024 is hereby affirmed and adopted with the modification 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 $30,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

**December 10, 2024**

SE/
O: 11/19/24
49

/s/ *Maria E. Portela*

/s/ *Amylee H. Simonovich*

/s/ *Christopher A. Harris*

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 22WC000785 |
| Case Name | Olga Hipolito v. Pepino Robles d/b/a McDonald's |
| Consolidated Cases | 22WC001075 |
| Proceeding Type | 19(b) Petition |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 15 |
| Decision Issued By | Rachael Sinnen, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Adam Rosner |
| Respondent Attorney | Brian Rudd |

DATE FILED: 1/4/2024

**THE INTEREST RATE FOR THE WEEK OF JANUARY 3, 2024 5.04%**

/s/ Rachael Sinnen, Arbitrator

Signature

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

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

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

**Olga Hipolito**
Employee/Petitioner

v.

**Pepino Robles d/b/a McDonald's**
Employer/Respondent

Case # **22** WC **0785**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Rachael Sinnen**, Arbitrator of the Commission, in the city of **Chicago**, on **9.7.23**. 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 **Whether Petitioner exceeded her choice of physicians**



**FINDINGS**

On the date of accident, **10.2.21**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**8,492.78**; the average weekly wage was $**535.59.**

On the date of accident, Petitioner was **34** 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 $6,662.50 for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $6,662.50.

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

**ORDER**

Respondent to pay Petitioner directly for outstanding medical services, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act, from Riverside Health Clinic (Px3), Micro Neuro Spine (Px8), Lakeshore Surgery Center (Px9 and Px10), Western Touhy Anesthesiology (Px11), Round Lake MRI (Px13), and Northwest Community Hospital (Px2) for dates of service October 4-7, 2021 that are specifically related to the back injury (which includes but is not limited to acetaminophen, x-rays, and MRIs).

Respondent to pay Petitioner directly for 30 2/7 weeks of TTD benefits (12.24.21 through 7.24.22) at a weekly rate of $440.00. Respondent is awarded a credit for TTD benefits already paid in the amount of $6,662.50.

Respondent shall approve and pay for the surgical hemilaminectomy from L4 through S1 and necessary post-operative care prescribed by Dr. Erickson as provided in Section 8(a) and 8.2 of the Act.

See also Arbitration Decision for Case No. 22WC001075, which is consolidated with the case at hand.

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 4, 2024**

Signature of Arbitrator

STATE OF ILLINOIS )
) SS
COUNTY OF COOK )

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

| | | |
|---|---|---|
| Olga Hipolito, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | |
| | ) | Case No. 22WC000785 |
| Pepino Robles d/b/a | ) | consolidated with |
| McDonald's | ) | Case No. 22WC001075 |
| | ) | |
| Respondent. | ) | |

**FINDINGS OF FACT**

This matter proceeded to hearing on September 7, 2023 in Chicago, Illinois before Arbitrator Rachael Sinnen on Petitioner's Petition for Immediate Hearing pursuant to Section 19b/8a of the Illinois Workers' Compensation Act "Act." For Case No. 22WC000785 (date of accident 10.2.21), issues in dispute include accident, causation, unpaid medical bills, temporary total disability "TTD" benefits, prospective medical and whether Petitioner exceeded her choice of physicians. Ax 1. For Case No. 22WC01075 (date of accident 12.12.21), issues in dispute include accident, notice, causation, unpaid medical bills, prospective medical and whether Petitioner exceeded her choice of physicians. Ax 2.

***Petitioner's Job Duties***

Petitioner testified that she was currently employed by McDonald's at their Northbrook location where she was working at for the past six months. Tx10. Petitioner testified that she previously worked for Respondent's location in Arlington Heights where she started in August of 2021. Id. at 11. Petitioner testified that as part of her job duties for Respondent, Petitioner worked in the kitchen wrapping hamburgers, cooking meat, washing dishes, and sweeping and mopping the floors. Id. at 12. Petitioner testified that prior to the work accident, she worked five days, forty to forty-two hours per week. Id.

***Alleged Accident of October 2, 2021***

Petitioner testified that on October 2, 2021, Petitioner was at work for Respondent wrapping burgers in the kitchen. Id. at 13. Petitioner testified that she went to a high shelf (approximately six to seven feet tall) to grab a box filled with burger wrappers. Id. at 13-15. Petitioner testified that she had to reach to the high shelf to grab the box of burger wrappers with her hands above her head and as Petitioner grabbed the box, Petitioner testified she felt a strong pain in her back. Id. at 16. Petitioner testified that as she felt the pain, she lowered the box down to the table. Id. at 17.

Petitioner testified that she felt pain in her lower back but continued working. Id. Petitioner testified that she notified her shift manager, Carla Martinez, of the accident. Id. at 18-19.

Petitioner testified that she completed her shift on October 2, 2021 and went to work the following day but continued to feel pain. Id. at 19. Petitioner testified that she then sought medical treatment on October 4, 2021. Id.

***Alleged Accident of December 12, 2021***

Petitioner testified that after her stay in the hospital following the October 2, 2021 accident, Petitioner returned back to work for Respondent. Id. at 21. Petitioner testified that as she worked, Petitioner's back continued to hurt. Id. Petitioner testified that on December 12, 2021, Petitioner bent down to reach for something at work when she felt a sharp pain in her low back. Id. at 22. Petitioner testified that she felt pain down her right leg as well. Id. Petitioner testified that two of her coworkers, Louis Perez, and Abraham, assisted Petitioner in getting up from the bent over position. Id. at 23. Petitioner testified that she also notified her manager, Kelly. Id. at 24. Petitioner testified that this accident occurred at night. Id. at 24. Petitioner testified that following the work accident, she went to the hospital.

***Summary of Medical Records***

On October 4, 2021, Petitioner presented to Dr. Meyer at Northwest Community Hospital with a history consistent with a lifting injury and upper/low back pain. Px1. On physical examination, the physician noted tenderness and spasms to the lumbar and thoracic spines. Id. MRIs taken of Petitioner's lumbar and thoracic spines were unremarkable. Id.

On December 12, 2021, Petitioner returned to Northwest Community Hospital. PX. 1. The history noted a 35-year-old female presenting with right-sided flank pain and back pain on and off for the last week. The pain radiated down her leg and was worse with activity. She had no loss of bowel or bladder control and no numbness or tingling. She also complained of some right lower abdominal tenderness. The record does not state anything about being at work or suffering another accident on or about December 12, 2021. The treating physician stated it was unclear whether the pain source was sciatica back pain versus a kidney stone. A CT was performed with no acute findings. Other laboratory studies were unremarkable. Petitioner was given IV medications and was feeling better. There were no neurologic findings. She was discharged with a recommendation/referral to follow up with the Northwest Community Hospital Back Pain Clinic.

Petitioner testified that she took two weeks off after being released from the hospital and saw a doctor at Access Northwest in Arlington Heights, but she could not recall the doctor's name. When asked whether she saw this doctor for her back, Petitioner initially answered that the doctor was recommended and referred for anemia by Northwest Community Hospital but also admitted that she treated for her back. TX. 63-64. The medical records from Access Northwest were not submitted into evidence.

On December 24, 2021, Petitioner presented to Riverside Health Clinic with low back pain and pain radiating into her right leg. Px3. Petitioner completed a course of physical

therapy/chiropractic treatment at Riverside Health Clinic by Amish Shah from December 24, 2021 through March 14, 2022. The record does not indicate that Chiropractor Shah ever made a referral to any other medical provider. Id.

Petitioner then sought pain management with Dr. Vargas on December 29, 2021 with low back pain and pain radiating caudally into both buttocks and into the postero-lateral route into both thighs, calves, ankles and feet and a history consistent with the testimony at trial. Px4. There is a notation in the records that Petitioner was referred by Chiropractor Shah. Id. at 1. On physical examination, Dr. Vargas noted decreased sensation through pinprick in the L4-L5 dermatomes, decreased forward flexion/extension, positive facet loading, and positive straight leg raise, Braggard, Bechterew tests on the right. Id. Dr. Vargas recommended Petitioner undergo an MRI of the lumbar spine, physical therapy, and a back brace. Id.

On January 4, 2022, Petitioner underwent the MRI of the lumbar spine, which showed posterior disk protrusions at L4-L5 and L5-S1 indenting the ventral surfaces of the thecal sac. Px6. Petitioner followed up with Dr. Vargas on January 14, 2022 with similar subjective complaints and physical examination findings. Px4. Dr. Vargas reviewed the lumbar MRI and noted that it confirmed a disc protrusion at the L4-L5 and L5-S1 level which resulted in central canal stenosis. Id. Dr. Vargas continued Petitioner's off work restrictions and recommended an EMG. Id. On March 11, 2022, Petitioner underwent an EMG of her bilateral lower extremities which showed acute left L4-L5 lumbar radiculopathy. Px7. Petitioner followed up with Dr. Vargas on March 25, 2022 with similar complaints and physical examination findings. Px4. Given Petitioner's axial low back pain and radicular symptoms, Dr. Vargas recommended a series of lumbar injections. Id. Petitioner underwent a left L4-L5, L5-S1 transforaminal epidural steroid injection and selective nerve root blocks. Id. Petitioner underwent a second left L4-L5, L5-S1 transforaminal epidural steroid injections and selective nerve root blocks on April 21, 2022. Id.

On March 31, 2022, Petitioner presented for an independent medical examination (IME) with Dr. Stanley at the request of the insurance company. Px2, Ex. 2. At the IME, Petitioner gave a history consistent with the testimony at trial. Id. On physical examination, Dr. Stanley noted multiple findings of inconsistent pain behaviors. Id. Dr. Stanley diagnosed Petitioner with a lumbar strain and found there to be no objective findings on examination or imaging. Id. Dr. Stanley noted Petitioner had positive Waddell signs and symptom magnification. Id. Dr. Stanley indicated no further treatment was necessary and placed Petitioner at maximum medical improvement. Id.

Following the injections, Petitioner presented to Dr. Vargas on May 3, 2022 with no improvement from the injections besides transient relief after the first injection. Px4. At this visit Petitioner complained of significant amount of distal lower back axial pain with associated lower extremity and radiculopathy. Id. Dr. Vargas reviewed Dr. Stanley's IME report and disagreed with Dr. Stanley's opinion in that Petitioner had clear, objective pathology on the MRI and EMG. Id. Dr. Vargas noted similar physical examination findings and referred Petitioner for a spinal surgery consultation. Id.

On June 7, 2022, Petitioner presented to Dr. Rerri at Lakeshore Surgery Center for a spine surgery consultation. Px5. At this visit, Petitioner complained of low back pain and bilateral radicular pain and a history consistent with the testimony at trial. Id. On physical examination, Dr. Rerri noted

tenderness over the left hip and left calf swelling. Id. Dr. Rerri reviewed the lumbar MRI and indicated it showed a disc protrusion at L4-L5 and L5-S1. Id. Dr. Rerri noted that Petitioner was having left hip pain, lumbar radiculopathy, and ordered diagnostic imaging for Petitioner's leg to rule out deep vein thrombosis (DVT). Id. Dr. Rerri noted that if DVT was excluded, he would consider options for the lumbar spine. Id. Petitioner underwent the ultrasound of her lower extremities on July 6, 2022, which was negative for DVT. Px13. Petitioner followed up with Dr. Rerri on July 19, 2022 with similar complaints and physical examination findings. Id. Dr. Rerri reviewed the ultrasound and indicated that Petitioner's problems are the L4-L5 and L5-S1 disc protrusions, which he recommended a L4-L5 and L5-S1 partial laminectomy, tubular discectomy, foraminoplasty and discogram. Px5.

Petitioner went for a second spinal surgery consultation with Dr. Erickson at Micro Neuro Spine on September 21, 2022. Px8. At this visit, Petitioner complained of low back pain and bilateral radicular pain and a history consistent with the testimony at trial. Id. Dr. Erickson reviewed the MRI of the lumbar spine and agreed with disc herniations at several levels and stenosis at L5-S1. Id. Dr. Erickson indicated that the stenosis at L4-S1 may not account for the majority of Petitioner's problem and indicated petitioner's pain may be a primary segmental injury associated with axial loading of the spine. Id. Petitioner followed up with Dr. Erickson on November 16, 2022 with similar complaints and difficulty sitting and prolonged walking. Id. Dr. Erickson noted that Petitioner had significant left-sided radicular pain and recommended a hemilaminectomy from L4 through S1. Id.

***Testimony of Dr. Robert Erickson (Petitioner's Treating Physician)***

On February 28, 2023 Dr. Erickson testified regarding his opinions and treatment of Petitioner. Px12. Dr. Erickson testified that he first saw Petitioner on September 21, 2022 with Petitioner having predominantly right-sided leg pain with the left leg worsening as well as low back pain. Id. at 10. Dr. Erickson testified that he reviewed the imaging of the January 4, 2022 MRI, which noted two-to-three-millimeter disc herniations with lateral recess stenosis. Id. at 12. Dr. Erickson testified that he noted the lateral recess stenosis was somewhat worse on the right side. Id. Dr. Erickson testified that a patient with stenosis can present with back pain, painful sitting, and if the nerves are involved, then radicular pain down the legs into the feet. Id. at 14. Dr. Erickson testified that an EMG is not used to be a total picture of the diagnosis but can be used in combination with other diagnostic studies. Id. at 17.

Dr. Erickson testified that he performed a physical examination on September 21, 2022 which noted a good neurological examination. Id. at 18. Dr. Erickson explained that Petitioner's lateral recess stenosis may not account for the majority of Petitioner's problem by testifying:

> I noticed that part of [Petitioner's] description of her pain included painful sitting. So if she does have nerve compression in the lateral recesses, it may not be the entire problem for her, that is she may have a problem from the discs or the joints or even the muscles that support the lumbar spine.

Id. at 19

Dr. Erickson explained that Petitioner's "problem in sitting is reflective of a structural injury like that which may go beyond a pure disc herniation or pure nerve compression." Id. at 19. Dr. Erickson testified that he next saw Petitioner on November 16, 2022 and noted that Petitioner had trouble walking and sitting along with numbness/tingling affecting her feet. Id. at 21. Dr. Erickson testified that the significance of Petitioner's difficulty walking or sitting is that patients with borderline spinal stenosis commonly are most miserable in those positions. Id. at 21. Dr. Erickson testified that he reviewed the EMG and MRI findings, acknowledged that Petitioner had radicular pain and painful sitting, and recommended a less complex surgery of hemilaminectomy. Id. at 22-23. Dr. Erickson explained that the hemilaminectomy would almost certainly take any pressure of the nerves and there would be a chance to remove adhesions or inflammatory tissues from the nerves. Id. at 24.

Dr. Erickson testified that the purpose of injections Petitioner underwent was to diminish inflammation and that if there is a period of time where the pain disappears, it may hint at that particular segment being important to the pain complaint. Id. at 28-29. Dr. Erickson testified that Petitioner's lifting injury of the box could either cause a disc herniation or make a weak spot in a disc worse in some way. Id. at 31. Dr. Erickson testified that he did not note any positive Waddell signs or symptom magnification. Id. at 31. Dr. Erickson testified that he had placed Petitioner on work restrictions of no lifting greater than twenty pounds and try to limit hours of work to four per day. Id. at 32. Dr. Erickson reviewed Dr. Rerri's surgical recommendation and testified that Dr. Rerri's recommendation is similar to that of his own surgical recommendation. Id. at 34.

On cross-examination, Dr. Erickson testified that the work restrictions were contained in his quick report. Id. at 35-36. Dr. Erickson testified that he did not review the records from Northwest Community Hospital or records from Chiropractor Shah. Id. at 40-41. Dr. Erickson testified he reviewed the records from Dr. Vargas and Dr. Rerri. Id. at 44. Dr. Erickson testified that he was only aware of the October of 2021 accident. Id. at 45. Dr. Erickson testified that Petitioner described the box as fifty pounds but that a twenty-five-pound lift would also be causative for a back injury. Id. at 48. Dr. Erickson testified that Petitioner noticed the pain onset at the time of the lifting incident. Id. at 49. Dr. Erickson testified that he agreed with the radiologist's impressions of the January 4, 2022 MRI report. Id. at 51. Dr. Erickson testified that he could not confirm nerve involvement from the MRI but indicated the discs are capable of either causing inflammation and tethering of the nerve or some compression of the nerves in the small corners of the lateral recesses. Id. at 54. Dr. Erickson testified that the primary purpose of the surgery he is recommending is nerve decompression and exploration of the nerves for other possible problems separate from compression. Id. at 58.

Dr. Erickson testified that discograms have been used less in the past years. Id. at 62. Dr. Erickson testified that he does not have a financial stake in any surgery centers that he uses. Id. at 67. Dr. Erickson testified that Petitioner's pain complaints followed the L5-S1 and L4-L5 dermatomes down her lower extremities. Id. at 68.

On redirect examination, Dr. Erickson testified that lumbar strains usually respond to treatment within several weeks. Id. at 69. Dr. Erickson testified that radicular complaints could wax and wane. Id. at 70.

***Testimony of Dr. Tom Stanley (Respondent's Section 12 Examiner)***

On May 19, 2023, Dr. Tom Stanley testified regarding his opinions contained in his IME report and his examination findings of Petitioner. Rx2. Dr. Stanley testified that during his IME, he took a history which indicated Petitioner was retrieving a box from a high shelf in October of 2021 when she injured her back. Id. at 8. Dr. Stanley testified that Petitioner reinjured her back when she was bending down to put something in a coffee maker in December of 2021. Id. at 8. Dr. Stanley testified that Petitioner needed a wheelchair to leave the IME. Id. at 9. Dr. Stanley testified that he noted a number of inconsistent pain behaviors and positive Waddell signs on physical examination. Id. at 11. Dr. Stanley testified that Petitioner's pain did not localize to a single nerve root dermatome. Id. at 13. Dr. Stanley testified that Petitioner had a normal neurological examination. Id. at 14. Dr. Stanley testified that he reviewed the October 5, 2021 MRI report and the imaging for the January 4, 2022 MRI. Id. at 16. Dr. Stanley testified that on his review of the January 4, 2022 MRI, he did not find any evidence of nerve compression. Id. at 16. Dr. Stanley testified that he diagnosed Petitioner with a lumbar strain as a result from the original accident in October of 2021 and found there was no separate injury in December of 2021. Id. at 17.

Dr. Stanley testified that Petitioner's ongoing complaints were non-verifiable as there were no objective findings to substantiate Petitioner's subjective complaints. Id. at 18. Dr. Stanley testified that Petitioner's lifting accident would not be a cause for anemia. Id. at 20. Dr. Stanley testified that no further treatment is necessary for Petitioner. Id. at 21. Dr. Stanley testified that injections, a discogram, and surgery would not be appropriate for Petitioner's condition. Id. at 21-24.

On cross examination, Dr. Stanley testified that one hundred percent of his IMEs are for respondents in worker's compensation cases. Id. at 25-26. Dr. Stanley testified that the last note he reviewed was a January 14, 2022 note by Dr. Vargas. Id. at 27. Dr. Stanley testified that he did not review any records from Dr. Rerri or Dr. Vargas. Id. at 28. Dr. Stanley testified that "literally anything can cause a strain. It can be from flexing the spine. It can be from extending the spine…" Id. at 29. Dr. Stanley testified that a strain usually resolves within a few weeks. Id. at 29. Dr. Stanley testified that the same mechanism of injury can aggravate an underlying spinal condition. Id. Dr. Stanley testified that his review of the January 4, 2022 MRI report coincided with the radiologist's review of the October 5, 2021 MRI report, but he did not review the imaging of the October 5, 2021 MRI. Id. at 30-31. Dr. Stanley testified that he disagreed with the reading radiologist, Dr. Erickson, and Dr. Rerri's reviews of the January 4, 2022 MRI report. Id. at 33-34. Dr. Stanley testified that radicular symptoms could wax and wane. Id. at 34.

On redirect examination, Dr. Stanley testified that what is important in reviewing pathology of an MRI is whether the disc abnormality is hitting a nerve. Id. at 37.

## CONCLUSIONS OF LAW

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

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

Petitioner testified that her employment with McDonald's included wrapping hamburgers, cooking meat, washing dishes, and sweeping and mopping the floors. See Tx. 12. Petitioner testified that on October 2, 2021, she felt a pain in her back as she reached for a high shelf, grabbed a box of burger wrappers, and brought the box down. See Tx. 13-15. She went to the hospital two days later reporting a lifting injury. See Px 1. On December 12, 2021, Petitioner credibly testified that she bent down to reach for something at work when she felt a sharp pain in her low back requiring two coworkers to assist her in getting up. See Tx at 22. The Arbitrator recognizes that although Petitioner went to the hospital that same day, there was no record of another accident occurring at work. See Px 1. However, Petitioner did give a history of a work accident on December 12, 2021 when she presented to Riverside Health Clinic on December 24, 2021. See Px 3.

The Arbitrator recognizes that Petitioner was a difficult witness particularly on cross examination. While there are discrepancies in her testimony and submitted medical records, the Arbitrator does not find them significant enough to defeat Petitioner's claims. The Arbitrator finds that accidents did occur on October 2, 2021 and December 12, 2021 and that Petitioner was injured engaging in acts that she was reasonably expected to perform incident to her assigned duties. See McAllister v. Illinois Workers' Compensation Comm'n, 2020 IL 124848.

For both claims, the Arbitrator finds that the accidents did arise out of and in the course of Petitioner's employment by Respondent.

***Issue E, whether timely notice of the accident was given to Respondent, the Arbitrator finds as follows:***

The issue of notice was not in dispute in Case No. 22WC000785 (date of accident 10.2.21). Ax 1.

Petitioner credibly testified that on December 12, 2021, two of her coworkers, Louis Perez, and Abraham, assisted Petitioner getting up from the bent over position Tx. at 23. Petitioner also testified that she notified her manager, Kelly. Id. at 24. She went to the hospital the same day. Respondent did not present any fact witnesses.

For Case No. 22WC01075 (date of accident 12.12.21), the Arbitrator finds that timely notice of the accident was given to Respondent.

***Issue F, whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds as follows:***

The Arbitrator notes that Petitioner had two accidents involving the same body parts. However, the second accident on December 12, 2021 was just a reaggravation of Petitioner's lumbar condition. The medical records and the physicians' testimony (including the IME) indicate that the original accident on October 2, 2021 was the onset of Petitioner's back complaints. Therefore, causation for both cases hinge on the October 2, 2021 accident.

The Arbitrator finds Dr. Vargas, Dr. Rerri, and Dr. Erickson to have been credible in their opinions in the medical records regarding the nature of her injuries and their causal relationship to the claimed injury at work for the Respondent. The Arbitrator specifically finds Dr. Erickson credible in his testimony regarding the nature of her injuries and their causal relationship to the claimed injury at work for the Respondent. The Arbitrator does not find the opinions of Dr. Stanley as credible or persuasive on this issue.

As noted above, Petitioner had two accidents, a lifting accident and reaggravation from bending over. Following the lifting accident on October 2, 2021, Petitioner went to the hospital complaining of low back pain. Petitioner returned to work and credibly testified that as she continued to work, her back pain progressively worsened. Petitioner then reaggravated her back by bending down on December 12, 2021 where she also went to the hospital.

Petitioner then sought treatment with Chiropractor Shah at Riverside Health Clinic on December 24, 2021 with significant low back pain and bilateral radicular pain. Chiropractor Shah recommended a course of physical therapy which Petitioner completed at Riverside Health Clinic from December 24, 2021 through March 14, 2022. Petitioner was then referred for pain management with Dr. Vargas on December 29, 2021 where she treated until May 3, 2022. Throughout Petitioner's treatment with Dr. Vargas, Petitioner consistently complained of low back pain with bilateral radicular pain. Further, Dr. Vargas consistently noted positive physical examination findings of the lumbar spine including decreased forward flexion/extension, facet loading maneuver, and neurological examinations.

Dr. Vargas recommended an MRI of the lumbar spine and an EMG of the bilateral lower extremities. The lumbar MRI on January 4, 2022 showed disc protrusions at L4-L5 and L5-S1 and the EMG showed acute left L4-L5 lumbar radiculopathy. Petitioner then underwent two lumbar injections which provided transient relief. As Petitioner did not improve from conservative treatment, Dr. Vargas referred Petitioner to Dr. Rerri for a spine surgery consult on June 7, 2022. Dr. Rerri reviewed Petitioner's MRI which he agreed showed disc protrusions at L4-L5 and L5-S1. Petitioner followed up with Dr. Rerri on July 19, 2022 where Petitioner complained of back and bilateral leg pain, and Dr. Rerri recommended a laminectomy and discectomy.

Petitioner was then referred to Dr. Erickson on September 21, 2022 and November 16, 2022. Dr. Erickson reviewed the MRI and EMG, noted the disc protrusions and acute radiculopathy, and recommended surgery. Throughout Petitioner's treatment with her physicians, Petitioner consistently complained of low back pain and radicular pain. Eventually, Dr. Erickson recommended a similar surgery as Dr. Rerri for Petitioner's lumbar spine.

As noted in Dr. Erickson's deposition, Petitioner had consistent complaints of difficulty sitting and prolonged walking. As Dr. Erickson explained, this is consistent with Petitioner's MRIs as that can be caused by disc abnormalities. He explained that the lifting injury that occurred on October 2, 2021 is a common way to either cause or aggravate lumbar pathology.

Dr. Stanley testified that in his review of the January 4, 2022 MRI, he did not note stenosis or disc protrusions. However, four other physicians (Dr. Vargas; Dr. Kuritza; Dr. Rerri; and Dr. Erickson) all noted disc protrusions at L4-L5 and L5-S1 on Petitioner's January 4, 2022 MRI. Thus, Dr. Stanley is the lone physician, out of five physicians, that did not note disc protrusions on Petitioner's MRI.

The Arbitrator does not find Dr. Stanley's opinion that Petitioner only suffered a lumbar strain as a result of the October 2, 2021 work accident to be persuasive. Dr. Stanley opined that a lumbar strain typically takes a few weeks to resolve. From the onset of Petitioner's work accident in October of 2021 until the trial date on September 7, 2023, Petitioner had consistent complaints of low back pain, difficulty sitting, and radicular pain.

While Dr. Stanley noted positive Waddell signs and symptom magnification during his IME of Petitioner, none of Petitioner's treating physicians noted positive Waddell signs or symptom magnification. The Arbitrator notes that Dr. Stanley only saw Petitioner once on March 31, 2022 while Chiropractor Shah, Dr. Vargas, Dr. Rerri, and Dr. Erickson saw Petitioner several times over two years.

For both claims, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the injury.

***Issue J, whether the medical services that were provided to Petitioner were reasonable and necessary and whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds as follows:***

The Arbitrator finds that the medical services provided to Petitioner were reasonable and necessary for the October 2, 2021 and December 12, 2021 accidents and Respondent has not paid for said treatment. This is supported by Petitioner's medical records from Riverside Health Clinic, Dr. Vargas, Dr. Rerri, and Dr. Erickson. The Arbitrator finds that the medical opinions and treatment plans set forth in the medical records from Dr. Vargas, Dr. Rerri, and Dr. Erickson are both credible and appropriate for her work-related injuries. As Petitioner's treating physicians saw Petitioner on several occasions, they were the most equipped physicians to diagnose Petitioner and recommend treatment based on Petitioner's subjective complaints and their own objective findings.

Dr. Stanley opined that Petitioner required no further treatment beyond the IME report to be necessary. However, as noted previously, Dr. Stanley only diagnosed Petitioner with a lumbar strain as a result of the October 2, 2021 work accident. As noted previously, Petitioner's condition was much more significant than a lumbar sprain, which is supported by Petitioner's testimony, the medical records, and Dr. Erickson's opinions. Thus, having found Dr. Erickson more credible than

Dr. Stanley on the issue of causation, the Arbitrator finds that the medical services provided to Petitioner throughout the course of her treatment were both reasonable and necessary.

Respondent contends that Petitioner's treatment with Dr. Vargas and thereafter exceeds Petitioner's choice of physicians. The "two-doctor rule" is outlined in Section 8(a) of the Act. One of the purposes behind the "two-doctor rule" is to avoid "doctor shopping."

It is clear that Petitioner's emergency treatment at Northwest Community Hospital does not constitute a choice under the Act.

Respondent argues that Petitioner's visit with an unknown doctor at Access Northwest in December 2021 following her hospital stay constitutes Petitioner's first choice. While Petitioner did admit to seeing a doctor with Access Northwest in December 2021, she could not remember the doctor's name. Petitioner testified that she was referred to the doctor for her anemia but also admitted after substantial questioning that she also treated for her back. See TX. 63-64. The medical records and bills from Access Northwest were not submitted into evidence. The Arbitrator finds that whatever treatment Petitioner may or may not have received by Access Northwest does not constitute a choice of provider under Section 8(a) of the Act.

The medical records for Riverside Health Clinic do not document any referral to or from Chiropractor Shah. The Arbitrator finds Riverside Health Clinic to be Petitioner's first choice under Section 8(a). The medical records from Dr. Vargas indicate that Petitioner was referred to him by Chiropractor Shah. See Px4 at 1. The Arbitrator finds that Dr. Vargas remains within the chain of referrals of Petitioner's first choice.

Dr. Vargas referred Petitioner for a neurological consult but she saw an orthopedic surgeon instead, Dr. Rerri. Dr. Rerri's records indicate that Petitioner was referred by Dr. Vargas. Petitioner did eventually see a neurosurgeon as Dr. Vargas instructed. On the last page of Petitioner's Exhibit 5, a referral from Dr. Rerri to Dr. Erickson can be found. The Arbitrator finds that Petitioner's treatment with Dr. Rerri and Dr. Erickson fall under the chain of referrals of Petitioner's first choice (stemming from Riverside Health Clinic).

Overall, the Arbitrator finds that Petitioner has not exceed her choice of physicians under Section 8(a) of the Act.

For Case No. 22WC000785 (date of accident 10.2.21), the Arbitrator orders Respondent to pay Petitioner directly for outstanding medical services from Riverside Health Clinic (Px3), Micro Neuro Spine (Px8), Lakeshore Surgery Center (Px9 and Px10), Western Touhy Anesthesiology (Px11), and Round Lake MRI (Px13), pursuant to Sections 8(a) and 8.2 of the Act and Perez v. Illinois Workers' Compensation Comm'n, 2018 IL App (2d) 170086WC, ¶ 17, 96 N.E.3d 524.

With regards to Petitioner's treatment at Northwest Community Hospital in October 2021, Petitioner was held overnight at the hospital because of her anemic condition, unrelated to the work accident. As a result, the Arbitrator also awards the medical bills from Northwest Community Hospital as seen in Px2 for dates of service October 4-7, 2021 that are specifically

related to the back injury, which includes but are not limited to: Acetaminophen; x-rays; and MRIs. The Arbitrator does not award any medical bills related to Petitioner's anemic condition.

The parties stipulate that Respondent is entitled to a credit under Section 8(j) of the Act for any medical bills paid by group insurance 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. Ax 1.

For Case No. 22WC01075 (date of accident 12.12.21), the Arbitrator orders Respondent to pay Petitioner directly for the outstanding medical services from Northwest Community Hospital for dates of service December 12-13, 2021 as listed in Px2, pursuant to Sections 8(a) and 8.2 of the Act and Perez v. Illinois Workers' Compensation Comm'n, 2018 IL App (2d) 170086WC, ¶ 17, 96 N.E.3d 524. The parties stipulated on the record that Respondent shall hold Petitioner harmless to the extent the above-mentioned bill was paid for by Medicare.

***Issue K, whether Petitioner is entitled to any prospective medical care, the Arbitrator finds as follows:***

Petitioner seeks to undergo a surgical hemilaminectomy from L4 through S1 as recommended by Dr. Erickson. Petitioner attempted all conservative treatment available to her including medication, physical therapy, and injections.

While Dr. Stanley maintained that Petitioner solely sustained a strain as a result of the work accident, he further opined that Petitioner did not require surgery. While the Arbitrator takes into consideration Dr. Stanley's opinion, the Arbitrator does not find it persuasive. Dr. Stanley never reviewed any of records from Petitioner's treating surgeons, Drs. Erickson and Rerri. As previously discussed, Dr. Stanley stood apart from four physicians who agreed that Petitioner's January 4, 2022 MRI scan showed disc protrusions at L4-L5 and L5-S1. Dr. Erickson explained that his surgical recommendation is very similar to that of Dr. Rerri's surgical recommendation. The Arbitrator finds it significant that two treating surgeons recommended surgery for Petitioner.

Thus, the Arbitrator finds the surgical recommendation by Dr. Erickson to be reasonable, necessary, and causally related to her work accident for the Respondent.

Respondent shall approve and pay for the surgical hemilaminectomy from L4 through S1 and necessary post-operative care prescribed by Dr. Erickson as provided in Section 8(a) and 8.2 of the Act.

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

TTD was only at issue for Case No. 22WC000785 (date of accident 10.2.21). Ax 1,2.

Having found the medical opinions of Petitioner's treating physicians to be more persuasive than those of Respondent's Section 12 examiner, the Arbitrator continues to rely on the medical records and recommendations of Petitioner's treating physicians with regard to her work status. Petitioner

was initially placed off work by Shah on December 24, 2021. Petitioner then started treatment with Dr. Vargas who had placed Petitioner off work. Petitioner testified that she then started working with restrictions per her treating physicians on July 24, 2022.

For Case No. 22WC000785 (date of accident 10.2.21), the Arbitrator finds Respondent liable for 30 and 2/7 weeks of TTD benefits (12.24.21 through 7.24.22) at a minimum weekly rate of $440.00 to be paid directly to Petitioner. Respondent is awarded a credit for TTD benefits already paid in the amount of $6,662.50.

***Issue O, whether Petitioner exceeded her choice of physicians, the Arbitrator finds as follows:***

The Arbitrator finds that Petitioner has not exceed her choice of physicians under Section 8(a) of the Act. See Issue J above.

It is so ordered:

Arbitrator Rachael Sinnen

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 22WC001075 |
| Case Name | Olga Hipolito v.<br>Pepino Robles dba McDonald's |
| Consolidated Cases | 22WC000785; |
| Proceeding Type | Petition for Review under 19(b)<br>Remand Arbitration |
| Decision Type | Commission Decision |
| Commission Decision Number | 24IWCC0592 |
| Number of Pages of Decision | 18 |
| Decision Issued By | Maria Portela, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Adam Rosner |
| Respondent Attorney | Cody Hartman |

DATE FILED: 12/10/2024

/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

Olga Hipolito,

Petitioner,

vs. NO: 22 WC 001075

Pepino Robles d/b/a McDonald's,

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 notice, causal connection, medical expenses, prospective medical, temporary total disability, and chain of doctors, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 4, 2024 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 $8,100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

**December 10, 2024**
o111924
MEP/yp
049

/s/ *Maria E. Portela*
Maria E. Portela
/s/ *Amylee H. Simonovich*
Amylee H. Simonovich
/s/ *Christopher A. Harris*
Christopher A. Harris

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 22WC001075 |
| Case Name | Olga Hipolito v. Pepino Robles d/b/a McDonald's |
| Consolidated Cases | 22WC000785 |
| Proceeding Type | 19(b) Petition |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 15 |
| Decision Issued By | Rachael Sinnen, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Adam Rosner |
| Respondent Attorney | Brian Rudd |

DATE FILED: 1/4/2024

**THE INTEREST RATE FOR THE WEEK OF JANUARY 3, 2024 5.04%**

/s/ Rachael Sinnen, Arbitrator

Signature

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

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

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

**Olga Hipolito**
Employee/Petitioner

v.

**Pepino Robles d/b/a McDonald's**
Employer/Respondent

Case # **22** WC **01075**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Rachael Sinnen**, Arbitrator of the Commission, in the city of **Chicago**, on **9.7.23**. 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 **Whether Petitioner Exceeded Her Choice Of Physicians**

**FINDINGS**

On the date of accident, **12.12.21**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**8,492.78**; the average weekly wage was $**535.59**.

On the date of accident, Petitioner was **35** 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 $**As Shown** under Section 8(j) of the Act.

**ORDER**

Respondent to pay Petitioner directly for outstanding medical services, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act, from Northwest Community Hospital as listed in Px2 for dates of service December 12-13, 2021.

See also Arbitration Decision for Case No. 22WC00785, which is consolidated with the case at hand.

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 4, 2024**

Signature of Arbitrator

ICArbDec19(b)

STATE OF ILLINOIS )
) SS
COUNTY OF COOK )

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

| | | |
|---|---|---|
| Olga Hipolito, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | |
| | ) | Case No. 22WC000785 |
| Pepino Robles d/b/a | ) | consolidated with |
| McDonald's | ) | Case No. 22WC001075 |
| | ) | |
| Respondent. | ) | |

## FINDINGS OF FACT

This matter proceeded to hearing on September 7, 2023 in Chicago, Illinois before Arbitrator Rachael Sinnen on Petitioner's Petition for Immediate Hearing pursuant to Section 19b/8a of the Illinois Workers' Compensation Act "Act." For Case No. 22WC000785 (date of accident 10.2.21), issues in dispute include accident, causation, unpaid medical bills, temporary total disability "TTD" benefits, prospective medical and whether Petitioner exceeded her choice of physicians. Ax 1. For Case No. 22WC01075 (date of accident 12.12.21), issues in dispute include accident, notice, causation, unpaid medical bills, prospective medical and whether Petitioner exceeded her choice of physicians. Ax 2.

***Petitioner's Job Duties***

Petitioner testified that she was currently employed by McDonald's at their Northbrook location where she was working at for the past six months. Tx10. Petitioner testified that she previously worked for Respondent's location in Arlington Heights where she started in August of 2021. Id. at 11. Petitioner testified that as part of her job duties for Respondent, Petitioner worked in the kitchen wrapping hamburgers, cooking meat, washing dishes, and sweeping and mopping the floors. Id. at 12. Petitioner testified that prior to the work accident, she worked five days, forty to forty-two hours per week. Id.

***Alleged Accident of October 2, 2021***

Petitioner testified that on October 2, 2021, Petitioner was at work for Respondent wrapping burgers in the kitchen. Id. at 13. Petitioner testified that she went to a high shelf (approximately six to seven feet tall) to grab a box filled with burger wrappers. Id. at 13-15. Petitioner testified that she had to reach to the high shelf to grab the box of burger wrappers with her hands above her head and as Petitioner grabbed the box, Petitioner testified she felt a strong pain in her back. Id. at 16. Petitioner testified that as she felt the pain, she lowered the box down to the table. Id. at 17.

Petitioner testified that she felt pain in her lower back but continued working. Id. Petitioner testified that she notified her shift manager, Carla Martinez, of the accident. Id. at 18-19.

Petitioner testified that she completed her shift on October 2, 2021 and went to work the following day but continued to feel pain. Id. at 19. Petitioner testified that she then sought medical treatment on October 4, 2021. Id.

***Alleged Accident of December 12, 2021***

Petitioner testified that after her stay in the hospital following the October 2, 2021 accident, Petitioner returned back to work for Respondent. Id. at 21. Petitioner testified that as she worked, Petitioner's back continued to hurt. Id. Petitioner testified that on December 12, 2021, Petitioner bent down to reach for something at work when she felt a sharp pain in her low back. Id. at 22. Petitioner testified that she felt pain down her right leg as well. Id. Petitioner testified that two of her coworkers, Louis Perez, and Abraham, assisted Petitioner in getting up from the bent over position. Id. at 23. Petitioner testified that she also notified her manager, Kelly. Id. at 24. Petitioner testified that this accident occurred at night. Id. at 24. Petitioner testified that following the work accident, she went to the hospital.

***Summary of Medical Records***

On October 4, 2021, Petitioner presented to Dr. Meyer at Northwest Community Hospital with a history consistent with a lifting injury and upper/low back pain. Px1. On physical examination, the physician noted tenderness and spasms to the lumbar and thoracic spines. Id. MRIs taken of Petitioner's lumbar and thoracic spines were unremarkable. Id.

On December 12, 2021, Petitioner returned to Northwest Community Hospital. PX. 1. The history noted a 35-year-old female presenting with right-sided flank pain and back pain on and off for the last week. The pain radiated down her leg and was worse with activity. She had no loss of bowel or bladder control and no numbness or tingling. She also complained of some right lower abdominal tenderness. The record does not state anything about being at work or suffering another accident on or about December 12, 2021. The treating physician stated it was unclear whether the pain source was sciatica back pain versus a kidney stone. A CT was performed with no acute findings. Other laboratory studies were unremarkable. Petitioner was given IV medications and was feeling better. There were no neurologic findings. She was discharged with a recommendation/referral to follow up with the Northwest Community Hospital Back Pain Clinic.

Petitioner testified that she took two weeks off after being released from the hospital and saw a doctor at Access Northwest in Arlington Heights, but she could not recall the doctor's name. When asked whether she saw this doctor for her back, Petitioner initially answered that the doctor was recommended and referred for anemia by Northwest Community Hospital but also admitted that she treated for her back. TX. 63-64. The medical records from Access Northwest were not submitted into evidence.

On December 24, 2021, Petitioner presented to Riverside Health Clinic with low back pain and pain radiating into her right leg. Px3. Petitioner completed a course of physical

therapy/chiropractic treatment at Riverside Health Clinic by Amish Shah from December 24, 2021 through March 14, 2022. The record does not indicate that Chiropractor Shah ever made a referral to any other medical provider. Id.

Petitioner then sought pain management with Dr. Vargas on December 29, 2021 with low back pain and pain radiating caudally into both buttocks and into the postero-lateral route into both thighs, calves, ankles and feet and a history consistent with the testimony at trial. Px4. There is a notation in the records that Petitioner was referred by Chiropractor Shah. Id. at 1. On physical examination, Dr. Vargas noted decreased sensation through pinprick in the L4-L5 dermatomes, decreased forward flexion/extension, positive facet loading, and positive straight leg raise, Braggard, Bechterew tests on the right. Id. Dr. Vargas recommended Petitioner undergo an MRI of the lumbar spine, physical therapy, and a back brace. Id.

On January 4, 2022, Petitioner underwent the MRI of the lumbar spine, which showed posterior disk protrusions at L4-L5 and L5-S1 indenting the ventral surfaces of the thecal sac. Px6. Petitioner followed up with Dr. Vargas on January 14, 2022 with similar subjective complaints and physical examination findings. Px4. Dr. Vargas reviewed the lumbar MRI and noted that it confirmed a disc protrusion at the L4-L5 and L5-S1 level which resulted in central canal stenosis. Id. Dr. Vargas continued Petitioner's off work restrictions and recommended an EMG. Id. On March 11, 2022, Petitioner underwent an EMG of her bilateral lower extremities which showed acute left L4-L5 lumbar radiculopathy. Px7. Petitioner followed up with Dr. Vargas on March 25, 2022 with similar complaints and physical examination findings. Px4. Given Petitioner's axial low back pain and radicular symptoms, Dr. Vargas recommended a series of lumbar injections. Id. Petitioner underwent a left L4-L5, L5-S1 transforaminal epidural steroid injection and selective nerve root blocks. Id. Petitioner underwent a second left L4-L5, L5-S1 transforaminal epidural steroid injections and selective nerve root blocks on April 21, 2022. Id.

On March 31, 2022, Petitioner presented for an independent medical examination (IME) with Dr. Stanley at the request of the insurance company. Px2, Ex. 2. At the IME, Petitioner gave a history consistent with the testimony at trial. Id. On physical examination, Dr. Stanley noted multiple findings of inconsistent pain behaviors. Id. Dr. Stanley diagnosed Petitioner with a lumbar strain and found there to be no objective findings on examination or imaging. Id. Dr. Stanley noted Petitioner had positive Waddell signs and symptom magnification. Id. Dr. Stanley indicated no further treatment was necessary and placed Petitioner at maximum medical improvement. Id.

Following the injections, Petitioner presented to Dr. Vargas on May 3, 2022 with no improvement from the injections besides transient relief after the first injection. Px4. At this visit Petitioner complained of significant amount of distal lower back axial pain with associated lower extremity and radiculopathy. Id. Dr. Vargas reviewed Dr. Stanley's IME report and disagreed with Dr. Stanley's opinion in that Petitioner had clear, objective pathology on the MRI and EMG. Id. Dr. Vargas noted similar physical examination findings and referred Petitioner for a spinal surgery consultation. Id.

On June 7, 2022, Petitioner presented to Dr. Rerri at Lakeshore Surgery Center for a spine surgery consultation. Px5. At this visit, Petitioner complained of low back pain and bilateral radicular pain and a history consistent with the testimony at trial. Id. On physical examination, Dr. Rerri noted

tenderness over the left hip and left calf swelling. Id. Dr. Rerri reviewed the lumbar MRI and indicated it showed a disc protrusion at L4-L5 and L5-S1. Id. Dr. Rerri noted that Petitioner was having left hip pain, lumbar radiculopathy, and ordered diagnostic imaging for Petitioner's leg to rule out deep vein thrombosis (DVT). Id. Dr. Rerri noted that if DVT was excluded, he would consider options for the lumbar spine. Id. Petitioner underwent the ultrasound of her lower extremities on July 6, 2022, which was negative for DVT. Px13. Petitioner followed up with Dr. Rerri on July 19, 2022 with similar complaints and physical examination findings. Id. Dr. Rerri reviewed the ultrasound and indicated that Petitioner's problems are the L4-L5 and L5-S1 disc protrusions, which he recommended a L4-L5 and L5-S1 partial laminectomy, tubular discectomy, foraminoplasty and discogram. Px5.

Petitioner went for a second spinal surgery consultation with Dr. Erickson at Micro Neuro Spine on September 21, 2022. Px8. At this visit, Petitioner complained of low back pain and bilateral radicular pain and a history consistent with the testimony at trial. Id. Dr. Erickson reviewed the MRI of the lumbar spine and agreed with disc herniations at several levels and stenosis at L5-S1. Id. Dr. Erickson indicated that the stenosis at L4-S1 may not account for the majority of Petitioner's problem and indicated petitioner's pain may be a primary segmental injury associated with axial loading of the spine. Id. Petitioner followed up with Dr. Erickson on November 16, 2022 with similar complaints and difficulty sitting and prolonged walking. Id. Dr. Erickson noted that Petitioner had significant left-sided radicular pain and recommended a hemilaminectomy from L4 through S1. Id.

***Testimony of Dr. Robert Erickson (Petitioner's Treating Physician)***

On February 28, 2023 Dr. Erickson testified regarding his opinions and treatment of Petitioner. Px12. Dr. Erickson testified that he first saw Petitioner on September 21, 2022 with Petitioner having predominantly right-sided leg pain with the left leg worsening as well as low back pain. Id. at 10. Dr. Erickson testified that he reviewed the imaging of the January 4, 2022 MRI, which noted two-to-three-millimeter disc herniations with lateral recess stenosis. Id. at 12. Dr. Erickson testified that he noted the lateral recess stenosis was somewhat worse on the right side. Id. Dr. Erickson testified that a patient with stenosis can present with back pain, painful sitting, and if the nerves are involved, then radicular pain down the legs into the feet. Id. at 14. Dr. Erickson testified that an EMG is not used to be a total picture of the diagnosis but can be used in combination with other diagnostic studies. Id. at 17.

Dr. Erickson testified that he performed a physical examination on September 21, 2022 which noted a good neurological examination. Id. at 18. Dr. Erickson explained that Petitioner's lateral recess stenosis may not account for the majority of Petitioner's problem by testifying:

> I noticed that part of [Petitioner's] description of her pain included painful sitting. So if she does have nerve compression in the lateral recesses, it may not be the entire problem for her, that is she may have a problem from the discs or the joints or even the muscles that support the lumbar spine.

Id. at 19

Dr. Erickson explained that Petitioner's "problem in sitting is reflective of a structural injury like that which may go beyond a pure disc herniation or pure nerve compression." Id. at 19. Dr. Erickson testified that he next saw Petitioner on November 16, 2022 and noted that Petitioner had trouble walking and sitting along with numbness/tingling affecting her feet. Id. at 21. Dr. Erickson testified that the significance of Petitioner's difficulty walking or sitting is that patients with borderline spinal stenosis commonly are most miserable in those positions. Id. at 21. Dr. Erickson testified that he reviewed the EMG and MRI findings, acknowledged that Petitioner had radicular pain and painful sitting, and recommended a less complex surgery of hemilaminectomy. Id. at 22-23. Dr. Erickson explained that the hemilaminectomy would almost certainly take any pressure of the nerves and there would be a chance to remove adhesions or inflammatory tissues from the nerves. Id. at 24.

Dr. Erickson testified that the purpose of injections Petitioner underwent was to diminish inflammation and that if there is a period of time where the pain disappears, it may hint at that particular segment being important to the pain complaint. Id. at 28-29. Dr. Erickson testified that Petitioner's lifting injury of the box could either cause a disc herniation or make a weak spot in a disc worse in some way. Id. at 31. Dr. Erickson testified that he did not note any positive Waddell signs or symptom magnification. Id. at 31. Dr. Erickson testified that he had placed Petitioner on work restrictions of no lifting greater than twenty pounds and try to limit hours of work to four per day. Id. at 32. Dr. Erickson reviewed Dr. Rerri's surgical recommendation and testified that Dr. Rerri's recommendation is similar to that of his own surgical recommendation. Id. at 34.

On cross-examination, Dr. Erickson testified that the work restrictions were contained in his quick report. Id. at 35-36. Dr. Erickson testified that he did not review the records from Northwest Community Hospital or records from Chiropractor Shah. Id. at 40-41. Dr. Erickson testified he reviewed the records from Dr. Vargas and Dr. Rerri. Id. at 44. Dr. Erickson testified that he was only aware of the October of 2021 accident. Id. at 45. Dr. Erickson testified that Petitioner described the box as fifty pounds but that a twenty-five-pound lift would also be causative for a back injury. Id. at 48. Dr. Erickson testified that Petitioner noticed the pain onset at the time of the lifting incident. Id. at 49. Dr. Erickson testified that he agreed with the radiologist's impressions of the January 4, 2022 MRI report. Id. at 51. Dr. Erickson testified that he could not confirm nerve involvement from the MRI but indicated the discs are capable of either causing inflammation and tethering of the nerve or some compression of the nerves in the small corners of the lateral recesses. Id. at 54. Dr. Erickson testified that the primary purpose of the surgery he is recommending is nerve decompression and exploration of the nerves for other possible problems separate from compression. Id. at 58.

Dr. Erickson testified that discograms have been used less in the past years. Id. at 62. Dr. Erickson testified that he does not have a financial stake in any surgery centers that he uses. Id. at 67. Dr. Erickson testified that Petitioner's pain complaints followed the L5-S1 and L4-L5 dermatomes down her lower extremities. Id. at 68.

On redirect examination, Dr. Erickson testified that lumbar strains usually respond to treatment within several weeks. Id. at 69. Dr. Erickson testified that radicular complaints could wax and wane. Id. at 70.

***Testimony of Dr. Tom Stanley (Respondent's Section 12 Examiner)***

On May 19, 2023, Dr. Tom Stanley testified regarding his opinions contained in his IME report and his examination findings of Petitioner. Rx2. Dr. Stanley testified that during his IME, he took a history which indicated Petitioner was retrieving a box from a high shelf in October of 2021 when she injured her back. Id. at 8. Dr. Stanley testified that Petitioner reinjured her back when she was bending down to put something in a coffee maker in December of 2021. Id. at 8. Dr. Stanley testified that Petitioner needed a wheelchair to leave the IME. Id. at 9. Dr. Stanley testified that he noted a number of inconsistent pain behaviors and positive Waddell signs on physical examination. Id. at 11. Dr. Stanley testified that Petitioner's pain did not localize to a single nerve root dermatome. Id. at 13. Dr. Stanley testified that Petitioner had a normal neurological examination. Id. at 14. Dr. Stanley testified that he reviewed the October 5, 2021 MRI report and the imaging for the January 4, 2022 MRI. Id. at 16. Dr. Stanley testified that on his review of the January 4, 2022 MRI, he did not find any evidence of nerve compression. Id. at 16. Dr. Stanley testified that he diagnosed Petitioner with a lumbar strain as a result from the original accident in October of 2021 and found there was no separate injury in December of 2021. Id. at 17.

Dr. Stanley testified that Petitioner's ongoing complaints were non-verifiable as there were no objective findings to substantiate Petitioner's subjective complaints. Id. at 18. Dr. Stanley testified that Petitioner's lifting accident would not be a cause for anemia. Id. at 20. Dr. Stanley testified that no further treatment is necessary for Petitioner. Id. at 21. Dr. Stanley testified that injections, a discogram, and surgery would not be appropriate for Petitioner's condition. Id. at 21-24.

On cross examination, Dr. Stanley testified that one hundred percent of his IMEs are for respondents in worker's compensation cases. Id. at 25-26. Dr. Stanley testified that the last note he reviewed was a January 14, 2022 note by Dr. Vargas. Id. at 27. Dr. Stanley testified that he did not review any records from Dr. Rerri or Dr. Vargas. Id. at 28. Dr. Stanley testified that "literally anything can cause a strain. It can be from flexing the spine. It can be from extending the spine…" Id. at 29. Dr. Stanley testified that a strain usually resolves within a few weeks. Id. at 29. Dr. Stanley testified that the same mechanism of injury can aggravate an underlying spinal condition. Id. Dr. Stanley testified that his review of the January 4, 2022 MRI report coincided with the radiologist's review of the October 5, 2021 MRI report, but he did not review the imaging of the October 5, 2021 MRI. Id. at 30-31. Dr. Stanley testified that he disagreed with the reading radiologist, Dr. Erickson, and Dr. Rerri's reviews of the January 4, 2022 MRI report. Id. at 33-34. Dr. Stanley testified that radicular symptoms could wax and wane. Id. at 34.

On redirect examination, Dr. Stanley testified that what is important in reviewing pathology of an MRI is whether the disc abnormality is hitting a nerve. Id. at 37.

## CONCLUSIONS OF LAW

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

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

Petitioner testified that her employment with McDonald's included wrapping hamburgers, cooking meat, washing dishes, and sweeping and mopping the floors. See Tx. 12. Petitioner testified that on October 2, 2021, she felt a pain in her back as she reached for a high shelf, grabbed a box of burger wrappers, and brought the box down. See Tx. 13-15. She went to the hospital two days later reporting a lifting injury. See Px 1. On December 12, 2021, Petitioner credibly testified that she bent down to reach for something at work when she felt a sharp pain in her low back requiring two coworkers to assist her in getting up. See Tx at 22. The Arbitrator recognizes that although Petitioner went to the hospital that same day, there was no record of another accident occurring at work. See Px 1. However, Petitioner did give a history of a work accident on December 12, 2021 when she presented to Riverside Health Clinic on December 24, 2021. See Px 3.

The Arbitrator recognizes that Petitioner was a difficult witness particularly on cross examination. While there are discrepancies in her testimony and submitted medical records, the Arbitrator does not find them significant enough to defeat Petitioner's claims. The Arbitrator finds that accidents did occur on October 2, 2021 and December 12, 2021 and that Petitioner was injured engaging in acts that she was reasonably expected to perform incident to her assigned duties. See McAllister v. Illinois Workers' Compensation Comm'n, 2020 IL 124848.

For both claims, the Arbitrator finds that the accidents did arise out of and in the course of Petitioner's employment by Respondent.

***Issue E, whether timely notice of the accident was given to Respondent, the Arbitrator finds as follows:***

The issue of notice was not in dispute in Case No. 22WC000785 (date of accident 10.2.21). Ax 1.

Petitioner credibly testified that on December 12, 2021, two of her coworkers, Louis Perez, and Abraham, assisted Petitioner getting up from the bent over position Tx. at 23. Petitioner also testified that she notified her manager, Kelly. Id. at 24. She went to the hospital the same day. Respondent did not present any fact witnesses.

For Case No. 22WC01075 (date of accident 12.12.21), the Arbitrator finds that timely notice of the accident was given to Respondent.

***Issue F, whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds as follows:***

The Arbitrator notes that Petitioner had two accidents involving the same body parts. However, the second accident on December 12, 2021 was just a reaggravation of Petitioner's lumbar condition. The medical records and the physicians' testimony (including the IME) indicate that the original accident on October 2, 2021 was the onset of Petitioner's back complaints. Therefore, causation for both cases hinge on the October 2, 2021 accident.

The Arbitrator finds Dr. Vargas, Dr. Rerri, and Dr. Erickson to have been credible in their opinions in the medical records regarding the nature of her injuries and their causal relationship to the claimed injury at work for the Respondent. The Arbitrator specifically finds Dr. Erickson credible in his testimony regarding the nature of her injuries and their causal relationship to the claimed injury at work for the Respondent. The Arbitrator does not find the opinions of Dr. Stanley as credible or persuasive on this issue.

As noted above, Petitioner had two accidents, a lifting accident and reaggravation from bending over. Following the lifting accident on October 2, 2021, Petitioner went to the hospital complaining of low back pain. Petitioner returned to work and credibly testified that as she continued to work, her back pain progressively worsened. Petitioner then reaggravated her back by bending down on December 12, 2021 where she also went to the hospital.

Petitioner then sought treatment with Chiropractor Shah at Riverside Health Clinic on December 24, 2021 with significant low back pain and bilateral radicular pain. Chiropractor Shah recommended a course of physical therapy which Petitioner completed at Riverside Health Clinic from December 24, 2021 through March 14, 2022. Petitioner was then referred for pain management with Dr. Vargas on December 29, 2021 where she treated until May 3, 2022. Throughout Petitioner's treatment with Dr. Vargas, Petitioner consistently complained of low back pain with bilateral radicular pain. Further, Dr. Vargas consistently noted positive physical examination findings of the lumbar spine including decreased forward flexion/extension, facet loading maneuver, and neurological examinations.

Dr. Vargas recommended an MRI of the lumbar spine and an EMG of the bilateral lower extremities. The lumbar MRI on January 4, 2022 showed disc protrusions at L4-L5 and L5-S1 and the EMG showed acute left L4-L5 lumbar radiculopathy. Petitioner then underwent two lumbar injections which provided transient relief. As Petitioner did not improve from conservative treatment, Dr. Vargas referred Petitioner to Dr. Rerri for a spine surgery consult on June 7, 2022. Dr. Rerri reviewed Petitioner's MRI which he agreed showed disc protrusions at L4-L5 and L5-S1. Petitioner followed up with Dr. Rerri on July 19, 2022 where Petitioner complained of back and bilateral leg pain, and Dr. Rerri recommended a laminectomy and discectomy.

Petitioner was then referred to Dr. Erickson on September 21, 2022 and November 16, 2022. Dr. Erickson reviewed the MRI and EMG, noted the disc protrusions and acute radiculopathy, and recommended surgery. Throughout Petitioner's treatment with her physicians, Petitioner consistently complained of low back pain and radicular pain. Eventually, Dr. Erickson recommended a similar surgery as Dr. Rerri for Petitioner's lumbar spine.

As noted in Dr. Erickson's deposition, Petitioner had consistent complaints of difficulty sitting and prolonged walking. As Dr. Erickson explained, this is consistent with Petitioner's MRIs as that can be caused by disc abnormalities. He explained that the lifting injury that occurred on October 2, 2021 is a common way to either cause or aggravate lumbar pathology.

Dr. Stanley testified that in his review of the January 4, 2022 MRI, he did not note stenosis or disc protrusions. However, four other physicians (Dr. Vargas; Dr. Kuritza; Dr. Rerri; and Dr. Erickson) all noted disc protrusions at L4-L5 and L5-S1 on Petitioner's January 4, 2022 MRI. Thus, Dr. Stanley is the lone physician, out of five physicians, that did not note disc protrusions on Petitioner's MRI.

The Arbitrator does not find Dr. Stanley's opinion that Petitioner only suffered a lumbar strain as a result of the October 2, 2021 work accident to be persuasive. Dr. Stanley opined that a lumbar strain typically takes a few weeks to resolve. From the onset of Petitioner's work accident in October of 2021 until the trial date on September 7, 2023, Petitioner had consistent complaints of low back pain, difficulty sitting, and radicular pain.

While Dr. Stanley noted positive Waddell signs and symptom magnification during his IME of Petitioner, none of Petitioner's treating physicians noted positive Waddell signs or symptom magnification. The Arbitrator notes that Dr. Stanley only saw Petitioner once on March 31, 2022 while Chiropractor Shah, Dr. Vargas, Dr. Rerri, and Dr. Erickson saw Petitioner several times over two years.

For both claims, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the injury.

***Issue J, whether the medical services that were provided to Petitioner were reasonable and necessary and whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds as follows:***

The Arbitrator finds that the medical services provided to Petitioner were reasonable and necessary for the October 2, 2021 and December 12, 2021 accidents and Respondent has not paid for said treatment. This is supported by Petitioner's medical records from Riverside Health Clinic, Dr. Vargas, Dr. Rerri, and Dr. Erickson. The Arbitrator finds that the medical opinions and treatment plans set forth in the medical records from Dr. Vargas, Dr. Rerri, and Dr. Erickson are both credible and appropriate for her work-related injuries. As Petitioner's treating physicians saw Petitioner on several occasions, they were the most equipped physicians to diagnose Petitioner and recommend treatment based on Petitioner's subjective complaints and their own objective findings.

Dr. Stanley opined that Petitioner required no further treatment beyond the IME report to be necessary. However, as noted previously, Dr. Stanley only diagnosed Petitioner with a lumbar strain as a result of the October 2, 2021 work accident. As noted previously, Petitioner's condition was much more significant than a lumbar sprain, which is supported by Petitioner's testimony, the medical records, and Dr. Erickson's opinions. Thus, having found Dr. Erickson more credible than

Dr. Stanley on the issue of causation, the Arbitrator finds that the medical services provided to Petitioner throughout the course of her treatment were both reasonable and necessary.

Respondent contends that Petitioner's treatment with Dr. Vargas and thereafter exceeds Petitioner's choice of physicians. The "two-doctor rule" is outlined in Section 8(a) of the Act. One of the purposes behind the "two-doctor rule" is to avoid "doctor shopping."

It is clear that Petitioner's emergency treatment at Northwest Community Hospital does not constitute a choice under the Act.

Respondent argues that Petitioner's visit with an unknown doctor at Access Northwest in December 2021 following her hospital stay constitutes Petitioner's first choice. While Petitioner did admit to seeing a doctor with Access Northwest in December 2021, she could not remember the doctor's name. Petitioner testified that she was referred to the doctor for her anemia but also admitted after substantial questioning that she also treated for her back. See TX. 63-64. The medical records and bills from Access Northwest were not submitted into evidence. The Arbitrator finds that whatever treatment Petitioner may or may not have received by Access Northwest does not constitute a choice of provider under Section 8(a) of the Act.

The medical records for Riverside Health Clinic do not document any referral to or from Chiropractor Shah. The Arbitrator finds Riverside Health Clinic to be Petitioner's first choice under Section 8(a). The medical records from Dr. Vargas indicate that Petitioner was referred to him by Chiropractor Shah. See Px4 at 1. The Arbitrator finds that Dr. Vargas remains within the chain of referrals of Petitioner's first choice.

Dr. Vargas referred Petitioner for a neurological consult but she saw an orthopedic surgeon instead, Dr. Rerri. Dr. Rerri's records indicate that Petitioner was referred by Dr. Vargas. Petitioner did eventually see a neurosurgeon as Dr. Vargas instructed. On the last page of Petitioner's Exhibit 5, a referral from Dr. Rerri to Dr. Erickson can be found. The Arbitrator finds that Petitioner's treatment with Dr. Rerri and Dr. Erickson fall under the chain of referrals of Petitioner's first choice (stemming from Riverside Health Clinic).

Overall, the Arbitrator finds that Petitioner has not exceed her choice of physicians under Section 8(a) of the Act.

For Case No. 22WC000785 (date of accident 10.2.21), the Arbitrator orders Respondent to pay Petitioner directly for outstanding medical services from Riverside Health Clinic (Px3), Micro Neuro Spine (Px8), Lakeshore Surgery Center (Px9 and Px10), Western Touhy Anesthesiology (Px11), and Round Lake MRI (Px13), pursuant to Sections 8(a) and 8.2 of the Act and Perez v. Illinois Workers' Compensation Comm'n, 2018 IL App (2d) 170086WC, ¶ 17, 96 N.E.3d 524.

With regards to Petitioner's treatment at Northwest Community Hospital in October 2021, Petitioner was held overnight at the hospital because of her anemic condition, unrelated to the work accident. As a result, the Arbitrator also awards the medical bills from Northwest Community Hospital as seen in Px2 for dates of service October 4-7, 2021 that are specifically

related to the back injury, which includes but are not limited to: Acetaminophen; x-rays; and MRIs. The Arbitrator does not award any medical bills related to Petitioner's anemic condition.

The parties stipulate that Respondent is entitled to a credit under Section 8(j) of the Act for any medical bills paid by group insurance 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. Ax 1.

For Case No. 22WC01075 (date of accident 12.12.21), the Arbitrator orders Respondent to pay Petitioner directly for the outstanding medical services from Northwest Community Hospital for dates of service December 12-13, 2021 as listed in Px2, pursuant to Sections 8(a) and 8.2 of the Act and Perez v. Illinois Workers' Compensation Comm'n, 2018 IL App (2d) 170086WC, ¶ 17, 96 N.E.3d 524. The parties stipulated on the record that Respondent shall hold Petitioner harmless to the extent the above-mentioned bill was paid for by Medicare.

***Issue K, whether Petitioner is entitled to any prospective medical care, the Arbitrator finds as follows:***

Petitioner seeks to undergo a surgical hemilaminectomy from L4 through S1 as recommended by Dr. Erickson. Petitioner attempted all conservative treatment available to her including medication, physical therapy, and injections.

While Dr. Stanley maintained that Petitioner solely sustained a strain as a result of the work accident, he further opined that Petitioner did not require surgery. While the Arbitrator takes into consideration Dr. Stanley's opinion, the Arbitrator does not find it persuasive. Dr. Stanley never reviewed any of records from Petitioner's treating surgeons, Drs. Erickson and Rerri. As previously discussed, Dr. Stanley stood apart from four physicians who agreed that Petitioner's January 4, 2022 MRI scan showed disc protrusions at L4-L5 and L5-S1. Dr. Erickson explained that his surgical recommendation is very similar to that of Dr. Rerri's surgical recommendation. The Arbitrator finds it significant that two treating surgeons recommended surgery for Petitioner.

Thus, the Arbitrator finds the surgical recommendation by Dr. Erickson to be reasonable, necessary, and causally related to her work accident for the Respondent.

Respondent shall approve and pay for the surgical hemilaminectomy from L4 through S1 and necessary post-operative care prescribed by Dr. Erickson as provided in Section 8(a) and 8.2 of the Act.

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

TTD was only at issue for Case No. 22WC000785 (date of accident 10.2.21). Ax 1,2.

Having found the medical opinions of Petitioner's treating physicians to be more persuasive than those of Respondent's Section 12 examiner, the Arbitrator continues to rely on the medical records and recommendations of Petitioner's treating physicians with regard to her work status. Petitioner

was initially placed off work by Shah on December 24, 2021. Petitioner then started treatment with Dr. Vargas who had placed Petitioner off work. Petitioner testified that she then started working with restrictions per her treating physicians on July 24, 2022.

For Case No. 22WC000785 (date of accident 10.2.21), the Arbitrator finds Respondent liable for 30 and 2/7 weeks of TTD benefits (12.24.21 through 7.24.22) at a minimum weekly rate of $440.00 to be paid directly to Petitioner. Respondent is awarded a credit for TTD benefits already paid in the amount of $6,662.50.

***Issue O, whether Petitioner exceeded her choice of physicians, the Arbitrator finds as follows:***

The Arbitrator finds that Petitioner has not exceed her choice of physicians under Section 8(a) of the Act. See Issue J above.

It is so ordered:

Arbitrator Rachael Sinnen

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 22WC033392 |
| Case Name | Robert Coyne v.<br>FS Grain |
| Consolidated Cases | |
| Proceeding Type | Petition for Review under 19(b)<br>Remand Arbitration |
| Decision Type | Commission Decision |
| Commission Decision Number | 24IWCC0593 |
| Number of Pages of Decision | 19 |
| Decision Issued By | Stephen Mathis, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Luis J. Magaña |
| Respondent Attorney | Kevin Luther |

DATE FILED: 12/11/2024

/s/Stephen Mathis, Commissioner

Signature

STATE OF ILLINOIS )
) SS.
COUNTY OF WILL )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ROBERT COYNE,

Petitioner,

vs. NO: 22 WC 033392

FS GRAIN,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of medical expenses, causal connection, temporary total disability and prospective medical care, and being advised of the facts and law, reverses in part, and corrects the Decision of the Arbitrator as stated below and otherwise affirms with corrections 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 Commissions corrects typographical errors which appear on Page 2 of the Arbitrator's Decision which should reflect that the date of accident was June 27, 2022. Additionally, the Commission corrects the typographical error on page 13, paragraph 4, line 3, should be corrected to state June 27, 2022, as the date of accident.

The Commission reverses the Arbitrator's Decision in part to award prospective medical care i.e. lumbar decompression and fusion as recommended by Dr. Sampat. The Arbitrator denied the prospective medical recommended by Petitioner's treating physician, Dr. Sampat on

the bases that the EMG referenced in his testimony was not present in the records, and that there were varying opinions as to whether Petitioner's symptoms were lumbar related.

Dr. Sampat testified in his deposition that it was his opinion that Petitioner's symptoms were related to a recurrent lumbar disc herniation at L3-4. He determined that the distribution of pain is consistent with the imaging findings. Dr. Sampat further testified that the injury Petitioner sustained on June 27, 2022, is a competent mechanism for the herniated L3-4 discs. The treatment Petitioner has received has been reasonable and necessary and is related to the June 27, 2022, work accident. It is Dr. Sampat's opinion as Petitioner's treating physician that he needs a revision decompression and a fusion. The Commission finds the testimony of Dr. Sampat persuasive and on that basis awards the prospective medical care that he has recommended.

As a final point the Arbitrator noted that it was unclear whether Petitioner had achieved the control of his blood sugar necessary in order to proceed to surgery. The Commission finds that the determination as to whether Petitioner is a candidate for the lumbar surgery based upon this factor is a question of medical management for Dr. Sampat and not the business of the Commission. For the foregoing reasons the Commission reverses the denial of prospective medical care and awards the surgery recommended by Dr. Sampat and affirms all else.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision that was filed February 6, 2024, is hereby corrected, and otherwise reversed in part and adopted as stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $643.22 per week for a period of 75- 3/7 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 reasonable and necessary medical expenses contained in Petitioner's Exhibit 2 as provided in Sections 8(a) and 8.2 of the Act. Excepted from this order are the medical expenses of OAK/ Dr. Muhammad/Illinois Bone & Joint, which are unrelated to June 27, 2022, accident and are denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for the prospective medical care i.e. revision lumbar decompression at L3-4 and fusion surgery recommended by Dr. Sampat, including all associated costs and rehabilitation.

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 is entitled to a credit of $15,432.22 for temporary total disability benefits that have been paid.

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $60,000.00 The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

**December 11, 2024**
o-10-9-24
SM/msb
44

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

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

/s/ *Raychel A. Wesley*
Raychel A. Wesley

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 22WC033392 |
| Case Name | Robert Coyne v.<br>FS Grain |
| Consolidated Cases | |
| Proceeding Type | 19(b) Petition<br>Remand Arbitration |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 15 |
| Decision Issued By | Paul Cellini, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Luis J. Magaña |
| Respondent Attorney | Kevin Luther |

DATE FILED: 2/6/2024

/s/ Paul Cellini, Arbitrator

Signature

**THE INTEREST RATE FOR THE WEEK OF FEBRUARY 6, 2024 5.045%**

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

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

**ILLINOIS WORKERS' COMPENSATION COMMISSION**
**ARBITRATION DECISION**
**19(b)/8(a)**

**ROBERT COYNE**
Employee/Petitioner
v.
**FS GRAINCO**
Employer/Respondent

Case # **22** WC **33392**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Cellini**, Arbitrator of the Commission, in the city of **Joliet**, on **December 7, 2023**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

**DISPUTED ISSUES**

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

**FINDINGS**

On the date of accident, **June 27, 2022**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**50,171.16**; the average weekly wage was $**964.83**.

On the date of accident, Petitioner was **71** 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 $**15,432.28** for TTD, $**0** for TPD, $**0** for maintenance, and $**8,683.50** (PPD advance) for other benefits, for a total credit of $**24,115.78**.

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

**ORDER**

The Arbitrator finds that the Petitioner's lumbar and radiating left lower extremity symptoms are causally related to the March 27, 2022 accident.

Respondent shall pay Petitioner temporary total disability benefits of $643.22 per week for 75-3/7 weeks, commencing June 28, 2022 through December 7, 2023, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $15,432.22 for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical expenses contained in Petitioner's Exhibit 2 as provided in Sections 8(a) and 8.2 of the Act. Excepted from this order are the medical expenses of OAK/Dr. Muhammad/Illinois Bone & Joint, which are unrelated to the March 27, 2022 accident and are denied.

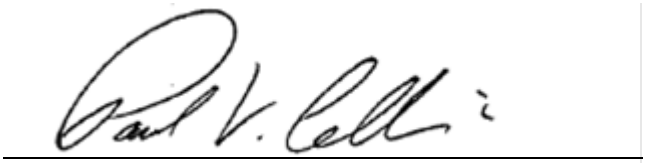
Respondent shall be given a credit for the awarded medical expenses that have been paid by Respondent prior to the hearing date, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Petitioner has failed to prove that the recommended lumbar surgery is reasonable and necessary at this time, and therefore the prospective surgery is denied at this time.

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

February 6, 2024

## STATEMENT OF FACTS

Petitioner worked for Respondent as a hauler of grain/corn/beans, driving a semi-truck, starting in December 2021. On 6/27/22, Petitioner was working full duty with no work restrictions. Around 6:15 a.m., while performing his pre-trip inspection, he pulled his truck hood open, which he indicated had a lot of pressure and tension, while he stood on the bumper. As he pulled, he testified it felt like someone stabbed him in his low back, causing him to let go, and he fell back onto the ground. He confirmed the pain began before he fell and was what caused him to fall. Another driver eventually showed up, but he declined assistance as he couldn't move due to the pain. An ambulance was called, and he was taken to ER at Riverside Hospital in Kankakee, where he reported what had occurred, as well as that he'd had prior lumbar surgeries, in 2016 with Dr. Mekhail and in 2017 with Dr. Ghaly, and he was released without restrictions.

The 6/27/22 ER report states: "70 year old male presents with low back pain. The patient has a history of prior back surgeries. He was opening the hood on his semitruck and in the process developed low back pain. This is something that he is [sic] done multiple times over the years. He states it was not difficult to open the hood and it was typical of his work routine. He did not strain. He is not certain why he developed the back pain. There is no pain radiating down his legs there is no numbness or tingling." In triage, Petitioner advised his legs felt like they weighed 500 pounds. Petitioner's history of prior surgeries was noted and that he was "somewhat insistent" on a CT scan, which was performed despite the doctor believing it wasn't clinically indicated, and that it revealed "degenerative change but nothing else." Diagnoses were lumbar strain, spondylosis, osteophyte, and stenosis without myelopathy or radiculopathy. Petitioner was discharged with medications and advised to follow up with his primary provider. (Px5). Petitioner testified he was advised to see a neurosurgeon at Riverside.

The CT scan report noted no acute fracture or subluxation, multilevel degenerative changes throughout the lumbar spine, and prior L4/5 laminectomy and L3/4 left hemilaminotomy changes. There was moderate canal stenosis at L3/4 and severe bilateral foraminal stenosis at L3/4 and L4/5. (Px5).

Petitioner had a visit with primary provider Dr. Sy on 6/29/22 via telehealth. It was noted he had been at the Palos ER on 6/20/22 due to shortness of breath and was diagnosed with Covid 3, but he left before being examined, and went to the SMH ER on 6/24/22 due to dehydration and tested positive for Covid. He reported the 6/27/22 incident as a back injury sustained while opening the hood of his semi-truck ("This is something that he has done multiple times over the years. He states it was not difficult to open the hood and it was typical of his work routine. He did not strain. There is no pain radiating down his legs, no numbness or tingling.") Petitioner was held off work through 7/11/22 with no further instructions noted other than that he could return to work on 7/12/22. (Px4).

Petitioner indicated that he continued having worsening pain in the days after the injury and was off work.

On 7/11/22 at Riverside, Petitioner had severe low back and left lower extremity pain in the SI joint region. He reported his pain started in January when he was working on a car and noticed immediate low back pain radiating into the left lower back. There was a positive left FABER sign and tenderness to palpation of the left SI joint, while neurologic exam was normal. After reviewing the CT scan and noting no severe stenosis, neurosurgeon Dr. Zakaria believed the problem was not the lumbar spine. Petitioner requested a lumbar MRI given his prior back procedures. He prescribed the MRI, flexion/extension x-rays, and referral to interventional pain management for ongoing treatment and possible left SI joint injection. Petitioner was held off work pending the MRI. (Px5).

On 7/18/22, Petitioner saw pain physician Dr. Issa. He reported his pain began a month prior when he "had a fall while he is working on his car." The pain had improved but he was still functionally limited. His worst pain was lower left lumbar area with occasional tingling and numbness in the left leg to the ankle without weakness. 7/11/22 x-ray showed laminectomy changes from L3 to S1 with multilevel degenerative changes. A therapeutic and diagnostic left SI joint injection was planned after the MRI was completed "per patient's wishes." Lumbar injections were noted as a subsequent possibility." It was noted Petitioner wanted to avoid surgery at this time. (Px5).

Petitioner denied telling Dr. Zakaria/Riverside that his injury occurred working on a car or that he'd had any January 2022 incident, and that he described the 6/27/22 incident with his truck hood. As to Dr. Issa's 7/18/22 report referencing a fall while working on a car, he testified this also was not accurate and that he was referring to the semi-truck incident. Petitioner did have some improvement during this time but still had problems and limited range of motion. He agreed he told Dr. Zakaria he wanted to avoid a steroid injection due to his diabetes, and that he wanted to avoid surgery because he thought the problem could be fixed without it.

On 7/28/22, lumbar MRI testing showed: 1) no acute osseous abnormalities, 2) L3/4 and L4/5 laminectomy changes, 3) mild multilevel degenerative changes with mild diffuse L3/4 disc bulge superimposed small broad-based left paracentral/foraminal disc herniation narrowing the left lateral recess, and 4) mild L1/2, moderate to severe bilateral L3/4, and at least mild L4/5 right neuroforaminal stenosis. (Px5). The Arbitrator notes that in a Patient Safety Information Form signed by Petitioner, where it asks how long symptoms have been present, has the following statement written in: "Fell hurt back 6/27/22." (Px5).

The 8/1/22 report from Dr. Zakaria has nurse notes which also reference a work injury from a fall 2 weeks prior. Petitioner advised Dr. Zakaria his left lower extremity pain was significantly improved with conservative measures at home. His review of the MRI indicated some degenerative and postoperative changes but no high-grade stenosis or compression. He also complained of a severe left-sided headache and nausea. Neurologic exam was "thoroughly reassuring." Dr. Zakaria indicated the lumbar symptoms were all consistent with non-radicular muscle strain/SI joint irritation. He issued a work excuse for an additional 2 weeks, but he was pleased with Petitioner's process and indicated he didn't see a need to follow up with neurosurgery. (Px5).

Petitioner testified that his symptoms continued at this time, that he remained off work and was receiving temporary total disability (TTD) benefits. He began physical therapy at the JoJo Sayson Clinic, which he testified did not help and actually worsened his symptoms with more pain and numbness/tingling in his foot.

Petitioner testified he told his primary provider, Dr. Thota, about the accident and that she advised him to return to neurosurgeon Dr. Ghaly, who had performed his 2017 surgery. The only primary care report the Arbitrator noted in evidence was the 6/29/22 report of Dr. Sy, which did not indicate anything about a referral. Petitioner

had not seen Dr. Ghaly again since August 2017 as he didn't need to, testifying he had been released and attended a different therapy location than Dr. Ghaly's location.

Dr. Ghaly's initial 8/11/22 report notes Petitioner was back due to another work injury, that a pain clinic told him he had an SI joint problem, and he wanted Ghaly's opinion because he had the same symptoms he had before and believed he had disc issues. Petitioner said, "he was pulling the hood really bad I guess and then he felt immediate low back pain and then he said he fell to the ground because of the severe pain in the left side and had his left foot against the bumper and then he immediately felt the severe left buttock pain, but he has no sharp, shooting pain to the left leg and no numbness or tingling." Dr. Ghaly also stated: ". . . he also has been losing weight and it is unexplained to him and wasting of the muscles and this is only since March of this year. He has also blood in the urine, and they were testing him for cancer and they told him no cancer." He had been taking Tramadol for a year or two after his lumbar surgery. A neurosurgeon advised him he had an SI joint problem, Petitioner did not want the SI joint injection the pain clinic wanted to perform, and he returned to his primary provider who wanted him to see another surgeon. Petitioner reported 10/10 level pain. It was noted Petitioner had not worked after his 2014 retirement until he started again in November 2021. Exam noted he looked somewhat skeletal, he had tenderness over the left paraspinal area and severe hip tenderness. He had a hard time lifting each leg, unable to stand on each leg or tippy toes or heels. Exam of the hip was limited because it would increase his pain "and this is all his pain." Petitioner had last been seen on 8/31/17 following L3/4 laminectomy and discectomy for severe stenosis and herniation, and then underwent a redo L4/5 foraminotomy. He had low back pain and left leg pain numbness and tingling. A detailed history of the treatment in 2016 and 2017 is noted. Dr. Ghaly's review of the 7/28/22 MRI "showed actually good surgical results, good lumbar lordosis, and degenerative changes in his spine. He always had the problem in the left side." He noted findings at L3/4 of perhaps some residual disc or bony spurs or scars "but this is what he always had." He felt both L3/4 and L4/5 looked well decompressed other than some residual foraminal narrowing at left L3/4 but no other significant stenosis. Dr. Ghaly opined: "He believes it is related to his back; however, the exam is not compatible with that. The exam is rather compatible with left hip pathology primarily and then the underlying cachexia (muscle wasting) that is unexplained." Left hip x-rays and MRI were recommended, as well as lumbar extension/flexion x-rays. He also recommended Petitioner see a hip orthopedic surgeon and an oncologist. Dr. Ghaly also stated: "His gait is unsteady with positive Romberg sign and very poor tandem gait and his gait is limping and shuffling, it is just very strange pictures of cachexia and the severe left hip pathology what appears." Further: "We told the patient that obviously the left hip is injured by the injury itself and this is not uncommon because he was pushing by his left leg while he was holding with his hands." They scheduled a follow up for 8/18/22 to review the new MRI and Petitioner already had a cancer doctor he indicated he would follow up with. (Rx5).

Petitioner testified he did not recall discussing any hip problem with Dr. Ghaly but agreed Ghaly advised him to see another orthopedic doctor, which was Dr. Wardell, who examined his hip. An 8/18/22 note of Dr. Ghaly states that Petitioner had an appointment that day but "did not show and refused to reschedule", which ended his care there. (Rx5).

Petitioner saw orthopedic surgeon Dr. Wardell on 8/19/22 for a noted left hip injury. Petitioner provided a consistent history of being injured with his truck hood, indicating he was trying to pull down the hood of his truck on 6/27/22 and felt severe left buttock and low back pain which was now radiating into the left posterolateral hip. He referenced his two 2016 back surgeries and that he had no problems with his back since until this incident. He reported a 40 pound weight loss over the last 5 months and a history of limited control of diabetes. Following exam and pelvic and left hip x-rays which showed well maintained joint spaces, Dr. Wardell diagnosed mild left hip osteoarthrosis as well as a lumbar strain. He did not think surgery was indicated and medication and physical therapy were prescribed. Petitioner was advised to follow up with primary provider Dr. Thota for the diabetes, which the doctor noted, if left uncontrolled, could increase the risk of neuropathy and

pain issues, and weight loss. (Px4). The 8/19/22 intake form, which appears to have been completed by Petitioner, states "Work comp fell on back at work." (Px4).

Petitioner agreed he was having significant weight loss at this time but didn't see a doctor for it. He was diagnosed with diabetes prior to the work accident.

On 11/1/22, Petitioner advised Dr. Wardell he was doing a rotation maneuver in therapy and had severe left sided low back pain. Therapy had been delayed for weeks as Petitioner thought he had covid, and he'd been off work for 4 months. He was taking 12 ibuprofen a day and had been diagnosed with multiple myeloma, which correlated to his weight loss. He had an EMG and was told he had a pinched nerve. The Arbitrator notes that an EMG test report could not be located in the evidentiary record. Dr. Wardell reiterated he did not feel hip surgery was warranted and believed Petitioner's symptoms were primarily back related. As to the left hip, he opined Petitioner could return to regular duty and follow up as needed. Petitioner did not feel he could return to work due to low back pain, so he was advised to follow up with neurosurgery/spine care and was held off work. (Px4). Petitioner agreed Dr. Wardell believed his problem was his back and not his hip, and that he was not a back doctor. Dr. Wardell advised the nurse case manager, Judy, about the visit, and Petitioner testified she then made an appointment for him with Dr. Sampat.

Petitioner returned to Dr. Zakaria on 12/19/22 indicating he had not yet had the SI joint injection due to his diabetes level. The report states Petitioner indicated he was motivated to get the diabetes under control, and he was advised to return for the injection when he did. (Px5).

On 1/13/23, Petitioner saw Dr. Sampat, telling him he was trying to open the hood of a semi-truck when he fell backwards because it required quite hard force to pull it, resulting in low back pain radiating down the left lower extremity. His prior surgeries were noted from 2016, with no radiating pain, and that he was asymptomatic prior to the recent incident. Petitioner reported when he fell he developed tingling in the left thigh and into the foot. An EMG showing lumbar radiculopathy from L4 to S1 without neuropathy was noted, though there was some peroneal nerve involvement which was thought to be from the back. The diabetes issue was also noted, which Petitioner testified to. The pain was noted to be 90% in the back and 10% in the lower extremity. Tingling was worse with standing and walking. It was noted that Petitioner retired because he had a hard time bending, lifting, twisting, and performing the activities of his job, but this report makes it unclear if this refers to the present time or when Petitioner retired around the time of his prior back surgeries. Lumbar MRI was prescribed, and Petitioner was held off work. (Px4).

The 2/23/23 lumbar MRI showed multilevel chronic degenerative changes most significant at L3/4, no high-grade canal stenosis, postsurgical changes related to posterior decompression from L4 to S1, and a transitional segment with partially sacralized L5 segment. Moderate to severe foraminal stenosis was noted bilaterally at L3/4, L4/5, and L5/S1 with facet arthropathy. Mild canal stenosis was noted from L2 to L4. (Px4).

On 2/24/23, Petitioner reported improved blood sugar but had significant ongoing pain in the low back with numbness and tingling down the anterior thigh without progressive numbness or weakness. He was using a cane to ambulate. Dr. Sampat compared Petitioner's July 2022 MRI films to the 2/23/23 films, noting Petitioner still had a recurrent left paracentral L3/4 disc herniation causing severe left foraminal stenosis "from his work injury." Given the ongoing blood sugar issues, any possible L3/4 surgery (revision decompression and fusion) would be in the future and ongoing conservative measures were planned, including an epidural. He was continued off work. (Px4).

Petitioner testified he was aware Dr. Sampat was planning an epidural injection when his diabetes improved.

On 4/7/23, Dr. Sampat again noted exam indicated no focal neurologic deficits, but some decreased left quad and dorsiflexion strength and some decreased sensation in the anterior left lower leg and dorsal foot. He again noted surgery was possible but wanted to maximize the benefit of therapy and for Petitioner to continue working on blood sugars. On 5/30/23, Dr. Sampat reported that Petitioner now wanted to undergo surgery after about a year of ongoing symptoms and did not want a steroid injection, as steroids previously made his blood sugar go up severely. He was having a hard time walking and standing and was using a cane. L3/4 decompression and fusion were recommended, noting "the need for surgery is related to his work injury." Petitioner remained off work. It was noted that the goal of surgery would be to relieve some of his radicular pain, not necessarily his axial back pain. (Px4).

Petitioner testified his symptoms were continuing to worsen through this time and that Dr. Sampat was restricting his work. He also testified that Dr. Sampat on 12/19/22 discussed surgery with him involving removal of a disc and installation of hardware, and that no other doctor had discussed surgery with him up to that point since his 2017 release, and he'd had no back treatment since 2017 until after the work accident. Petitioner testified Dr. Sampat recommended that he get his diabetes under control prior to surgery. The Arbitrator notes that Petitioner had not seen Dr. Sampat in December 2022, but rather in January 2023, and that the initial report mentioned nothing about surgery.

On 4/10/23, Petitioner sought treatment for a left wrist injury at OAK Orthopaedics following a fall at an airport, and he was diagnosed with a TFCC tear. (Px3). On 4/20/23, Petitioner returned to OAK for left knee pain, indicating he went to sit down on a chair and it collapsed. He was diagnosed with degenerative joint disease. Petitioner was diagnosed with left radial styloid tenosynovitis. (Px3).

Petitioner testified he has never improved since seeing Dr. Sampat on 5/30/23, and that he continued to recommend fusion surgery so long as his diabetes was under control. To his knowledge, he hasn't undergone surgery at this point because authorization was denied by Respondent.

On 6/29/23, orthopedic surgeon Dr. Singh was asked by Respondent to perform a medical record review with regard to Petitioner. This included a review of both Petitioner's 2016 and 2017 records from when he underwent lumbar surgery and the current post-accident records. His review of a 3/10/16 lumbar MRI film showed L3/4 central disc protrusion with moderate stenosis and severe spinal stenosis at L4/5 secondary to a disc osteophyte complex with mild bilateral foraminal stenosis. He reviewed a 5/1/17 MRI film which he opined showed an interval increase in the size of the L3/4 herniation resulting in severe stenosis, as well as post-laminectomy L4/5 defect with minimal residual stenosis. A 5/15/17 EMG revealed evidence of a left L4 radiculopathy. Thoracic and cervical MRIs were also obtained in June 2017. Dr. Singh found that the 7/28/22 lumbar MRI films showed post-operative laminectomy changes from L3 to L5 with a residual disc osteophyte complex central/left paracentral at L3/4 with mild L3/4 neuroforaminal narrowing. He opined that the 2/23/23 films were unchanged versus the 7/28/22 films. Dr. Singh opined Petitioner sustained a lumbar muscular strain and was status post-L3 to L5 lumbar laminectomy. In response to specific questions from Respondent, Dr. Singh opined he could not objectify Petitioner's low back and left hip complaints based on the lumbar films, and that the L3/4 disc protrusion would not result in hip pain and would rather result in an L4 radicular pattern, which was inconsistent with the current complaints. He believed Petitioner sustained a lumbar strain, which had resolved, and he deferred any hip opinion to a hip specialist, noting the hip complaints did not have a lumbar etiology. Dr. Singh believed 4 weeks or therapy was reasonable to treat Petitioner's work related condition and Petitioner had reached maximum medical improvement (MMI) after that. He further opined Petitioner was capable of returning to full duty employment. (Rx3).

Dr. Singh then examined the Petitioner on 8/23/23, noting Petitioner provided a history of on 6/27/23 attempting to open a semi hood that "was significantly rusted and could not open", so he stepped on the bumper

and pushed it when he felt a sharp pain in the low back like he had been stabbed. Following examination, Dr. Singh again opined Petitioner sustained only a strain as a result of the truck hood incident, and that there were no objective findings to substantiate his complaints of 10 out of 10 (10/10) low back pain and the entire bilateral lower extremity pain, which Singh found to be non-anatomic. He opined that lumbar MRI films showed minimum findings and that he had extreme symptom magnification on exam with a normal neurologic exam. Dr. Singh reiterated his beliefs that Petitioner needed four weeks of therapy followed by a return to regular duty work. (Rx4).

Petitioner testified that when he was examined by Dr. Singh, he reported the 6/27/22 work injury and described his symptoms as including low back pain into the left leg. He also advised that he'd had no low back treatment since 2017 until the 6/27/22 accident. Petitioner hasn't seen Dr. Sampat since 5/30/23, as the next steps are for him to get his diabetes under control and to get the surgery authorized.

An EMG from 5/15/17, which took place between the two prior surgeries, indicated a mixed feature of mild to moderate distal neuropathy, as well as evidence of left mid and lower lumbar irritation consistent with L4 radiculopathy. The Arbitrator notes that in the Petitioner's last post-operative note from ATI Therapy on 8/23/17, he continued to complain of low back and left leg pain with numbness and tingling, especially when his medication would wear off. He was discharged when he stopped showing up or returning phone calls. The last post-operative report of Dr. Ghaly was dated 8/31/17, subsequent to the last ATI report, and states that Petitioner did very well immediately after the last 7/24/17 surgery and progressed to almost complete resolution of symptoms, particularly in the left leg. It also appears that Petitioner was advised to continue therapy and, similar to ATI, the Petitioner then did not attend a follow up visit and would not return repeated phone calls. (Rx5).

Board certified orthopedic surgeon Dr. Sampat testified via deposition. He testified Petitioner was referred by Dr. Wardell to evaluate whether Petitioner's symptoms were left hip or lumbar spine related, noting that left lower extremity symptoms can overlap with the hip and the lumbar spine. At the initial 1/13/23 visit, Petitioner's main complaint was low back pain with numbness and tingling and pain down the left leg which started after he fell backwards while trying to open a semi hood because it required a hard force. Symptoms were worse with weightbearing. He had a hard time doing work activities like bending, twisting, and lifting, so he retired. Petitioner's EMG showed lumbar radiculopathy with no peripheral neuropathy, which he indicated as an important finding given Petitioner's diabetes. Therapy provided only temporary relief. Dr. Sampat testified that Petitioner had no further back treatment after he last saw Dr. Mekhail in February 2017 following December 2016 surgery, which does not acknowledge the second surgery with Dr. Ghaly in 2017. Exam reflected mechanical back pain with normal strength and motor function, and x-rays taken on 1/13/23 showed the prior laminectomies at L4 to S1 and some age appropriate L4/5 degeneration. Based on his complaints and the EMG testing, Dr. Sampat diagnosed lumbar radiculopathy and requested an updated MRI. He held Petitioner off work given his difficulties with work activities. It was noted that Dr. Wardell opined there was not a left hip problem, which Sampat testified was consistent with his own examination. The February 2023 lumbar MRI showed no change versus the July 2022 MRI, including the size of an L3/4 disc herniation, and Dr. Sampat stated this L3/4 level correlated to the nerve pattern of Petitioner's subjective complaints. Dr. Mekhail had noted Petitioner was doing very well after the prior surgery and didn't indicate anything about a herniated disc, which again seems to indicate Dr. Sampat was not aware of the second surgery during this testimony. Petitioner had some left quad weakness at Dr. Sampat's 2/24/23 exam, which he opined to be related to the L3/4 disc, as this area is enervated by L3 and L4 nerves. He opined the herniated disc was causing Petitioner's symptoms but he wanted to exhaust conservative treatment and to allow him to get his blood sugar under control to attempt an epidural, which can impact blood sugar in a dangerous way. Diabetics have more risk of peri-operative complications and can result in a nerve taking longer to heal. Petitioner was continued off work and again seen on 4/7/23 and 5/30/23 with no change in symptoms. Dr. Sampat believed the fall on 6/27/22 caused a recurrent

herniated disc and resulted in again pinching the nerve at this level, after this had previously been resolved with the prior surgery. On 5/30/23, Dr. Sampat recommended an L3/4 decompression and fusion surgery, as Petitioner was not a good epidural candidate. He testified the fusion was needed as the decompression in the setting of the prior surgery would result in instability. He had nothing further scheduled with Petitioner pending surgical approval. (Px7).

Asked about the opinions of Dr. Singh, Dr. Sampat noted Singh also saw the L3/4 disc protrusion and incorrectly concluded it could not cause hip pain. Dr. Singh wanted Petitioner to see a hip specialist, which he at this point has already done with Dr. Wardell. Dr. Singh diagnosed a muscular strain, but Dr. Sampat opined this would not result in radiculopathy down the leg Petitioner complains of, and the EMG objectively supports the radiculopathy finding. Dr. Sampat noted the symptoms involve the anterior thigh and quadriceps, which are enervated by the L3 and L4 levels, and thus he was providing "anatomically more details" than Dr. Singh's basic description of "left hip", which can encompass multiple areas, and his indication there is no lumbar etiology. Dr. Sampat opined Petitioner's fall is a competent cause of the disc herniation, and Petitioner had been asymptomatic for many years after his surgeries until this accident. He had the complaints he came to Dr. Sampat for within 6 weeks of the fall and has been ruled out for hip pathology. The treatment to date, including hip evaluation with Dr. Wardell, has been reasonable and necessary. If Petitioner's symptoms remain the same now as they were on 5/30/23, Dr. Sampat would continue to recommend the surgery and off work status pending same. It is likely Petitioner would need an FCE post-recovery. (Px7).

On cross, Dr. Sampat agreed he only reviewed Dr. Singh's 6/29/23 record review, not his exam report. His review of the 3/10/16 lumbar MRI indicated an L3/4 disc protrusion with moderate stenosis. As to its previous size compared to now, Dr. Sampat testified that Petitioner underwent a posterior decompression since the prior MRI, so the size of it doesn't really matter because the nerves were decompressed from the back, "so I think it depends on the context of why and what was done." Dr. Sampat testified that he didn't have access to the 2016 MRI and didn't review any 5/15/17 EMG testing. His understanding of the history of the 6/27/22 accident came from Dr. Wardell's report and Petitioner himself. While he didn't have a formal job description, Petitioner explained the things he had trouble doing at work. Dr. Sampat has a 3/22/23 treatment note from JoJo Sayson PT, but not a 4/24/23 note. As to whether he was aware Petitioner had responded to PT, Dr. Sampat testified that Petitioner did not get any long term relief with therapy and was continuing to have difficulty walking and standing. He had been symptomatic for nearly a year by 5/23, and so surgery was recommended as further therapy was unlikely to provide long term relief. He is not aware of Petitioner's current blood sugar levels, but that would have to be optimized prior to surgery. Petitioner's specific spinal levels are tricky in this case as he has a sacralized transitional vertebra at the L5 level, but it is clear the prior laminectomies were performed at his last two functional disc levels. To Dr. Sampat's understanding, diabetic neuropathy had been ruled out by the EMG testing indicating no peripheral neuropathy. Dr. Mekhail had mentioned diabetic neuropathy in the past, but as of when Sampat saw him that had resolved based on the objective best available test, EMG. On redirect, Dr. Sampat reiterated his belief that Petitioner's symptoms are related to the herniated disc, not degenerative disc disease – "Everybody in his age group would have some degenerative disc disease. His is at L4/5. That's not where his symptoms are coming from" given his anterior thigh and buttocks area symptoms, as well as the EMG finding of L4 radiculopathy. He also opined that the current herniation is new given its off to the side in the foramen and the prior disc was more central and addressed with the prior surgery. (Px7).

The records from physical therapy facility JoJo Sayson indicate that Petitioner attended from 10/3/22 to 11/10/22, as well as from 3/22/23 to 4/27/23 (with additional 5/17 and 5/18/23 visits). The handwritten daily reports are difficult to read accurately. The initial report of 10/3/22 indicates Petitioner's signs and symptoms are discogenic pain referral to the left hip and low back, as well as signs of degenerative facets, mainly left-sided, and significant deconditioning of the spine, pelvis, and left leg. He reported pain that appeared localized to the lateral left hip below the waistline. He had some limping, improved after 10-15 minutes of ambulation,

and pain with sitting over 10 minutes. No specific hip movement caused pain, but he had reduced range of motion versus the right side. Exam noted findings of reduction of L3 knee jerk, and weakness from L3 to L5, with positive neurotension on the left for sciatica. The 3/22/23 report notes that based on manual testing, Petitioner's signs and symptoms were consistent with discogenic-type low back pain generator with nerve compromise from L3 to S2 on the left lower extremity with significant deconditioning. There also was possible painful left episacroiliac lipoma signs and symptoms. Petitioner complained of left to middle low back pain down to the left hip area, pain to the lateral thigh and left calf, ending at the lateral foot. The 4/24/23 update indicates that after 8 visits, Petitioner indicated his low back pain appeared to have diminished by 20%, especially on the left side to the hip, thigh, and foot. General functionality was improved 20% to 30%. He had improved strength, gait, and walking tolerance. Based on the positive response after even a few visits, further therapy was recommended. (Px6).

Since May 2023, Petitioner testified the rest of his spine is being impacted, and he is weaker on his left side. He has pain at belt level from the mid back to his left side and down the left leg. He had no such symptoms between his 2017 post-surgical release and the 6/27/22 accident. He indicated he is inhibited as he "can hardly do anything" due to his pain. He remains off work per Dr. Sampat but has not received temporary total disability (TTD) benefits since December 2022. He will be seeing Dr. Sampat in the week following after the hearing to update him on his condition and to try to get something for his pain and an answer as to why he keeps worsening. Petitioner does want the surgery being recommended by Dr. Sampat as he believes in him and thinks he can fix him. Petitioner agreed that he also treated at OAK with Dr. Corcoran for unrelated hand/wrist/shoulder conditions.

Questioned on cross, Petitioner agreed that in addition to his 2016 and 2017 lumbar surgeries, he had a left shoulder surgery in 2021 and has had surgeries on his bilateral knees. He agreed that Dr. Issa offered a left hip injection with cortisone, but he elected against this ("I couldn't do that"). Petitioner did not recall being a no show for an 8/18/22 visit with Dr. Ghaly. He agreed that Dr. Zakaria indicated he had no neurosurgical options to offer him and didn't refer Petitioner anywhere else.

Petitioner acknowledged some references in the OAK records as accurate. In April 2023, Petitioner testified he was on the way to a funeral in Arizona and at a charging station at the Denver airport, his chair collapsed and he fell to the ground, injuring his left wrist. A 5/15/23 note while treating for the left wrist indicates he was on a seven day cruise in England/Scotland/Ireland, was in the bathroom and fell backward into a shower. He had flown from Chicago to London and back, about an 8 hour flight each way. Petitioner testified that while he "fell back", he just hit something but didn't injure his body at all in this incident. Asked why he would tell the doctor about it if he wasn't injured, he indicated that he honestly couldn't recall. As to the 4/20/23 report of Dr. Corcoran noting he aggravated his knee when the chair collapsed in Denver, Petitioner agreed he hurt his arm but denied injuring his knee. Petitioner was asked if this discrepancy was similar to when his July 2022 records from Riverside indicated he injured his back working on his car in January, and Petitioner again denied that this was true. As to an 8/1/22 report from Riverside indicating he was hurt in a fall two weeks prior, Petitioner denied this and indicated the injury occurred on 6/27/22.

As to the 6/27/22 Riverside report stating Petitioner reported it was not difficult to open the hood, it was part of his regular routine, and he did not have to strain, and he wasn't certain why he developed the back pain – Petitioner denied reporting this. He also denied indicating he had no pain down his legs or numbness and tingling. As to the report not saying anything about the Petitioner falling, Petitioner testified he did tell the ER he fell - "They would have to know I fell. I told them." Petitioner also testified "I know what I told them", but he never reviewed his medical records or kept his own contemporaneous notes. Petitioner advised he was having a difficult time remembering all dates and times ("I'm having a hard time. When I walk out of here, I won't remember what happened 5 minutes ago"). Whenever he was at Dr. Sampat's office, he saw Dr. Sampat,

and he hasn't been there since May 2023. He made an appointment for next week because he has continued to wait for the insurance company, but now his pain is so bad he has to do something and "I didn't know what else to do."

On redirect examination, Petitioner testified he has not worked since 6/27/22, he couldn't recall when he began receiving TTD, with the question referencing whether he was receiving benefits prior to 2 weeks before the 8/1/22 report referencing an injury two weeks prior. Petitioner testified neither the fall at the Denver airport or on the cruise increased his back pain. He had back pain both before and after the incidents. The left wrist injury ended up being a bruise or something. He declined the cortisone injection because he "didn't believe in cortisone", and then Dr. Issa said his blood sugar level indicated he couldn't give him the injection at that time. Regardless of what some of his medical records may say, Petitioner fell onto the ground at the time of the 6/27/22 accident, and he was taken off the ground onto a back board and brought to the ER. On recross, as to whether his blood sugar remains too high for injection of surgery, Petitioner indicated to his knowledge he is at 9 and doesn't know what level he has to be at. He has to keep it low to keep his driver's license. With pain and stress, it was higher. Petitioner was asked if at the scene where the accident happened he told his employer or anyone who came to the scene that he noticed back pain and that he then laid down, as opposed to have fallen down, he denied this.

# CONCLUSIONS OF LAW

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

The parties have stipulated to a 6/27/22 accident. While there are some discrepancies in the histories contained in some of the medical records as to the mechanism of injury and whether the Petitioner developed pain before or after he fell from the truck, the Arbitrator finds that the greater weight of the evidence supports the finding that Petitioner's symptoms of low back pain radiating into the left hip/leg are causally related to the 6/27/22 accident.

The Petitioner initially reported severe back pain, pain that he testified caused him to decline a co-worker's assistance getting up from the ground and resulted in an ambulance being called, and he was then placed on a back board. While it is also accurate that the initial ER report did not reflect complaints of leg pain, numbness, or tingling, such symptoms were noted in the 7/11/22 report from Riverside.

While this 7/11/22 report references an incident in January where he was working on a car and noticed the back pain into the left leg, the Petitioner denied stating this, there is no evidence of treatment between January and the June 2022 accident, and the initial ER report indicated the same history as the Petitioner testified to. Thus, the Arbitrator believes this tends to show there was an error in communication between Petitioner and Riverside rather than that an accident had occurred in January 2022 involving the low back. The Petitioner was working throughout that time based on the evidence.

The Respondent argues that of the eight providers that Petitioner has seen since the 6/27/22 accident, Dr. Sampat is the only doctor who has opined that lumbar surgery is indicated, including Dr. Zakaria, Dr. Issa, Dr. Wardell, Dr. Ghaly, and Dr. Singh. Respondent also references that Petitioner sought treatment following two other incidents, the fall at the Denver airport and the incident while on a cruise in Europe. Respondent also argues that the initial therapy with Jojo Sayson indicate he was referred there for the left hip and had no low back treatment until after he saw Dr. Sampat in January 2023.

Dr. Zakaria diagnosed a lumbar strain. Dr. Issa diagnosed SI joint dysfunction. Dr. Ghaly believed Petitioner's condition was not compatible with a back injury and advised that Petitioner needed a left hip workup as well as a workup as to why he had suddenly lost so much weight. Dr. Wardell performed the left hip workup and opined Petitioner's condition was mainly back related and not related to the left hip. Petitioner then failed to follow up with Dr. Ghaly, who's office noted he was contacted to reschedule and refused. Petitioner then had the noted airport and cruise incidents and treated with Dr. Corcoran for the left hand/arm in mid-2023. Dr. Sampat then became involved, with Petitioner testifying this doctor was chosen by Respondent's nurse case manager, and he opined that Petitioner's condition was compatible with an L4 nerve issue. However, he also referenced an EMG that was positive for L4 radiculopathy, which is nowhere to be found in the Arbitrator's review of the evidence presented. Section 12 examiner Dr. Singh then opined that Petitioner sustained nothing more than a lumbar strain and opined that Petitioner's symptoms were non-anatomical based on the objective lumbar evidence and that he exhibited symptom magnification with complaints of 10/10 pain.

Based on the evidence as presented, the Arbitrator finds that the Petitioner's ongoing symptoms in the low back radiating into the left lower extremity are causally related to the 6/27/22 accident. The accident itself is not in dispute. There is some discrepancy as to whether the semi-truck hood was easy to open, as noted in the initial medical records, or was difficult to open, which was noted in the later medical records as well as Petitioner's testimony. However, there does not appear to be any discrepancy as to the fact that an incident occurred while Petitioner was opening the hood of the truck, which resulted in him falling to the ground, having back pain, and being taken by ambulance to the ER.

There also does not seem to be any discrepancy as to the fact that Petitioner has had ongoing symptoms since that time. The Arbitrator notes that the Petitioner does seem to be a relatively poor historian. He said as much at the hearing when he indicated he might not remember when he left the hearing what occurred five minutes before. We have the discrepancy as to the difficulty of opening the hood. We have some discrepancy if he complained of radiation to the left leg initially at the ER. We have discrepancies of the history of accident in terms of the references in July 2022 at Riverside to being injured working on his car in January and an 8/1/22 report stating he hurt himself two weeks prior working on a car. As to the latter two, the Petitioner clearly had been working between January 2022 and 6/27/22, and it had already been established that the 6/27/22 incident had occurred by 8/1/22.

Dr. Singh's opinion, while certainly not unreliable given the other medical opinions in this case, does not explain Petitioner's ongoing symptoms, as his opinion was that Petitioner sustained a lumbar strain and had reached MMI prior to his exam. The Arbitrator found the Petitioner credible in that he sustained an injury which caused low back pain and shortly thereafter left lower extremity pain, and that pain has not subsided since the accident occurred. Dr. Singh did also opine that there was evidence of symptom magnification. However, none of the other physicians involved in this case have findings which would support this. Ten out of ten pain is rather excessive, but the evidence supports that this claimant went from a normal truck driving position to having consistent pain that ultimately led to him using a cane to walk, and the Arbitrator finds this to be largely credible.

The Petitioner had prior decompressions/laminectomies in 2016 and 2017, so he has a preexisting condition in the lower lumbar spine, but there is no evidence of treatment between 2018 and the 6/27/22 injury.

The Arbitrator finds that the Petitioner's lumbar condition of ill-being and the symptoms into the left hip/lower extremity remain causally related to the 6/27/22 accident.

**WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL**

**APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:**

Petitioner presented his claimed outstanding medical expenses as Petitioner's Exhibit 2.

According to these records, all of the medical bills being claimed had zero balances other than Dr. Sampat, who indicates a balance of $1,621.00. The bills reflect that workers' compensation has made payments on these bills and has received adjustments.

The Arbitrator awards the expenses contained in Px2, pursuant to Sections 8(a) and 8.2 of the Act. Respondent is entitled to credit against these awarded expenses for anything Respondent has paid towards these expenses (See Rx1) prior to the hearing date, so long as Respondent agrees to hold Petitioner harmless against the applicable providers. The Arbitrator notes that the providers are only entitled to what the Fee Schedule (Section 8.2) allows, and that neither the Petitioner nor the Respondent are liable for any balance billing in this regard.

Excluded from this award are the expenses contained in Px2 from OAK/Dr. Muhammad/Illinois Bone & Joint. These bills on their face are related to different accidents the Petitioner was involved in which impacted his upper extremity and knee. As they are unrelated to the 3/27/22 accident, these expenses that are included in Px2 are denied.

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

The Arbitrator finds that the Petitioner has failed to prove entitlement to the medical care requested, that being a lumbar decompression and fusion recommended by Dr. Sampat. One of the glaring problems in this case in the Arbitrator's view is the doctor's reliance on an EMG test that is not contained in the records in evidence. The Arbitrator, as noted above, also did not locate any records where such EMG was ever prescribed. Thus, weight cannot be given to Dr. Sampat's opinion given its reliance on this alleged test when there is no evidence of the test in the evidentiary record or any evidence of it being ordered. Dr. Sampat testified that the appearance of the herniated disc did not matter based on the prior surgeries but did indicate it existed when he reviewed the prior MRI.

Additionally, the evidence leaves the Arbitrator with the conclusion that the Petitioner simply has not proven the reasonableness of the lumbar surgery, at least not at this point. There are many conflicting opinions of what is causing the Petitioner's symptoms. There are opinions indicating they are lumbar related. There are opinions specifically finding they are not lumbar related. There are findings that they are related to the SI joint. There are findings that they are related to the left hip. There is a weight loss/muscle wasting problem which also does not yet appear to have been diagnosed, and therefore no indication if the symptoms could be related to another condition. Therefore, the Arbitrator finds that the Petitioner, at this time, has failed to prove that the proposed surgery is reasonable and necessary in terms of the causally related symptoms. This does not bar the Petitioner from seeking such surgery in the future if evidence is presented in support of said surgery being causally related to the 6/27/22 accident and being reasonable and necessary treatment.

The Arbitrator also notes that there appears to be a delay in any further recommended treatment of Dr. Sampat, whether it be epidural or surgery, due to a lack of control of blood sugar. Based on Petitioner's testimony, it is unclear whether he has improved this situation of not, but his comments make this unclear. Additionally, the evidence does not indicate what an appropriate blood sugar level would be in terms of proceeding with injection or surgery. There are no real primary care records contained in the evidentiary record which reflect what the blood sugar levels are, what the relevancy of such levels would be to an epidural or surgery, whether there is

any likelihood that the Petitioner will reach the appropriate level, and whether the Petitioner's voluntary actions or failure to act are why the sugar levels have not reached the point where further treatment would be allowed.

It is unclear and has not been shown by the greater weight of the evidence what the Petitioner's key diagnosis is with regard to his symptoms, making a surgery questionable, and additionally the Petitioner does not appear to have obtained a sufficient blood sugar level to undergo the recommended surgery as of the hearing date. At a minimum no evidence was produced to support what the Petitioner's blood sugar level was.

Under these circumstances, the Arbitrator finds the Petitioner has failed to provide sufficient evidence to support the surgical recommendation of Dr. Sampat.

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

Given the Arbitrator's finding of causation, the Arbitrator finds that the Respondent is liable for Petitioner's TTD period from 6/28/22 to 12/7/23, the hearing date. This is based on Dr. Sampat holding the Petitioner off work during this period. Dr. Sampat testified that his rationale for restrictions was because Petitioner had a hard time walking for any prolonged period of time or climbing into a truck because of quadricep muscle weakness. The Arbitrator had the opportunity to observe Petitioner needing the assistance of a cane at trial. Respondent claims that Petitioner's period ended on 12/22/22 based on the opinion of Dr. Singh, who indicated the Petitioner sustained only a back strain and was capable of returning to work. While the opinion that the Petitioner was exhibiting signs of symptom magnification is relevant and considered, the Petitioner's ongoing symptoms that continued after the time Dr. Singh believed Petitioner could have returned to work were credible based on a review of the medical evidence. While Dr. Singh believed Petitioner was magnifying his symptoms, none of the other numerous providers have made such a finding.

Based on the greater weight of the evidence, the Arbitrator finds that Respondent is liable for Petitioner's TTD period from 6/28/22 through 12/7/23.

Respondent is entitled to credit against this award totaling $24,115.78, constituting the previous payment by Respondent of TTD ($15,432.28) and a permanency advance ($8,683.50). (See Rx2). The Arbitrator notes this credit is based on the stipulation in Arbx1. Rx2 indicates the TTD paid to be $15,437.28, so the Respondent may be entitled to an additional credit of $5.00 if the parties agree.

The Arbitrator notes that going forward the Petitioner's diabetic condition will be relevant to his reaching of maximum medical improvement and entitlement to ongoing TTD. His ability to modify his sugar levels in a way that leaves further treatment possible, and whether this is dependent on his own voluntary choices, will impact this determination in the Arbitrator's view. As noted, no evidence was presented as to the Petitioner's current blood sugar level, and whether it has changed since the surgical recommendation.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 22WC033511 |
| Case Name | Jesse Robison v.<br>Walsh Construction |
| Consolidated Cases | 22WC033512; |
| Proceeding Type | Petition for Review under 19(b)<br>Remand Arbitration |
| Decision Type | Commission Decision |
| Commission Decision Number | 24IWCC0594 |
| Number of Pages of Decision | 32 |
| Decision Issued By | Stephen Mathis, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Donna Zadeikis |
| Respondent Attorney | Matthew Walsh,<br>Lauren Kus |

DATE FILED: 12/11/2024

/s/Stephen Mathis, Commissioner

Signature

STATE OF ILLINOIS )
) SS.
COUNTY OF COOK )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jesse Robison,

Petitioner,

vs. No. 22 WC 33511
Consolidated with: No. 22 WC 33512

Walsh Construction,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review under §19(b) having been filed by the parties herein and proper notice given, the Commission, after considering the issues of accident, causal connection, medical expenses, prospective medical care, temporary disability, penalties and attorney fees, and being advised of the facts and law, modifies the Decisions of the Arbitrator as stated below and otherwise affirms and adopts the Decisions of the Arbitrator, which are 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, medical benefits or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327 (1980).

Petitioner's application for adjustment of claim in the instant case No. 22 WC 33511 alleges that on December 19, 2022, Petitioner injured his back, neck, head, left shoulder, right knee and person as a whole at work. Petitioner's application for adjustment of claim in consolidated case No. 22 WC 33512 alleges that two days later, on December 21, 2022, Petitioner sustained injuries to the person as a whole at work. The two claims were consolidated before trial. The underlying facts are intertwined, making it impossible to render separate awards. The Commission awards all benefits and sets the bond in the instant case.

Petitioner testified that he has a substance abuse disorder.[1] He lived "currently in a facility" in Chicago that was "a recovery home" "for people that have a substance use disorder." Petitioner stated that "you cannot reside at that facility if you are using any mind or mood altering substances." The facility tests its residents for drugs. Petitioner has been living in the facility since March of 2022. Petitioner denied testing positive for drugs during that time. Petitioner likewise denied that he used controlled substances after March of 2022.

Regarding the accident on December 19, 2022, Petitioner denied taking any controlled substances. Petitioner, who was a construction laborer, testified that he had been employed by Respondent for approximately six or seven months. The accident occurred around noon. Petitioner was kneeling on one knee, with the other leg extended, and using a tool to pry and lower "steel tables" (steel and plywood forms used in pouring concrete). Petitioner, who is left hand dominant, was operating the tool with his left hand and arm. While Petitioner was engaged in that task, a "full sheet" of plywood fell on him from the ceiling. The sheet of plywood measured "[e]ight by four" and three-quarter inch thick. Petitioner stated the piece of plywood struck "[m]y head, my neck, my shoulder, my upper body, just basically my upper body" with its flat side. The left arm was also struck. Petitioner was wearing a hard hat. After the accident, Petitioner saw that the hard hat "was cracked and the liner inside of the hard hat had broke." Upon further questioning, Petitioner stated that only the interior lining became cracked. On cross-examination, Petitioner maintained the impact "broke" or "busted" the liner of his hard hat. Asked about the condition of the exterior of the hard hat, Petitioner eventually responded: "[M]y testimony is that it hit—the hard hat was cracked. It was no longer in the position of being able to use it. It was damaged after this." The exterior "was damaged. There was marks all over it. If it was specifically broke in half, I don't think it was broke in half, I do know that, but it was busted." "As far as I know that the hard hat was damaged to the point that it could not be used to provide safety." The following colloquy then took place:

> "THE ARBITRATOR: Let me cut to the chase, the shell of the hard hat, was that cracked, do you know?
>
> THE WITNESS: I don't particularly know. They said it was cracked."

Ultimately, on cross-examination, Petitioner agreed he had no personal knowledge of the condition of the hard hat. On redirect examination, however, Petitioner testified to the exact opposite—that he looked at the inside of the hard hat and "saw the broken interior lining and their slots that it goes into. Okay. Those was broken. The line was broken and those slots was broken." Petitioner stated none of that was broken at the beginning of his workday.

Petitioner described his condition immediately after the accident as follows: "It took the wind out of me. My adrenaline was pumping, but I was very dizzy, you know, and I just stood there. Well, prior to standing there, when they was getting the plywood, I was in a daze and so they helped me up and I just stood there and I was just extremely dizzy." Petitioner did not believe he lost consciousness. Petitioner's left shoulder and elbow hurt. His back, neck, knee and

[1] Drug intoxication at the time of the accident is at issue.

ankle also hurt. Petitioner reported the accident five to ten minutes later to Ronnie, the superintendent. Ronnie told Petitioner to sit down in the laborers' office and take an aspirin.

Petitioner further testified that he left work a little early because he did not feel well and took the "L" train to West Suburban Hospital. The staff performed a brief examination, took some x-rays, and discharged Petitioner with instructions to follow up at Romano Orthopaedics. Respondent, however, directed Petitioner to Physicians Immediate Care. On December 20, 2022, Petitioner went to Physicians Immediate Care. At the time, Petitioner was in a lot of pain. "My head was hurting, my neck was hurting, my shoulder was hurting, my back was hurting, my knee was hurting." The staff discharged Petitioner to return to work on light duty and follow up on December 27, 2022. Petitioner returned to work the same day. He did not follow up at Romano Orthopaedics.

Moving on to the accident on December 21, 2022, Petitioner testified that the accident occurred at the same job site between 7 and 7:30 a.m. That morning, Petitioner felt sleepy because he did not get much sleep the night before. Petitioner was assigned to perform work on the 19th floor. To get there, he had to take an elevator to the 16th floor and then climb "handmade" ladders (made by the carpenters) to the 19th floor. Petitioner described the accident as follows: "I went up the first one—I don't know if it was the second or the third one, but on the second or the third ladder when I was going up I tripped and fell off the ladder and I was upsidedown." Petitioner explained: "My foot slips, I'm trying to, you know, hang on, but it was so awkward that my—my foot went in between the ladder and I was upsidedown. They said they got me from upsidedown." Petitioner then stated he lost his balance, fell and lost consciousness. When he regained consciousness, the paramedics were already on the scene. Petitioner agreed with the paramedic report, which his attorney summarized as follows: "Found unconscious at the bottom of a homemade ladder. *** [H]e was hanging by his feet. Coworkers pulled him down. Paramedics packaged him on a board and you were put in a Stokes basket where you were lowered to the ground 16 stories by a crane." Petitioner attributed the accident to the symptoms from his head injury on December 19, 2022. On cross-examination, Petitioner's recollection of the accident was limited. "I was going up the ladder and I fell." "And I was unconscious. *** I remember being in the sky." The feeling of being in the sky was when Petitioner was being lowered down from the building. Petitioner denied being intoxicated. When shown photographs of a syringe found at the scene, Petitioner denied ever using a syringe or that the syringe was his. "I had a substance use disorder, but it didn't include needles."

Petitioner further testified that an ambulance took him to Stroger Hospital. The Stroger staff performed imaging studies, including a CT scan, and kept Petitioner overnight. Petitioner stated the Stroger staff gave him a cane, which he then used. Petitioner denied/did not recall that the Stroger staff released him to return to work full duty on January 7, 2023. After receiving initial treatment at Stroger Hospital, Petitioner followed up with multiple providers for multiple conditions. He also underwent two section 12 examinations at Respondent's request. Respondent terminated Petitioner's employment on January 5 or 6, 2023. At the time of the arbitration hearing on October 10, 2023, Petitioner was unemployed because of his injuries. He was still actively treating, and his doctors have kept him off work.

Petitioner denied treating for his left shoulder, back or neck during the two years before December of 2022. Petitioner did not remember whether he ever injured his back or neck in a car accident.[2] Petitioner testified he has memory problems since the work accidents.

Petitioner acknowledged a felony conviction within the past ten years for driving without a driver's license. Petitioner also acknowledged a felony conviction for domestic battery, with a release from prison in 2015. Petitioner's domestic battery arrest and conviction records are in evidence.

Jose Lecea, a laborer and foreman for Respondent, testified that he witnessed Petitioner's accident on December 19, 2022. Mr. Lecea stated: "I saw [Petitioner] and another coworker were dropping a piece of equipment, a table, we call them tables, right in front of me about 8 feet from me from where I was. And, yeah, I did see when the table dropped and the piece of—a sheet of plywood peeled off the ceiling and it landed pretty much, yeah, on both of them." "[Petitioner] was kneeling on the ground right in front of me. It pretty much caught both his back and his head." Petitioner was struck with the flat side of the plywood. Mr. Lecea estimated the piece of plywood weighed 40 pounds and fell six feet. Mr. Lecea thought the blow to Petitioner was not hard, but "medium," because the plywood hit the table next to Petitioner first. After the accident, Mr. Lecea looked at Petitioner's hard hat, but not closely. He saw nothing wrong with the hard hat. Petitioner continued to use the hard hat for the rest of his shift without complaints.

Augustine Najera, a carpenter for Respondent, testified that he saw Petitioner the morning of December 21, 2022. "I was walking towards work and I just thought he was sleeping or standing up, just laying back." Petitioner was on a street corner by the job site. "I just saw him there asleep. I thought he was sad or something. I let him be and I walked inside." Mr. Najera elaborated: "I walked up and I turned right towards the job and I saw him just standing there with his head down so I just kept walking by." "I thought he was sad or something so I just left him." It looked like Petitioner was sleeping while standing. A little later, Mr. Najera witnessed Petitioner's incident with the ladder. "I walked up the stairs—or the ladders because our stairs die down because they're still in construction and we have platforms *** on both sides of the building. And we were on the north side. And as I go up the ladder, I was turning, hang my bookbag, turn around, and [Petitioner] falls backwards and he hits the floor—or hits the plywood." Petitioner was going up the ladder when he fell. Mr. Najera clarified: "He fell off the ladder and got caught in the ladder while falling." Petitioner was hanging from the ladder upside down; he actually did not fall. A syringe was found on the landing a floor below, directly below where Petitioner fell. "There is a two by three hole in between each landing so a ladder can fit through it." Mr. Najera saw the syringe on the landing. When Mr. Najera walked in the area ten minutes earlier, the syringe was not there.

Craig Bender, Respondent's safety manager who is also a firefighter paramedic, testified that as a firefighter paramedic he interacts with individuals who use drugs. When shown photographs of the syringe, Mr. Bender described it as "a prefilled medical syringe with a MAD device on the end of it to administer medications." The syringe in the photographs was empty, as the

[2] Respondent introduced into evidence an emergency room record from Rush Oak Park Hospital dated November 10, 2019, three years before the work accidents, showing that Petitioner received treatment for mild pain in the low back, neck and left knee after a car accident. Petitioner admitted to drug use and appeared sleepy/sedated.

plunger was completely depressed. This type of syringe could be used to administer drugs intranasally. Mr. Bender further testified that individuals under the influence of drugs "appear to be very unsteady on their feet and also they appear to be disoriented and, for lack of a better word, out of it."

Joseph Daughrity, a laborer for Respondent, testified that before December 19, 2022, he observed Petitioner act confused once or twice. Within two weeks after the accidents, Petitioner returned to the job site on crutches. Mr. Daughrity saw Petitioner leave the job site, and "before he got to the corner on Lake Street and turned, he picked the crutches up and put them up under his arm and just walked off." "I saw him pick the crutches up and walk normally around the corner." "He was walking normally after he picked up the crutches. He was walking on the crutches like he was hurt, but before he got to the corner he took about another five steps, put the crutches under his arm, and just walked normally around the corner. So maybe he thought somebody wasn't watching, but I was—I literally was sitting there watching him." Mr. Daughrity reported what he saw to his supervisor.

The medical records in evidence show that on December 19, 2022, Petitioner sought emergency treatment at West Suburban Medical Center. The attending physician noted: "Pt c/o right neck and shoulder pain, left elbow pain, left shoulder/side and head pain r/t to work injury. Pt states he was hit in head with plywood. Pt denies LOC." The attending physician observed no wounds. Physical examination was notable for a left paracentral spine spasm and reproducible tenderness, mild reproducible tenderness over the left posterior shoulder, and left paracervical and left posterior shoulder pain with abduction and forward flexion of the left shoulder. Physical examination was otherwise normal. X-rays of the left elbow, left shoulder and cervical spine were unremarkable. "On secondary assessment patient also complains of lower back pain and left rib pain. New physical exam finding of left paralumbar spine tenderness to palpation." Straight leg raise test was normal. X-rays of the ribs and lower back were unremarkable. "Patient without any major signs of trauma." Petitioner's gait was "steady and uncomplicated." The final diagnoses were cervical strain, shoulder strain, chest wall pain, lumbosacral strain, and degenerative joint disease. Petitioner was instructed to follow up at Romano Orthopaedics.

Medical records from Physicians Immediate Care show that on December 20, 2022, the triage nurse noted: "PT states that something heavy fell on him at work and now he is in pain almost everywhere. His head, neck, shoulder blades (both), left shoulder, elbow, and right knee is hurting." Petitioner was seen by Physician Assistant Wieseler, who noted "a chief complaint of pain of the head, neck, left shoulder, right shoulder, and lower back." Petitioner reported a piece of plywood struck his lower back, left shoulder and head. Petitioner stated his hard hat cracked. He denied loss of consciousness. "Today the patient is noticing significant pain with attempting to move his left arm at the shoulder joint with lateral abduction and external rotation." "The patient also reports pain in his right knee due to his knee being in a kneeling position and the impact forcing his knee into the ground." "He is also noticing a throbbing pain in his right knee as well and *** low back pain that radiates into the right leg." Physical examination was notable for diffuse tenderness of the cervical, thoracic and lumbar muscles. "Patient's exam demonstrates overdramatic reaction to light touch as well as exaggerated response." Straight leg raise test was positive on the right, negative on cross straight leg raise on the right, and negative on the left. Physical examination was otherwise normal. X-rays were unremarkable. A rapid

drug screen was negative. Petitioner was prescribed naproxen and Pharbetol, and released to return to work on light duty.

A paramedic report dated December 21, 2022, states in pertinent part: "Pt was unconscious at bottom of a homemade ladder where we found him. It was reported that pt was hanging by his feet on the ladder and pulled down by his coworkers." Petitioner was lowered to ground level and taken to Stroger Hospital.

At Stroger Hospital, the attending physician noted: "[The patient is] presenting after fall. Patient was standing on a ladder when he lost his balance, falling from approx 6 feet up. Patient reports that his left foot was caught in the ladder. Patient denies LOC. No seizures or vomiting. Patient does not remember the fall or events immediately prior to the fall. Patient reports that a piece of plywood fell on his head 1 week ago and he feels that he has been forgetful since then *** and has had occasional blurry vision. Patient was wearing a helmet when plywood fell on him and did not seek medical attention." Physical examination was notable for point tenderness in the cervical, thoracic, lumbar and sacral spine. There was pain with passive range of motion of the left knee and left ankle. X-rays of the chest, pelvis, left knee and left ankle were unremarkable. A CT scan of the head showed "[n]o acute traumatic process."[3] CT scans of the cervical spine, chest, abdomen and pelvis showed no evidence of acute traumatic injury. A drug screen was performed, but the results are not in evidence. The attending physician suspected a concussion, noting "slowly improving mental status," "unstable on feet, not safe for home." Petitioner was admitted for observation and physical therapy assessment. The following day, Petitioner complained of blurry vision, headache, dizziness and "L leg pain described as burning radiating from low back down leg." Petitioner was discharged with instructions to follow up with neurology, ophthalmology, outpatient physical therapy, and primary care regarding his work status. He was provisionally released to return to work full duty on January 7, 2023.

Medical records from the Pain Center of Illinois show that Petitioner saw Dr. Bayran on December 23, 2022. Petitioner complained of pain in the head, left knee, left ankle, right knee, neck, left shoulder, left elbow, mid back, low back and both hips. Dr. Bayran noted complaints of "severe pain all over his body" and that Petitioner walked with a cane. "He also complains of pain radiating into his eyeballs bilaterally. He complains of dizziness, blurry vision, difficulty with coordination and memory loss." "He [additionally] complains of shooting pain radiating into his legs and feet bilaterally. He complains of numbness in his feet bilaterally." Petitioner reported both work accidents—this time stating regarding the first accident that he was pinned against the other plywoods on the floor by the piece of plywood that fell on him. He also stated the power tool he used hit him in the upper body. He further stated he lost consciousness. Regarding the second accident, Petitioner stated he became dizzy and fell off a ladder. He hit the back of his head and passed out. Physical examination was notable for: tenderness over the cervical, thoracic and lumbar spine/paraspinal muscles; reduced shoulder range of motion bilaterally; left shoulder pain with range of motion; tenderness to palpation with decreased range

[3] The CT scan of the head/brain showed the following findings: "Multiple metallic foreign bodies embedded within the occipital bone and overlying soft tissues. Focal area of encephalomalacia [softening or loss of brain tissue] within the posterior paramedian cerebellar hemispheres. No hemorrhage. No abnormal extra-axial fluid collections. Brain volume and ventricles appear unremarkable. No skull fracture." A subsequent CT report dated January 19, 2023, noted a prior history of gunshot wound to the head.

of motion of the right knee; and tenderness to palpation of the left ankle. The examination was otherwise normal. Dr. Bayran causally connected the pain complaints in the head, neck, shoulders, low back, right knee and left ankle to the work accident on December 19, 2022. Dr. Bayran ordered MRIs of the left shoulder, right knee and left ankle, and prescribed Mobic, cyclobenzaprine, tramadol and physical therapy. Petitioner was taken off work and referred to a neurologist.

On January 7, 2023, Petitioner began treating with Dr. Daif at Hope Neurological and Medical Services. It does not appear Dr. Daif is a board-certified neurologist, as he referred Petitioner to neurologists. Dr. Daif noted the following history: "[The patient] on 12/21/22 was climbing a ladder and missed a step and fell. The patient hit his head, neck, lower back and twisted his right knee. Patient states he lost consciousness. Patient complains of dizziness, impaired balance, confusion and headaches. *** The patient subsequently started to have a persistent headache, severe 10/10 and diffuse body, neck/lumbar radiculopathy pain. Becoming more forgetful with back flashes. Patient currently following pain clinic with minimal improvement." Dr. Daif causally connected Petitioner's condition to the accident on December 21, 2022. Physical examination was "limited due to severe pain." Neurologic examination was significant for blurry vision. Dr. Daif thought Petitioner "may be suffering of post concussion cognitive impairment, vestibular dysfunction, PTSD, memory decline, diffuse cervical and lumbar radiculopathies." He ordered MRIs of the brain, cervical spine and lumbar spine, noting that an MRI of the right knee "has already been order[ed] by Chiropractor." Further, Dr. Daif referred Petitioner "for full concussion testing including VNG," as well as BrainCheck CQ™ testing. Lastly, Dr. Daif recommended "[e]xercise w/oxygen therapy." An addendum dated January 17, 2023, states: "Approved by Dr Ahmad Daif to change imaging from MRI brain without contrast to CT brain with and without contrast. Patient has bullet fragments in his body."

A BrainCheck CQ™ report dated January 7, 2023, placed Petitioner in a "very low" population percentile, with likely impairments.

A Neurodiagnostic Battery – VNG and Cognitive Studies, also performed January 7, 2023, was "consistent with both central and peripheral vestibular dysfunction" and cerebral damage in multiple areas of the brain.

On January 11, 2023, Petitioner saw Dr. Candido at the Pain Center of Illinois. Petitioner reported the medications were not helping and rated his pain a 10/10. "Asking for increase in meds. Was advised he will not receive stronger opioids here." Dr. Candido noted "memory issues" and "some cognitive cloudiness." Physical examination was notable for tenderness to touch in the neck and low back, and some limited range of motion. Dr. Candido instructed Petitioner to follow up in four weeks.

A CT of the head performed January 19, 2023, noted, among other things, "diffuse metallic densities overlying the right calvarium consistent with the history of gunshot wound, moderately involving the right posterior annular table." Conclusion: "There is asymmetric prominence to the left posterior superficial soft tissues, correlate for contusion and direct impact site. Underlying this, no definitive evidence for subdural hematoma, correlate with any prior imaging if available. There is a left medial orbital blowout fracture with fat herniation no

evidence for rectus entrapment. There is high suspicion for inferior left orbital floor fracture, not well visualized." The radiologist recommended an MRI, "as CT is insensitive for traumatic brain injury."

On January 25, 2023, Petitioner followed up with Dr. Candido. Petitioner mainly complained of headaches, stating the medications were not helping and rating the pain a 10/10. He also complained of pain in the right eye, left shoulder, low back with radicular symptoms, knee and ankle, and walked with a cane. He reported no help with physical therapy. Petitioner's medications included: Pharbetol, naproxen, Tylenol, gabapentin, Mobic, cyclobenzaprine and tramadol. Physical examination was unremarkable, except for a limited range of motion in the neck. Dr. Candido instructed Petitioner to follow up in four weeks. An addendum states: "CT brain: left orbital blowout fracture with fat herniation. Refer to Ophthalmology."

An MRI of the left shoulder performed January 31, 2023, showed tendinosis involving the supraspinatus and subscapularis tendons, and "[t]raumatic arthropathy involving the acromioclavicular joint with joint space separation with acromioclavicular interval measuring 8 mm. Joint effusion is noted. Subchondral bone marrow edema is noted in distal aspect of acromion and clavicle. Sprain of the acromioclavicular ligament is noted with capsular hypertrophy." "Above described pathology appears acute, correlate clinically with history of trauma and onset of symptoms."

An MRI of the left knee performed January 31, 2023, showed evidence of ligamentous sprain, "bone marrow edema/contusion with cyst," and knee joint effusion. "Above described pathology appears acute, correlate clinically with history of trauma and onset of symptoms."

An MRI of the right knee performed January 31, 2023, likewise showed evidence of ligamentous sprain, bone marrow edema, and knee joint effusion, acute.

An MRI of the right ankle performed January 31, 2023, showed: "1. Diffuse thickening with patchy hyperintense signals on the lateral image involving posterior talofibular ligament may represent severe ligamentous sprain with high-grade interstitial tear ***. 2. Well-defined osteochondral lesion of the medial talar dome of low signal on T1 and heterogeneous high signal on T2 image of the medial aspect of the talus – suggestive of osteochondritis dissecans ***. 3. Ankle and subtalar joint effusion." "Above described pathology appears acute, correlate clinically with history of trauma and onset of symptoms."

An MRI of the left ankle performed January 31, 2023, showed similar findings, acute.

An MRI of the brain performed February 3, 2023, showed: "1. There are scattered periventricular, subcortical and deep white matter foci of increased T2/FLAIR weighted signal, findings most consistent with moderate chronic small vessel disease and microvascular changes of aging, correlate for risk factors. Greater than 50 foci are identified, advanced for age. The possibility that some of the subcortical foci are secondary to nonhemorrhagic shearing injuries and the patient's history of head trauma is not excluded in the appropriate clinical setting. There is diffuse subcortical predominance and frontal predominance greater on the left. 2. Remote lacunar infarct involving the right lentiform nucleus, in retrospect present on prior CT. 3. There

is evidence of a medial left orbital wall fracture with fat herniation without rectus entrapment, similar to prior CT. Similar to prior CT there is left posterior inferior scalp swelling adjacent to the inner table, correlate for direct impact site."

An MRI of the lumbar spine performed February 3, 2023, showed: "1. Straightening of the normal lumbar lordosis which can be seen with muscle spasm due to ligamentous sprain and/or disc injury. 2. At L5-S1 there is a broad-based posterior disc herniation with impingement on the thecal sac and impingement on the bilateral S1 nerve roots. There is mild to moderate central canal stenosis. There is moderate bilateral foraminal stenosis with impingement on the exiting nerve roots."

An MRI of the right foot performed February 3, 2023, showed: "1. Marrow edema/bone contusions at the first metatarsal, proximal aspect of the first proximal phalanx and medial and intermediate cuneiforms. Cannot exclude a nondisplaced fracture at the superior aspect of the medial cuneiform. Recommend clinical correlation. 2. Findings may be acute to subacute and related to recent injury."

On February 4, 2023, Petitioner followed up with Dr. Daif, reporting minimal improvement. Dr. Daif noted the VNG and BrainCheck CQ™ test results and the recent CT of the brain results. He failed to note that Petitioner's past medical history included a gunshot wound to the head. Dr. Daif continued to causally connect Petitioner's condition to the work accident on December 21, 2022. Dr. Daif ordered MRIs of the "orbit face" and cervical spine and referred Petitioner to an ophthalmologist.

An MRI of the orbits, face and neck performed February 20, 2023, showed: "1. Left medial orbital wall fracture with herniation of extraconal fat, similar to prior MRI. No new findings. 2. Redemonstration of multifocal scattered periventricular, subcortical, and deep white matter hyperintense foci on the sagittal FLAIR sequence, advanced for age, seen to better advantage and detailed on MRI brain to 2/3/2023."

On February 22, 2023, Petitioner followed up with Dr. Candido. He used a crutch to ambulate. He rated the pain a 10/10 and variously reported taking up to six tramadols daily and/or being unable to obtain tramadol due to insurance issues. He complained of pain in his left arm, head, "worst pain is in the lumbar spine," right leg and knee, and both feet. Dr. Candido noted that a cervical MRI showed a minor disc bulge at C3-C4 with some spinal canal stenosis, and an MRI of the head showed a small area posteriorly which could represent a resolving small brain bleed. Physical examination was unremarkable. Dr. Candido instructed Petitioner to follow up in four weeks.

On March 18, 2023, Petitioner followed up with Dr. Daif, who referred Petitioner to a neurosurgeon for the cervical spine, orthopedics for the right ankle, and "a neurologist for a stroke workup." Dr. Daif instructed Petitioner to follow up as needed.

On March 22, 2023, Petitioner followed up with Dr. Candido, rating his pain a 5-7/10 on medication. His complaints were unchanged. He reported the "neurologist" prescribed a neck

brace. Physical examination was notable for some pain and reduced range of motion of the neck. Dr. Candido instructed Petitioner to follow up in four weeks.

On April 21, 2023, Petitioner followed up with Dr. Candido, rating his pain a 7-8/10. He asked to switch from tramadol because the pharmacy would not fill it. Dr. Candido prescribed a low dose of Norco. Petitioner also asked to schedule cervical and lumbar epidural steroid injections. Physical examination was unchanged. Dr. Candido instructed Petitioner to follow up in four weeks.

On May 9, 2023, Petitioner consulted Dr. DeFrino at Parkview Orthopaedic Group about bilateral ankle and foot pain, which he attributed to the work accidents. Dr. DeFrino examined Petitioner and reviewed the MRIs. He saw "no underlying structural issue on either the left ankle or the right ankle to warrant surgery," recommended conservative treatment, and restricted Petitioner to light duty.

Also on May 9, 2023, Petitioner consulted Dr. Sompalli about his left shoulder, which he attributed to the work accidents. He rated the pain a 10/10. Dr. Sompalli reviewed an MRI and performed a physical examination, noting positive impingement and O'Brien's signs. He ordered an MRI arthrogram, injected the shoulder, and took Petitioner off work.

On May 17, 2023, Petitioner followed up with Dr. Candido. He appeared "in better state of mind than previously." He complained of pain in the left shoulder and right foot (main problem), neck and low back, rating the pain a 4-7/10. A recent injection into the left shoulder helped. Dr. Candido instructed Petitioner to follow up in four weeks.

On May 22, 2023, Petitioner underwent an Agile Depression Screen by SafeWay Psychological Services. The report concluded that Petitioner "is experiencing symptoms that are consistent with a major depressive episode" and he should be referred to a mental health professional. Also, Petitioner underwent an Agile Post-Trauma Anxiety Screen, which concluded that Petitioner "scored within the severe range" and should be referred to a mental health professional.

On May 30, 2023, Dr. Sompalli reviewed the MRI arthrogram and diagnosed a type 2 SLAP tear, which "is an aggravation of pre-existing or caused by his work injury." Dr. Sompalli recommended surgery and imposed the restriction of no use of the left arm.

On June 6, 2023, Petitioner followed up with Dr. DeFrino, reporting doing much better. Dr. DeFrino stated: "He can manage the residual soreness with anti-inflammatories, return to work full duty, no restrictions." Petitioner was to follow up as needed.

On June 8, 2023, Dr. Reardon, PhD, a licensed clinical psychologist, examined Petitioner "to investigate whether [Petitioner] has suffered a formal psychological condition" as a result of the accident on December 19, 2022. Dr. Reardon reviewed the Agile screens and interviewed Petitioner, diagnosing a major depressive disorder and recommending psychotherapeutic treatment.

On June 14, 2023, Petitioner followed up with Dr. Candido, reporting a recent MRI arthrogram of the left shoulder showed a SLAP tear and he was scheduled for surgery. He rated the pain a 5-7/10. The right foot had improved. Now, the focus was on the left shoulder. "Not asking for med escalation or early refills." Dr. Candido instructed Petitioner to follow up in four weeks.

On July 25, 2023, Petitioner followed up with Dr. Candido. "Returns today in 10/10 pain. Continues in pain, but also, paradoxically, to improve ROM and activity." Petitioner's main pain was in the left shoulder, which he stated was severe. He also complained of radicular pain in both upper extremities. He used tramadol for pain with some benefit. The left shoulder surgery had not been approved. Dr. Candido recommended an updated MRI of the cervical spine and instructed Petitioner to follow up in four weeks.

On August 3, 2023, Dr. Candido performed a right cervical medial branch block.

On August 8, 2023, Dr. Sompalli awaited approval for the surgery. He continued Petitioner's restriction.

On August 21, 2023, Petitioner underwent a preoperative physical examination. Petitioner denied having any physical or psychological symptoms, and no abnormalities were noted on physical examination.

On August 22, 2023, Petitioner followed up with Dr. Candido, reporting a 75 percent improvement after the cervical medial branch block. He rated the pain an 8/10. He complained of headaches and left-sided neck pain. Dr. Candido instructed Petitioner to follow up in four weeks.

On September 6, 2023, Dr. Sompalli performed a left shoulder surgery: "arthroscopic labral repair, SAD, partial acromioplasty, debridement, DCR, and PRP injection." On September 12, 2023, Petitioner followed up, rating the pain a 9/10. Dr. Sompalli noted a substance abuse disorder, ordered a toxicology screen, prescribed physical therapy, and continued Petitioner's restriction.

On September 20, 2023, Petitioner followed up with Nurse Practitioner Youngquist instead of Dr. Candido. Petitioner reported undergoing a left shoulder surgery on September 6, 2023. He rated his pain an 8/10, but reported that his neck was no longer a problem. "He states he continues to have pain in the lower back that radiates down the back of both of his legs. At times he gets numbness/tingling in his legs." He stated a lumbar MRI showed a "slipped disc" and wanted treatment for his low back. NP Youngquist prescribed Meloxicam and a Lidocaine patch, and instructed Petitioner to follow up in two weeks.

Petitioner also underwent chiropractic treatment from January 3 through September 27, 2023.

Respondent introduced into evidence section 12 reports from Dr. Deutsch and Dr. Aribindi. Dr. Deutsch's report is dated February 13, 2023. Dr. Deutsch, a neurosurgeon, noted a

history of both accidents. Dr. Deutsch further noted: "[The claimant] now says he has 10/10 headaches. He now says he has 10/10 neck pain and he has clicking in his neck. He now says he has 10/10 lower back pain. He says he has left shoulder pain and limitation of abduction of the shoulder. He says his left shoulder is numb. He says he has 9/10 left knee pain. He has right knee pain." Petitioner also complained the left side of his face was numb. He had a cloth brace on his left knee, used a cane, walked very slowly, and limped. On physical examination, Dr. Deutsch noted: "He is an athletic well-developed man. He is yelling out in pain and speaking loudly. Grooming is very good. He is wearing a shoe on the left leg and a slipper on the right foot. He's unable to explain why." Examination of the head was normal. Motor examination was notable for poor effort. Neck examination was notable for guarding and pain to very light palpation. Thoracic examination was notable for tenderness to palpation and pain with passive movement of the shoulders. Lumbar examination was notable for guarding and "tenderness to light palpation diffusely and he yells out in pain." 5/5 Waddell signs were positive. Dr. Deutsch opined: "There are no objective findings of any injury. [The claimant's] complaints are not consistent with any work injury. Medical records I reviewed are limited and he is not a reliable historian. At most he had a cervical and lumbar strain injury although given the general examination findings suggest malingering, it's not clear that there was a work injury." Dr. Deutsch continued: "He has poor effort on motor testing and multiple inconsistent complaints. Complaints of vision problems and headaches are not substantiated by the records I reviewed. There are no objective findings of any injury. True evaluation is difficult due to malingering." Dr. Deutsch concluded that Petitioner required no further treatment and could return to work full duty.

In an addendum report dated May 30, 2023, Dr. Deutsch stated that he reviewed additional medical records, noting among other things: "A head CT was done [at Stroger] and was normal;" "[a] 1/19/2023 brain CT was unremarkable;" "[a] 2/3/2023 brain MRI was normal;" "[o]n 2/20/2023, he had a face orbit MRI that was unremarkable." Dr. Deutsch's opinions did not change. Regarding Petitioner's head/brain condition, Dr. Deutsch stated: "[I]f he had a mild concussion, no treatment would have been reasonable for that diagnosis."

In a report dated June 14, 2023, Dr. Aribindi, an orthopedic surgeon, noted a history of both accidents. Petitioner complained of neck pain (mild, intermittent), low back pain (mild, intermittent), left shoulder pain, bilateral knee pain and resolved bilateral ankle pain. He denied any numbness or paresthesias in the extremities. He stated he was walking well. Examination of the neck was normal. Examination of the left shoulder was notable for some tenderness over the glenohumeral joint, pain with active forward elevation beyond 120 degrees, and some pain with Speed's test. Examination of the right shoulder was normal. Examination of the back, hips, knees, ankles and feet was normal. Dr. Aribindi reviewed the MRI arthrogram of the left shoulder and certain medical records. Dr. Aribindi opined: "[The claimant] has LEFT shoulder pain with MRI with arthrogram revealing a labral tear. The mechanism of injuries of December 19, 2022, a piece of plywood striking the posterior aspect of the neck, left shoulder and his back is inconsistent with injuries causing anterior superior labral tear. The mechanism of injury of December 21, 2022, namely, falling off the ladder onto his back onto a plywood floor, when one of his legs got stuck in the rungs of the ladder is also inconsistent with an injury causing labral pathology." Dr. Aribindi agreed with Dr. Sompalli's recommendation for a left shoulder surgery; however, the surgery would be unrelated to either accident.

In an addendum report dated October 8, 2023, Dr. Aribindi opined, in pertinent part, that the cervical blocks performed in August of 2023 were not medically necessary, and no further treatment was warranted for the low back.

On review, Petitioner asks the Commission to affirm and adopt the Arbitrator's Decisions, while Respondent asks us to reverse the Arbitrator's awards. Respondent disputes: (1) a work-related accident on December 21, 2022, arguing intoxication and lack of credibility; (2) Petitioner's left shoulder, head, low back and neck conditions being related to either accident; (3) medical expenses and prospective medical care after the full-duty release on January 7, 2023; and (4) temporary total disability benefits after the full-duty release on January 7, 2023. In the request for hearing form in case No. 22 WC 33511, Respondent admitted the accident on December 19, 2022.

The Commission begins its analysis by noting the challenges posed by Petitioner's testimony and subjective complaints. The Commission considers Petitioner's testimony and various statements for narrative continuity, rather than weighty substantive value. The Commission mainly relies on eyewitness testimony and objective, well-supported evidence in the medical records.

Regarding the intoxication defense, the Commission notes that a drug screen was performed at Stroger Hospital. The results are not in evidence, and the Commission draws appropriate adverse inference against Respondent. Respondent relies on circumstantial evidence. The Commission observes that it very well could be that at the time of the accident on December 21, 2022, Petitioner was suffering from post-concussive symptoms superimposed on preexisting brain damage from a gunshot wound to the head. The Commission finds that Respondent's intoxication defense fails.

The Commission finds, based on the mechanisms of injury, the medical records and the chain of events, that the treatment Petitioner underwent and his off work/light duty work status through the date of the arbitration hearing are related to the accidents. The Commission is aware that the evidence shows symptom magnification. However, Petitioner's treaters relied on objective findings, rather than the magnified complaints. The Commission finds the opinions of Dr. Aribindi are not unreasonable, although the Commission gives greater weight to the opinions of Dr. Sompalli.

The Commission affirms the Arbitrator's awards of temporary total disability benefits, medical bills in evidence, and $6,000.00 credit for disputed temporary total disability payments. The Commission modifies the award of prospective medical care. The Commission awards only follow-up care for the operated left shoulder. It is the only prospective medical care supported by the medical records in evidence.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decisions of the Arbitrator filed December 5, 2023, are 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 $1,253.33 per week for a period of 39 2/7 weeks, from January 9, 2023 through October 10, 2023, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation, medical benefits or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay related medical bills in evidence pursuant to §§8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall provide prospective medical care in the form of follow-up care for the operated left shoulder, pursuant to §§8(a) and 8.2 of the Act.

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

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

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

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

**December 11, 2024**

SJM/sk
o-10/9/2024
44

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

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

/s/ *Raychel A. Wesley*
Raychel A. Wesley

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 22WC033511 |
| Case Name | Jesse Robison v. Walsh Construction |
| Consolidated Cases | |
| Proceeding Type | 19(b) Petition |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 17 |
| Decision Issued By | William McLaughlin, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Donna Zadeikis |
| Respondent Attorney | Matthew Walsh |

DATE FILED: 12/5/2023

**THE INTEREST RATE FOR THE WEEK OF DECEMBER 5, 2023 5.19%**

/s/William McLaughlin, Arbitrator

Signature

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

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

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

**Jesse Robison**
Employee/Petitioner

v.

**Walsh Construction**
Employer/Respondent

Case # **22** WC **33511**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **William J. McLaughlin**, Arbitrator of the Commission, in the city of **Chicago**, on **October 10, 2023**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

**DISPUTED ISSUES**

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

**FINDINGS**

On the date of accident, **12/19/2022**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**97,760.00**; the average weekly wage was $**1,880.00**.

On the date of accident, Petitioner was **50** 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 to Petitioner pursuant to the medical fee schedule as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall authorize and provide for prospective medical care for the lower back.

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.

Respondent is not liable to Petitioner for fees or penalties.

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

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

Signature of Arbitrator

**DECEMBER 5, 2023**

**THE ILLINOIS WORKERS' COMPENSATION COMMISSION**

**CHICAGO, ILLINOIS**

| | | |
|---|---|---|
| Jesse Robison,<br><br>Petitioner,<br><br>v.<br><br>Walsh Construction Company of Illinois,<br><br>Respondent. | ) | No. 22WC033512, 22WC033511 |

**RESPONDENT'S PROPOSED FINDINGS IN SUPPORT OF ARBITRATOR'S DECISION**

**FINDINGS OF FACT**

This matter proceeded to trial on October 10, 2023, before Arbitrator William McLaughlin, and the following facts were presented.

Petitioner Jesse Robison is a union laborer who was employed by Respondent Walsh Construction for six months before alleging two accidents. The first is alleged to have occurred on December 19, 2022, and a second on December 21, 2022. (Tr. 12).

**12/19/22 Accident**

On December 19, 2022, petitioner was working on a job site for Walsh in Chicago at the intersection of Morgan and Lake Street during the phase of construction involving pouring concrete. (Tr. 13) Petitioner's job at the site involved working with a machine to pry apart concrete forms from steel tables and lower them to the next floor. (Tr. 14-15) Petitioner, who is left hand dominant, testified he was kneeling on one knee on a stack of nine sheets of plywood with the other leg extended pumping the machine with his left arm with some force when the flat side of an 8x4 three-quarter inch thick piece of plywood came loose and fell approximately seven feet from the ceiling and broadly hit petitioner's head, neck, shoulder, waist, and upper body including his left arm. (Tr. 14-18, 42-43). He testified and told staff at West Suburban Medical Center that he did not lose consciousness. (Tr. 41-42, 101-102) Petitioner testified that he observed that the inner lining of his hard hat was cracked because of the impact and was told that the exterior shell was damaged. (Tr. 18, 44-48) Petitioner testified that he felt dizzy and faint when he stood up, his eyes were blurry, and that his memory was affected. (Tr. 19, 74) Petitioner testified that his left shoulder, left elbow, back, neck, knee, and ankle hurt immediately after the accident. (Tr. 20) Petitioner testified he stopped working and reported the accident to his superintendent, Ronnie, and the foreman, Yale, five minutes after the accident. (Tr. 20-21, 43, 60) He was offered an aspirin and time to rest in the laborers' office. (Tr. 20-21)

Petitioner left work early on 12/19/22 and by his own choice took the CTA train to the Emergency Department at West Suburban Hospital. (Tr. 22, 57, 58) He told emergency staff that he was working on a job site when a piece of plywood fell from the ceiling and fell on his head, neck, and back, pinning his entire body under the plywood. (Tr. 22) Petitioner testified his left knee twisted with falling and being struck. (Tr. 23) Petitioner testified he was not sure if he complained of left shoulder pain, but deferred to the medical records and agreed with his attorney that his complaints were reflected in the West Suburban medical records. (Tr. 23, 60) Petitioner underwent a physical examination and X-rays and was discharged from the Emergency Department that day with instructions to follow up with Dr. Brindise of Romano Orthopedics. (Tr. 23-24, 57) He was not given a prescription for medication but took over the counter Tylenol. (Tr. 60-61) Petitioner did not follow up with Dr. Brindise but presented to Physicians Immediate Care the next day. (Tr. 57-59)

Petitioner returned to the job site on December 20, 2022, and accompanied by the Walsh safety managers he presented to Physicians Immediate Care, complaining of pain in the neck, left shoulder, back, and knee, and told providers that a piece of plywood fell on him at work and impacted his hard hat. (Tr. 24-26, 59) Physicians Immediate Care discharged petitioner with light duty 25-pound lifting restrictions until he followed up at the clinic on December 27, 2022. (Tr. 28). Petitioner returned to the same job site that day and resumed his job collecting debris from the site with assistance. (Tr. 29, 50-51)

**12/21/22 Accident**

On December 21, 2022, petitioner arrived at the job site at 7 a.m. (Tr. 67) Petitioner was assigned to monitor the deck which involved moving equipment from the 16th floor of the building to the 19th floor using a handmade ladder. (Tr. 68-70) Petitioner testified between 7 a.m. and 8 a.m. he was using a handmade ladder when his foot slipped and went in between the rungs of the ladder. (Tr. 71-72, 103) He testified that paramedics found him hanging by his feet from upside down the ladder. (Tr. 72-73) The medical records reflected that he was standing on a ladder, lost his balance and his left foot became caught in the ladder. (Tr. 73-74) He testified that he briefly lost consciousness at the scene and was taken by ambulance to Stroger Hospital. (Tr. 73) On cross-examination, petitioner admitted all he remembered was going up the ladder, falling, and "being in the sky." (Tr. 102-103) Medical providers examined petitioner, ordered a CT scan of the head and neck, and kept him overnight before discharging him from care full duty the next day with a cane to use as necessary as a result of the ankle injury. (Tr. 75-76, 80-81)

Petitioner began treating with Dr. Bayran on December 23, 2022, and complained of ankle, leg, back, neck, left shoulder, elbow, and head pain, as well as memory loss and head symptoms. (Tr. 76-78, 89) Petitioner testified that he could not really move his neck, and the area between his neck to the lower back was in pain and uncomfortable. (Tr. 89) Dr. Bayran prescribed MRI's, medication, oxygen therapy, physical therapy at Elite Rehabilitation Institute, and referred petitioner to a neurologist at Hope Neurological and Medical Services. (Tr. 77-78, 81)

Petitioner followed up with Dr. Bayran on January 11, 2023, and January 25, 2023. (Tr. 78-79) Petitioner underwent an MRI of the brain on March 25, 2023. (Tr. 81) Petitioner testified that he did not personally see Dr. Bayran at the last visit on September 20, 2023, only his nurse practitioner, and was only given a note from his nurse practitioner. (Tr. 99-100) Petitioner further testified that he did not have a note from Dr. Bayran ordering back injections. (Tr. 101)

Petitioner saw Dr. Sompalli at Elite Ortho and Sports Medicine on May 9, 2023, and he gave Dr. Sompalli a history of accident. (Tr. 90) Dr. Sompalli ordered an MRI arthrogram of the left shoulder which he underwent on May 23, 2023. (Tr. 90) Petitioner had cervical blocks done August 8, 2023. (R. Ex. 5, pg. 8) Dr. Sompalli recommended left shoulder surgery which was done at the Illinois Back & Neck Institute on September 6, 2023. (Tr. 88, 91)

Petitioner treated for his feet and ankle at Parkview Orthopaedics from May 9, 2023, through June 6, 2023, and was released from care without restriction by Dr. DeFrino on June 6, 2023. (Tr. 94-95) Petitioner did not seek treatment for his knee. (Tr. 95)

**Medical Records/Treatment**

After the 12/19/22 accident, petitioner presented to West Suburban Medical Center, with complaints of 7/10 neck pain, shoulder, left elbow, left shoulder/side and head pain after being hit in the head with a 4-to-5-inch piece of plywood on his posterior neck and left shoulder. (P's Ex. A1 22WC33511, pg. 4-7 of 34) He denied loss of consciousness or any focal neuro deficits. The provider noted he had no major signs of trauma. He was diagnosed with cervical strain, shoulder strain, chest wall strain, lumbosacral strain, and degenerative joint disease. He was discharged home that day.

Petitioner thereafter returned to full duty work on December 20, 2022, and presented that day to physician's assistant Braedon Wieseler, PA at Physicians Immediate Care, now complaining of head/neck pain, *bilateral* shoulder pain, lower back pain with radiation into the right leg, and throbbing right knee pain. (P's Ex. A2 22WC33511, pg. 1-6 of 6) X-rays of the LEFT shoulder, chest, cervical spine, lumbar spine, and right knee taken that day were all reported as negative. Petitioner was prescribed naproxen and pharbetol/Tylenol and was released to work with 25 pound lifting restrictions over the shoulder/waist to shoulder and 25 pounds pushing/pulling restrictions up to December 27, 2022.

After the 12/21/22 alleged accident petitioner was taken by ambulance to Stroger Hospital. (P's Ex. A1 22WC33512), Petitioner stated he felt dizzy after taking a pain medication. EMS noted that petitioner was alert and oriented and had a normal mental status assessment. Petitioner denied loss of consciousness. Petitioner was treated at Stroger and underwent imaging of the head, cervical spine, chest, left knee, left tibia/fibula, and left ankle, which were all normal. (P's Ex. A2 22WC33512, PDF pages 65-85) Petitioner told Stroger Emergency Department that a piece of plywood fell on his head, and he was wearing a helmet. (P's Ex. 2, pg. 35 of 205) He was discharged with diagnoses of a blunt head injury, contusion, possible concussion "1 week ago" (though the CT of the head was negative), and left leg pain. He was discharged home from Stroger on December 22, 2022. (P's Ex. A2 22WC33512, PDF pages 79-80) He was given a full work release to return to work on January 7, 2023, without limitation. (R's Ex. 9).

Petitioner presented to Dr. Neema Bayran of The Pain Center of Illinois on December 23, 2022, with complaints of pain in the head, left knee, left ankle, right knee, neck, left shoulder, left elbow, mid back, lower back, left hip, and right hip. (P's Ex. A3 22WC33512, pg. 1-5/31) He was diagnosed with cervicalgia, low back pain, right shoulder pain, left shoulder pain, right knee pain, and left ankle pain. He was restricted from work and began physical therapy.

Petitioner presented to Dr. Candido on January 11, 2023. (P's Ex. 3, pg. 6-7/31) Petitioner requested an increase in medications and "was advised he will not receive stronger opioids here." Petitioner complained of head pain, left knee pain, left ankle pain, right knee pain, neck pain, left shoulder pain, left elbow, mid back pain, and lower back pain – and Dr. Candido diagnosed him with neck pain and low back pain. Petitioner followed up with Dr. Candido on January 25, 2023, and continued to be diagnosed with cervicalgia and low back pain, with the addition of headache. (P's Ex. 3, pg. 8-9/31) By a follow up appointment on February 22, 2023, Dr. Candido had petitioner diagnosed with cervicalgia and headache only. (P's Ex. 3, pg. 10-11/31) Dr. Candido's diagnoses continued as cervicalgia and headache on March 22, 2023; April 21, 2023; and May 17, 2023 (plus low back pain on that date) (P's Ex. 3, pg. 12-13, 14-15, 16-17/31) Dr. Candido first diagnosed petitioner with left shoulder pain on June 14, 2023. (P's Ex. 3, pg. 19-20/31)

MRI imaging of the left shoulder was ordered, and petitioner began treating with Dr. Chandrasekhar Sompalli, M.D., orthopedic surgeon at Elite Orthopaedics and Sports Medicine, for the left shoulder. (P's Ex. A9 22WC33512, 5/9/23 OV) Dr. Sompalli read the 1/31/23 MRI of the left shoulder as revealing supraspinatus tendinosis and AC joint separation. He diagnosed petitioner with impingement syndrome of the left shoulder, pain in the left shoulder, and sprain of the left acromioclavicular joint, and performed a cortisone injection into the left shoulder glenohumeral space. Dr. Sompalli ordered an MRI arthrogram and X-ray of the left shoulder to rule out a SLAP tear. Petitioner underwent an MRI arthrogram of the left shoulder on May 23, 2023. Dr. Sompalli read the MRI arthrogram as revealing a Type 2 SLAP tear which Dr. Sompalli opined was either an aggravation of a pre-existing condition or caused by his work injury of 12/21/22. (P's Ex. A9 22WC33512, 5/30/23 OV) On May 30, 2023, petitioner was complaining of 10/10 sharp shoulder pain. As of May 30, 2023, Dr. Sompalli recommended a left shoulder arthroscopy and biceps tenodesis. Petitioner underwent the following procedures with Dr. Sompalli on September 6, 2023: (1) left shoulder arthroscopy; (2) arthroscopic anterior labral repair using one PushLock anchor and FiberWire suture; (3) arthroscopic subacromial decompression with release of the coracoacromial ligament and partial acromioplasty; (4) extensive debridement of the glenohumeral joint and subacromial space; (5) arthroscopic distal 1 cm of the clavicle resection; and (6) PRP injection over the labral repair to help promote healing. (P's Ex. A9 22WC33512, 9/6/23 Operative Report)

Petitioner also treated with neurologist Dr. Ahmad Daif for concussion symptoms and underwent VNG testing. Dr. Daif referred petitioner to an ophthalmologist for reportedly worsening vision/management of orbital bone fracture, a neurosurgeon for possible surgical intervention of C3-C4 flattening cord lesion, and orthopedic surgeon for a possible right ankle ligament tear and to assess bone cystic lesions. Petitioner presented to Dr. Paul De Frino for both

ankles and was released to full duty work with respect to the ankles on June 6, 2023. (P's Ex. A8 22WC33512, 6/6/23 OV)

**IME of Dr. Deutsch**

Petitioner was examined by IME Dr. Deutsch on February 13, 2023. (Tr. 85) Dr. Deutsch is a neurosurgeon from Midwest Orthopedics at Rush. Petitioner testified that he gave a truthful and honest report to Dr. Deutsch. (Tr. 121) Petitioner testified that he reported 10/10 headaches, 10/10 neck pain, and 10/10 low back pain. (Tr. 122) Dr. Deutsch issued a report and opined that petitioner had no objective findings of any work injury and his complaints were not consistent with any work injury. (R. Ex. 6, pg. 4) Dr. Deutsch opined that at most Petitioner had sustained a cervical and lumbar strain injury, but commented that the general examination findings suggested malingering, it was not clear that there was any work injury, and his complaints of vision problems and headaches were not substantiated by the records. (R. Ex. 6, pg. 4) Dr. Deutsch opined that Petitioner had no work restrictions related to either accident and that he could work full duty without restrictions or need for any medical treatment. (R. Ex. 6, pg. 4-5) Dr. Deutsch further reviewed additional medical records on May 30, 2023, and his opinions remained unchanged. (R. Ex. 7, pg. 5) Dr. Deutsch opined that the only reasonable, related, and necessary treatment was treatment for a cervical/lumbar strain in the first week following the alleged work injury. (R. Ex. 7, pg. 5) He specifically found that MRI/imaging of multiple body parts, treatment by Dr. Daif, Dr. Daif's referral to a neurosurgeon for a cervical MRI findings of a mild disc bulge, and chiropractic treatment for diffuse whole-body pain were not reasonable. (R. Ex. 7, pg. 5) Dr. Deutsch again recommended against any additional medical treatment as of May 30, 2023. (R. Ex. 7, pg. 5)

**IME of Dr. Aribindi**

Respondent Walsh also had petitioner examined by IME Dr. Ram Aribindi on June 14, 2023. (R. Ex. 5) Dr. Aribindi is an orthopedic surgeon and as part of his practice he regularly treats shoulders, including surgery. Petitioner testified that he also gave a truthful and honest report to Dr. Aribindi on June 14, 2023. (Tr. 125-126) Dr. Aribindi issued a report, and he reviewed an MRI arthrogram of the left shoulder done on May 23, 2023. (R. Ex. 5, pg. 6) Per Dr. Aribindi the only finding on exam and MRI was a possible labral tear. However, Dr. Aribindi opined that the mechanisms of injuries on both dates of accident 12/19/22 and 12/21/22 were inconsistent with causing an anterior superior labral tear. (R. Ex. 5, pg. 6) In light of Petitioner's complaints Dr. Aribindi indicated that a left shoulder arthroscopy was a treatment option but opined that it would not be related to either date of accident because the reported mechanics of the accident would not cause any pathology that would need surgery. (R. Ex. 5, pg. 6-7) Dr. Aribindi opined that petitioner could return to work full duty without restriction at MMI three months after the surgery. (R. Ex. 5, pg. 6-7) Dr. Aribindi noted that petitioner had a normal exam of the right shoulder, neck, back, and bilateral knees, and recommended against any additional treatment for those body parts as of June 14, 2023. (R. Ex. 5, pg. 6-7)

**Shoulder Surgery of September 6, 2023 & Updated Opinion of Dr. Aribindi**

Petitioner underwent a left shoulder arthroscopy with labral repair, subacromial decompression and extensive debridement of glenohumeral joint, subacromial decompression, distal clavicle excision, and PRP injection over the labral repair on September 6, 2023, with Dr. Sompalli. (R. Ex. 5, pg. 8) Dr. Aribindi reviewed the operative report and opined that only the labral repair was justified by the physical exam findings and MRI arthrogram findings. (R. Ex. 5, pg. 8) Dr. Aribindi found that petitioner had only mild degenerative arthritic changes over the AC joint consistent with patients his age, had no impingement signs, and good passive range of motion of the shoulder. (R. Ex. 5, pg. 8) Dr. Aribindi opined that the acromioplasty/subacromial decompression with lysis of adhesions and PRP injections performed by Dr. Sompalli were all unnecessary. (R. Ex. 5, pg. 8) Only the labral repair was reasonable and that was not related to the accidents because the mechanics of the accident would not have caused it. Dr. Aribindi further opined that the 8/8/23 cervical blocks done were unnecessary considering petitioner's normal neck exam with no tenderness or swelling, good range of motion of the neck, and negative Spurling's sign. (R. Ex. 5, pg. 8)

**Petitioner's Pre-Accident Medical Treatment**

In the two years prior to December 19, 2022, petitioner denied having left shoulder, neck, or radiating low back pain or treatment or reporting to any medical provider any left shoulder symptoms. (Tr. 38-39)

Petitioner testified that he may have treated at the University of Illinois Hospital on Taylor Street in September 2022, but did not recall the treatment. (Tr. 38) However, Petitioner did not recall being in an auto accident where he injured his neck or back and was not sure if he ever gave a recorded statement to an insurance company where he complained that he had back or neck pain. (Tr. 40-41) Petitioner did not recall giving a statement to Geico on 11/11/19 regarding injuries sustained in an auto accident. (Tr. 52-55) Petitioner did not recall going to Rush Oak Park Hospital on 11/11/19 with complaints of low back, neck, and left knee pain after a motor vehicle accident. (Tr. 55)

Petitioner testified that he resides at Phoenix Recovery Services, a sober living facility for patients with substance abuse disorders since March 28, 2022. (Tr. 8-10, 30) Petitioner testified that the facility does not allow the use of unauthorized substances and submits residents to random drug screenings. (Tr. 10) Petitioner testified he had a substance abuse disorder before moving into this facility in March 2022. (Tr. 31)

During his testimony Petitioner was shown photographs depicting what he identified as a syringe in Respondent Exhibits 1 and 2. (Tr. 105-106). Petitioner did not know if the providers at Stroger took blood or urine from him or did a drug test. (Tr. 108-109, 113)

Petitioner testified that he returned to the Walsh construction site to pick up his check and was on crutches. (Tr. 117-118) Petitioner testified that when he saw Dr. Bayran on December 23, 2022, he complained of neck pain, low back pain, right shoulder pain, left shoulder pain, right

knee pain, left ankle pain, pain shooting down the arms, pain shooting down the legs, right foot, and joints of the left foot/ankle, and had headaches. (Tr. 118-121)

Petitioner is a convicted felon. (Tr. 131; R. Ex. 4) Petitioner testified that he pled guilty to domestic battery against his girlfriend. (Tr. 131-132) Petitioner has not looked for light work since the accidents. (Tr. 134)

**Testimony of Joseph Daughrity**

Joseph Daughrity is a union laborer who was working for Walsh on the same project as Petitioner in December 2022. (Tr. 142-143) Mr. Daughrity testified that he observed petitioner working at the project before December 19, 2022, and appeared to be moving slowly, being confused, and not knowing what to do. (Tr. 143-145) Mr. Daughrity testified he saw petitioner return to the job site on crutches like he was hurt within two weeks after the alleged accident. (Tr. 146, 147) and then watched Petitioner pick up the crutches, put them under his arm, and walk off normally once he got around the corner presumably out of the view of the construction site. (Tr. 146-148). Mr. Daughrity volunteered this information to Walsh. (Tr. 155)

**Testimony of Jose Lecea**

Jose Lecea is a union laborer foreman who was working for Walsh on the same project as Petitioner in December 2022 and observed the 12/19/22 accident. (Tr. 157-158) Mr. Lecea testified that he saw petitioner and another coworker dropping a table eight feet in front of him. (Tr. 158) Petitioner was kneeling. (Tr. 161) When the table dropped, the flat section of a 40 pound sheet of plywood peeled off the ceiling in two stages from six feet above and fell down on to both of them with a medium impact after hitting the table first and then broadly bouncing off petitioner on the flat side, not the edge. (Tr. 158-159, 160-161, 162) Mr. Lecea was shown a photograph of a hard hat in Respondent's Exhibit 2 and testified that it truly and accurately depicted the hard hat that petitioner was wearing at the time of the 12/19/22 accident. (Tr. 163-164) After the accident Mr. Lecea looked at the interior and exterior of the hard hat. (Tr. 164) The exterior was not cracked, the inside was not dislodged, and there was nothing wrong with the hard hat after the impact. (Tr. 164-165) Mr. Lecea testified that petitioner continued working after the accident on 12/19/22 and kept using the hard hat the rest of the day without complaints. (Tr. 164-165)

**Testimony of Augustine Najera**

- Augustine Najera is a union carpenter who was working for Walsh on the same project as Petitioner in December 2022 and saw petitioner on the morning of December 21, 2022, before the occurrence. (Tr. 167-168, 169) Mr. Najera testified that he was walking toward work when he saw petitioner sleeping standing up lying back with his head down. (Tr. 170) Mr. Najera thought he was sad or sleeping standing up and let him be. (Tr. 170) Mr. Najera was present when petitioner climbed the ladder. (Tr. 171) Mr. Najera was walking up the ladder, turned, and saw petitioner going up the ladder when he fell backward and hit the plywood. (Tr. 171-172) Mr. Najera testified that he did not see what caused

petitioner to fall. (Tr. 172) Mr. Najera was shown two photographs depicted in Respondents Exhibits 1 and 2. (Tr. 172) Mr. Najera testified that the syringe depicted in Exhibits 1 and 2 was found right after the fall on the landing directly below where petitioner fell. (Tr. 173-175) Mr. Najera walked in that same area 10 minutes before the accident and did not see that syringe there. (Tr. 174, 180-181)

**Testimony of Craig Bender**

Craig Bender is a Walsh safety manager and firefighter/paramedic for Crete Township Fire Protection District. (Tr. 184) In his occupation as a paramedic Mr. Bender testified that he has responded to calls involving individuals abusing drugs. (Tr. 185) Mr. Bender was shown the photographs of the syringes depicted in Respondent's Exhibits 1 and 2. (Tr. 185) Based on his experience and knowledge as a paramedic Mr. Bender identified the object as a pre-filled syringe with a MAD device on the end that is used by people to administer medications intranasally. (Tr. 185-187) .

**Respondent Credit**

Respondent paid $2,114.63 in medical. Respondent paid a disputed PPD advance of $6,000.00.

**FINDINGS OF FACTS AND CONCLUSIONS OF LAW**

**C. Did petitioner sustain an accident arising out of and in the course of employment?**

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. IndustrialCommission*, 44 Ill. 2d 214 (1969). 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.*

**12/19/2022 ACCIDENT**

Petitioner testified that while on the job site, Petitioner was kneeling on one knee with the other leg extended behind him while operating a pump with his left arm for the purpose of separating newly poured concrete from forms. While in this awkward position, Petitioner testified that he was struck by a full-sized sheet of plywood, 8' x 4' x 3/4" thick which fell from above him and struck his head, neck, shoulders, left arm, and upper body.

Petitioner reported the accident to his superintendent and was instructed to sit down in the laborers' office and take an aspirin out of the first aid box.

Petitioner testified that he left the jobsite early and sought treatment on his own at West Suburban Medical Center as the Respondent did not offer Petitioner any formal medical care.

At the emergency room, Petitioner received a physical examination and x-rays. He was released from the hospital with instructions to follow up with Romano Orthopedics.

On December 20, 2022, Respondent took Petitioner to Physicians Immediate Care. Wherein Petitioner once again gave a history of being struck by a piece of plywood at work and voiced complaints of pain in the head, neck, shoulders, back and knees. At Physicians Immediate Care, Petitioner was examined and was discharged with instructions to work light duty, not lift more than 25 lbs. and return for a follow up appointment on December 27, 2022. Petitioner then returned to work on December 21st, 2022, and sustained another accident which is the subject of IWCC Case No. 22 WC 33512. The Arbitrator finds that Petitioner's current condition of ill-being was causally connected to the accident of December 19, 2022.

The Arbitrator notes that respondent entered evidence Petitioners felony conviction. While Arbitrator acknowledges that prior felony convictions can affect credibility of a witness, Arbitrator finds the Petitioners testimony credible as to this accident.

The Arbitrator also finds that the four live witnesses presented by Respondent were credible witnesses. However, Arbitrator notes that none of the Respondents witnesses provided testimony that refuted Petitioner's testimony nor undermined Petitioner's credibility.

With respect to the alleged accident of 12-19-22 the event was witnessed by foreman Jose Lecia. The Arbitrator finds Mr. Lecea's testimony credible that a piece of plywood did fall off a wall, hit a table first and then on the broad flat face of the plywood hit Petitioner and a co-worker. Petitioner continued to use it and keep working until the end of the day after which he took the CTA train to West Suburban where he was released back to work after exam. Petitioner also told several medical providers that the blow was so hard it cracked the hard hat. The Arbitrator give little weight to where on the helmet it was cracked.

**12/21/22 ACCIDENT**

Petitioner's Exhibit (1) are the records of Chicago Fire Department EMS and indicate that on 12-21-22 they responded to a construction site at North Morgan Street and West Lake Street in Chicago, Illinois. The records indicate that Petitioner was picked up at the scene of a construction accident on the 19th floor of the site. The paramedics took the elevator up 16 floors and then found Petitioner unconscious at the bottom of a homemade ladder, hanging by his feet from the ladder and had been pulled off the ladder by his co-workers. Paramedics placed Petitioner on a board and put in a Stokes basket which lowered him to ground level via crane. Respondent argues that Petitioner did not sustain an accident that arose out of and in the course of his employment, claiming that Petitioner was allegedly under the influence of some sort of "substance.".

Illinois law does provide precedent for credible circumstantial evidence of intoxication being sufficient in the absence of direct evidence being available one way or the other. Here there was no toxicology evidence positive or negative in the records. The Respondent attempts to establish that the Petitioner was under the influence of something by introducing testimony that Petitioner was seen sleeping before clocking in the date of the accident, that a syringe was found lying near where the Petitioner had fallen from the ladder and proof that Petitioner was living in a drug facility. Arbitrator does not find any of these theories taken individually or together establishes intoxication. According to Section 11 of the Act, to create a rebuttable presumption that intoxication compensation shall not be payable if (1) the employee's intoxication is the proximate cause of the employee's accident injury or (2) at the time the employee incurred the accidental injury, the employee was so intoxicated that the intoxication constituted a departure from the employment.

Arbitrator notes that Petitioner denied that he was intoxicated and further denied that it was his syringe. There was no evidence to prove otherwise. There is no toxicology report in the record, there is no witness to the occurrence who saw a syringe fall out of Petitioners person during the accident and no witness testifying to Petitioner actions and mannerisms prior to the accident other than he was seen sleeping prior to starting work. Therefore, Arbitrator finds that there is not enough substantial circumstantial evidence to establish intoxication as defined in the act.

For the above-mentioned reasoning, Arbitrator finds Petitioner sustained an injury that arose out of the course of his employment.

**F. Is petitioner's current condition of ill-being causally related to the injury? Did petitioner establish a causal connection between the work accidents of 12/19/ 22 and 12/21/22?**

Arbitrator finds the accidents and injuries are related to the 12-19-23. And 12-21-23.

The petitioner carries the burden of proof to establish the issue of causal connection by a preponderance of the evidence. *Sisbro v. Indus. Comm'n*, 207 Ill. 2d 193 (2003).

As to the 12-19-22 accident Petitioner testified that while on the job site, Petitioner was kneeling on one knee with the other leg extended behind him while operating a pump with his left arm for the purpose of separating newly poured concrete from forms. While in this position, Petitioner testified that he was struck by a full-sized sheet of plywood, 8' x 4' x 3/4" thick which fell from above him and struck his head, neck, shoulders, left arm, and upper body.

Petitioner reported the accident to his superintendent and was instructed to sit down in the laborers' office and take an aspirin out of the first aid box.

Petitioner testified that he left the jobsite early and sought treatment on his own at West Suburban Medical Center as the Respondent did not offer Petitioner any formal medical care.

At the emergency room, Petitioner received a physical examination and x-rays. He was released from the hospital with instructions to follow up with Romano Orthopedics.

On December 20, 2022, Respondent took Petitioner to Physicians Immediate Care Wherein Petitioner once again gave a history of being struck by a piece of plywood at work and voiced complaints of pain in the head, neck, shoulders, back and knees. At Physicians Immediate Care, Petitioner was examined and was discharged with instructions to work light duty, not lift in excess of 25 lbs. and return for a follow up appointment on December 27, 2022. Petitioner then returned to work on December 21st, 2022, and sustained another accident which is the subject of IWCC Case No. 22 WC 33512. The Arbitrator finds that Petitioner's as met his burden and that his current condition of ill-being was causally connected to the 12-19-22 accident.

After the 12-21-22 accident reference to Petitioner's spine, documentation is contained in Petitioner's Exhibit No. 3, the records of The Pain Center of Illinois wherein Petitioner was originally seen on December 23, 2022. During this visit, Petitioner complained of bilateral neck pain with difficulty turning his head to the side along with pain in the middle of the lower back with radiation into the left buttock along with shooting pain irradiating into the leg and feet, bilaterally, along with numbness in the feet, bilaterally. On examination, there was tenderness over the midline along with tenderness over paraspinal muscles bilaterally, said pain being aggravated by extension and loading of cervical joints. With reference to the lower back, there was tenderness over the midline and tenderness over paraspinal muscles bilaterally. Initially, physical therapy was recommended. Thereafter, on September 20, 2023, Petitioner noted that he had had cervical median branch nerve blocks on the right side at C3, C4, and C5 on August 3, 2023. Petitioner stated that upon receiving these injections, his neck was "feeling really good now." However, Petitioner continued to have pain in the lower back that radiated down the back with both legs along with numbness and tingling. He described aggravation when sitting for long periods of time and repeated that the neck was doing better.

Accordingly, the Arbitrator finds that Petitioner has established causal connection between his accident of December 21, 2022, and finds that the recommend lumbar spine injections and finds that the prior treatment rendered to Petitioner's lower back are causally related to the accident and warrant prospective treatment in the form of lumbar epidural injections.

**Left shoulder.**

Petitioner introduces the records of Dr. Sompalli of Elite Orthopedics and Sports Medicine as Petitioners' Exhibit No. 9.

Dr. Sompalli saw Petitioner on May 9, 2023.

Dr. Sompalli notes two accidents. The first was December 19, 2022, when Petitioner was kneeling on the floor pumping a piece of equipment with his left arm when the plywood fell from above, striking Petitioner on his head, left shoulder and back while the Petitioner was engaged in the pumping motion with his left arm. Dr. Sompalli noted that the Petitioner had completed almost five months of conservative physical therapy to the left shoulder with no

improvement and denied any injections to the left shoulder. The Petitioner has not been working and per the orders of his physicians and was having difficulties even with the activities of daily living. Dr. Sompalli notes no prior evidence of left shoulder pain or injury.

Dr. Sompalli had available to him the previous MRI of the left shoulder and initially prescribed an MR arthrogram which he reviewed with the Petitioner during the visit of June 29, 2023. Dr. Sompalli diagnosed a traumatic Type II slap tear in the left shoulder which he deemed either an aggravation of a pre-existing asymptomatic condition or caused by the work injury. Dr. Sompalli endorsed a left shoulder arthroscopy with biceps tenodesis. Dr. Sompalli prescribed a cold therapy unit post-surgery to reduce pain and inflammation and to reduce medication intake along with a shoulder sling which Petitioner wore at the time of trial.

The shoulder surgery took place on September 6, 2023. The preoperative diagnosis included left shoulder Type II slap tear impingement along with joint arthritis and bursitis. The post operative diagnosis was no evidence of any Type II slap tear and no evidence of the detachment of the biceps anchor but was concluded to be left shoulder anterior labral tear from the 9 o'clock to the 11 o'clock positions along with AC joint arthritis and impingement bursitis. The surgical procedures included left shoulder arthroscopic anterior labral repair, arthroscopic subacromial decompression with release of the ligament and partial acromioplasty and extensive debridement of the glenohumeral joint and subacromial space taking in excess of 30 minutes due to adhesions and bursitis. Arthroscopic distal 1 cm resection of the clavicle and PRP injection over the labral repair to promote healing.

Arbitrator notes Dr. Aribindi initially opined that he recommends left shoulder arthroscopy but denies that the need for this procedure is related to the accident of December 19, 2022, or the accident of December 21, 2022.

It is also noted that there is no evidence of prior complaints or injury to Petitioner's left shoulder.

The Arbitrator finds that the opinion of Dr. Sompalli, the orthopedic surgeon who performed the procedure on Petitioner more credible than the opinion of Dr. Aribindi and therefore finds causal connection for Petitioner's accident injuring Petitioner's left shoulder.

**Head injury/traumatic brain injury**

Petitioner testified that on December 19, 2022, Petitioner was struck on the head, neck, shoulders, left arm, and upper body by a full-sized sheet of plywood, 8' x 4' x ¾"thick which fell from above the Petitioner. Petitioner's Exhibit No. 6, the records of Simon Medical Imaging, contain records with reference to an MRI of the brain performed on February 3, 2023. The records indicate a history of severe pain, limited range of motion following falling from a ladder…a few days earlier was hit in the head with a piece of plywood. The conclusion of the MRI was "evidence of a medial left orbital wall fracture with fat herniation without rectus entrapment, similar to prior CT. Similar to the prior CT there is left inferior, posterior scalp swelling adjacent to the inner table. The same records contained documentation of a CT scan performed on January 19, 2023, which was positive for "asymmetric prominence of the left posterior soft tissues of the head along with a left medial orbital blowout fracture with fat herniation." The conclusion of the CT scan was a left medial orbital blowout fracture with fat

herniation with a suspicion for an inferior left orbital floor fracture. The history given to the radiologist was a concussion with loss of consciousness after falling from ladder on December 21, 2022, with memory loss and post traumatic headache, blurred vision and dizziness.

Respondent offered Respondent's Exhibit No. 1, the IME of Dr. Deutsch dated February 13, 2023. It appears from Dr. Deutsch's IME that he failed to review the aforesaid MRI and CT scan findings noted in the Simon Medical Imaging records, introduced into evidence as Petitioner's Exhibit No. 6.

Accordingly, the Arbitrator finds that the Petitioner's current condition of ill-being with reference to a head injury is causally connected to the injury.

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

Per the Arbitrators findings above as to accident and causation medical is awarded and further notes that the Arbitrator finds the medical bills are related, and necessary. Accordingly, respondent is responsible for the medical bills subject to the medical fee schedule.

**K. Is petitioner entitled to any prospective medical care? What temporary benefits are in dispute?**

Based on the above-mentioned reasoning Arbitrator award prospective medical for Petitioners lower back and continued follow up care related to Petitioners left shoulder.

**M. Should penalties or fees be imposed on respondent?**

The Arbitrator finds that penalties and fees are not warranted in this case. Generally, an employer's reasonable and good faith challenge to liability does not warrant the imposition of penalties. *USF Holland v. Industrial Comm'n*, 357 Ill. App. 3d 798, 805 (1st Dist. 2005). When the employer acts in reliance upon reasonable medical opinion or when there are conflicting medical opinions, penalties are ordinarily not imposed. *Reynolds v. Illinois Workers' Compensation Comm'n*, 395 Ill. App. 3d 966, 971-72 (3d Dist. 2009). See also *Global Products v. Illinois Workers Compensation Comm'n*, 392 Ill. App. 3d 408 (1st Dist. 2009) (setting aside penalties based upon employer's reasonable reliance on its IME).

Respondent had a good faith basis to deny benefits based on the full duty release from Stroger Hospital on January 7, 2023, as Petitioner was paid salary up to that date, the IME opinions of Dr. Deutsch and Dr. Aribindi and there being no accident on 12-21-23 due Petitioner's intoxication. Dr. Deutsch's opinion is no accident and no injury and Dr. Aribindi also opined no injury for the alleged accident based on exam and the mechanism of injury would not have caused the shoulder condition that was treated surgically. Accordingly, petitioner's request for penalties is denied.

**N. Is respondent due any credit?**

The Arbitrator hereby awards a general credit to Respondent for a PPD advance of $6,000.00.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 22WC033512 |
| Case Name | Jesse Robison v.<br>Walsh Construction |
| Consolidated Cases | 22WC033511; |
| Proceeding Type | Petition for Review under 19(b)<br>Remand Arbitration |
| Decision Type | Commission Decision |
| Commission Decision Number | 24IWCC0595 |
| Number of Pages of Decision | 20 |
| Decision Issued By | Stephen Mathis, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Donna Zadeikis |
| Respondent Attorney | Matthew Walsh,<br>Lauren Kus |

DATE FILED: 12/11/2024

/s/Stephen Mathis, Commissioner

Signature

22 WC 33512
Consolidated with: 22 WC 33511


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

Jesse Robison,

Petitioner,

vs. No. 22 WC 33512
Consolidated with: No. 22 WC 33511

Walsh Construction,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review under §19(b) having been filed by the parties herein and proper notice given, the Commission, after considering the issues of accident, causal connection, medical expenses, prospective medical care, temporary disability, penalties and attorney fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation, medical benefits or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327 (1980).

Petitioner's application for adjustment of claim in consolidated case No. 22 WC 33511 alleges that on December 19, 2022, Petitioner injured his back, neck, head, left shoulder, right knee and person as a whole at work. Petitioner's application for adjustment of claim in the instant case No. 22 WC 33512 alleges that two days later, on December 21, 2022, Petitioner sustained injuries to the person as a whole at work. The two claims were consolidated before trial. The underlying facts are intertwined, making it impossible to render separate awards. The Commission awards all benefits and sets the bond in the consolidated case No. 22 WC 33511.

IT IS THEREFORE ORDERED BY THE COMMISSION that all benefits are awarded and bond set in the consolidated case No. 22 WC 33511.

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 in the consolidated case No. 22 WC 33511. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

**December 11, 2024**

SJM/sk
o-10/9/2024
44

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

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

/s/ *Raychel A. Wesley*
Raychel A. Wesley

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 22WC033512 |
| Case Name | Jesse Robison v. Walsh Construction |
| Consolidated Cases | |
| Proceeding Type | 19(b) Petition |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 17 |
| Decision Issued By | William McLaughlin, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Donna Zadeikis |
| Respondent Attorney | Matthew Walsh |

DATE FILED: 12/5/2023

**THE INTEREST RATE FOR THE WEEK OF DECEMBER 5, 2023 5.19%**

/s/William McLaughlin, Arbitrator

Signature

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

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

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

**Jesse Robison**
Employee/Petitioner

v.

**Walsh Construction**
Employer/Respondent

Case # **22** WC **33512**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **William J. McLaughlin**, Arbitrator of the Commission, in the city of **Chicago**, on **October 10, 2023**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

**DISPUTED ISSUES**

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

**FINDINGS**

On the date of accident, **12/21/2022**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**97,760.00**; the average weekly wage was $**1,880.00**.

On the date of accident, Petitioner was **50** 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 $**6,000.00** 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 $1,253.33/week for 39 weeks, commencing 1/9/2023 through 10/10/2023, as provided in Section 8(b) of the Act.

Respondent shall be given credit for $6,000.00 for TTD benefits paid under Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services to Petitioner pursuant to the medical fee schedule as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall authorize and provide for prospective medical care for the lower back and the continued follow up care that is causally related to Petitioners operated left shoulder.

Respondent is not responsible to Petitioner for penalties or fees.

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

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

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

**DECEMBER 5, 2023**

Signature of Arbitrator

ICArbDec19(b)

**THE ILLINOIS WORKERS' COMPENSATION COMMISSION**

**CHICAGO, ILLINOIS**

| | | |
|---|---|---|
| Jesse Robison,<br><br>Petitioner,<br><br>v.<br><br>Walsh Construction Company of Illinois,<br><br>Respondent. | ) | No. 22WC033512, 22WC033511 |

**RESPONDENT'S PROPOSED FINDINGS IN SUPPORT OF ARBITRATOR'S DECISION**

**FINDINGS OF FACT**

This matter proceeded to trial on October 10, 2023, before Arbitrator William McLaughlin, and the following facts were presented.

Petitioner Jesse Robison is a union laborer who was employed by Respondent Walsh Construction for six months before alleging two accidents. The first is alleged to have occurred on December 19, 2022, and a second on December 21, 2022. (Tr. 12).

**12/19/22 Accident**

On December 19, 2022, petitioner was working on a job site for Walsh in Chicago at the intersection of Morgan and Lake Street during the phase of construction involving pouring concrete. (Tr. 13) Petitioner's job at the site involved working with a machine to pry apart concrete forms from steel tables and lower them to the next floor. (Tr. 14-15) Petitioner, who is left hand dominant, testified he was kneeling on one knee on a stack of nine sheets of plywood with the other leg extended pumping the machine with his left arm with some force when the flat side of an 8x4 three-quarter inch thick piece of plywood came loose and fell approximately seven feet from the ceiling and broadly hit petitioner's head, neck, shoulder, waist, and upper body including his left arm. (Tr. 14-18, 42-43). He testified and told staff at West Suburban Medical Center that he did not lose consciousness. (Tr. 41-42, 101-102) Petitioner testified that he observed that the inner lining of his hard hat was cracked because of the impact and was told that the exterior shell was damaged. (Tr. 18, 44-48) Petitioner testified that he felt dizzy and faint when he stood up, his eyes were blurry, and that his memory was affected. (Tr. 19, 74) Petitioner testified that his left shoulder, left elbow, back, neck, knee, and ankle hurt immediately after the accident. (Tr. 20) Petitioner testified he stopped working and reported the accident to his superintendent, Ronnie, and the foreman, Yale, five minutes after the accident. (Tr. 20-21, 43, 60) He was offered an aspirin and time to rest in the laborers' office. (Tr. 20-21)

Petitioner left work early on 12/19/22 and by his own choice took the CTA train to the Emergency Department at West Suburban Hospital. (Tr. 22, 57, 58) He told emergency staff that he was working on a job site when a piece of plywood fell from the ceiling and fell on his head, neck, and back, pinning his entire body under the plywood. (Tr. 22) Petitioner testified his left knee twisted with falling and being struck. (Tr. 23) Petitioner testified he was not sure if he complained of left shoulder pain, but deferred to the medical records and agreed with his attorney that his complaints were reflected in the West Suburban medical records. (Tr. 23, 60) Petitioner underwent a physical examination and X-rays and was discharged from the Emergency Department that day with instructions to follow up with Dr. Brindise of Romano Orthopedics. (Tr. 23-24, 57) He was not given a prescription for medication but took over the counter Tylenol. (Tr. 60-61) Petitioner did not follow up with Dr. Brindise but presented to Physicians Immediate Care the next day. (Tr. 57-59)

Petitioner returned to the job site on December 20, 2022, and accompanied by the Walsh safety managers he presented to Physicians Immediate Care, complaining of pain in the neck, left shoulder, back, and knee, and told providers that a piece of plywood fell on him at work and impacted his hard hat. (Tr. 24-26, 59) Physicians Immediate Care discharged petitioner with light duty 25-pound lifting restrictions until he followed up at the clinic on December 27, 2022. (Tr. 28). Petitioner returned to the same job site that day and resumed his job collecting debris from the site with assistance. (Tr. 29, 50-51)

**12/21/22 Accident**

On December 21, 2022, petitioner arrived at the job site at 7 a.m. (Tr. 67) Petitioner was assigned to monitor the deck which involved moving equipment from the 16th floor of the building to the 19th floor using a handmade ladder. (Tr. 68-70) Petitioner testified between 7 a.m. and 8 a.m. he was using a handmade ladder when his foot slipped and went in between the rungs of the ladder. (Tr. 71-72, 103) He testified that paramedics found him hanging by his feet from upside down the ladder. (Tr. 72-73) The medical records reflected that he was standing on a ladder, lost his balance and his left foot became caught in the ladder. (Tr. 73-74) He testified that he briefly lost consciousness at the scene and was taken by ambulance to Stroger Hospital. (Tr. 73) On cross-examination, petitioner admitted all he remembered was going up the ladder, falling, and "being in the sky." (Tr. 102-103) Medical providers examined petitioner, ordered a CT scan of the head and neck, and kept him overnight before discharging him from care full duty the next day with a cane to use as necessary as a result of the ankle injury. (Tr. 75-76, 80-81)

Petitioner began treating with Dr. Bayran on December 23, 2022, and complained of ankle, leg, back, neck, left shoulder, elbow, and head pain, as well as memory loss and head symptoms. (Tr. 76-78, 89) Petitioner testified that he could not really move his neck, and the area between his neck to the lower back was in pain and uncomfortable. (Tr. 89) Dr. Bayran prescribed MRI's, medication, oxygen therapy, physical therapy at Elite Rehabilitation Institute, and referred petitioner to a neurologist at Hope Neurological and Medical Services. (Tr. 77-78, 81)

Petitioner followed up with Dr. Bayran on January 11, 2023, and January 25, 2023. (Tr. 78-79) Petitioner underwent an MRI of the brain on March 25, 2023. (Tr. 81) Petitioner testified that he did not personally see Dr. Bayran at the last visit on September 20, 2023, only his nurse practitioner, and was only given a note from his nurse practitioner. (Tr. 99-100) Petitioner further testified that he did not have a note from Dr. Bayran ordering back injections. (Tr. 101)

Petitioner saw Dr. Sompalli at Elite Ortho and Sports Medicine on May 9, 2023, and he gave Dr. Sompalli a history of accident. (Tr. 90) Dr. Sompalli ordered an MRI arthrogram of the left shoulder which he underwent on May 23, 2023. (Tr. 90) Petitioner had cervical blocks done August 8, 2023. (R. Ex. 5, pg. 8) Dr. Sompalli recommended left shoulder surgery which was done at the Illinois Back & Neck Institute on September 6, 2023. (Tr. 88, 91)

Petitioner treated for his feet and ankle at Parkview Orthopaedics from May 9, 2023, through June 6, 2023, and was released from care without restriction by Dr. DeFrino on June 6, 2023. (Tr. 94-95) Petitioner did not seek treatment for his knee. (Tr. 95)

**Medical Records/Treatment**

After the 12/19/22 accident, petitioner presented to West Suburban Medical Center, with complaints of 7/10 neck pain, shoulder, left elbow, left shoulder/side and head pain after being hit in the head with a 4-to-5-inch piece of plywood on his posterior neck and left shoulder. (P's Ex. A1 22WC33511, pg. 4-7 of 34) He denied loss of consciousness or any focal neuro deficits. The provider noted he had no major signs of trauma. He was diagnosed with cervical strain, shoulder strain, chest wall strain, lumbosacral strain, and degenerative joint disease. He was discharged home that day.

Petitioner thereafter returned to full duty work on December 20, 2022, and presented that day to physician's assistant Braedon Wieseler, PA at Physicians Immediate Care, now complaining of head/neck pain, *bilateral* shoulder pain, lower back pain with radiation into the right leg, and throbbing right knee pain. (P's Ex. A2 22WC33511, pg. 1-6 of 6) X-rays of the LEFT shoulder, chest, cervical spine, lumbar spine, and right knee taken that day were all reported as negative. Petitioner was prescribed naproxen and pharbetol/Tylenol and was released to work with 25 pound lifting restrictions over the shoulder/waist to shoulder and 25 pounds pushing/pulling restrictions up to December 27, 2022.

After the 12/21/22 alleged accident petitioner was taken by ambulance to Stroger Hospital. (P's Ex. A1 22WC33512), Petitioner stated he felt dizzy after taking a pain medication. EMS noted that petitioner was alert and oriented and had a normal mental status assessment. Petitioner denied loss of consciousness. Petitioner was treated at Stroger and underwent imaging of the head, cervical spine, chest, left knee, left tibia/fibula, and left ankle, which were all normal. (P's Ex. A2 22WC33512, PDF pages 65-85) Petitioner told Stroger Emergency Department that a piece of plywood fell on his head, and he was wearing a helmet. (P's Ex. 2, pg. 35 of 205) He was discharged with diagnoses of a blunt head injury, contusion, possible concussion "1 week ago" (though the CT of the head was negative), and left leg pain. He was discharged home from Stroger on December 22, 2022. (P's Ex. A2 22WC33512, PDF pages 79-80) He was given a full work release to return to work on January 7, 2023, without limitation. (R's Ex. 9).

Petitioner presented to Dr. Neema Bayran of The Pain Center of Illinois on December 23, 2022, with complaints of pain in the head, left knee, left ankle, right knee, neck, left shoulder, left elbow, mid back, lower back, left hip, and right hip. (P's Ex. A3 22WC33512, pg. 1-5/31) He was diagnosed with cervicalgia, low back pain, right shoulder pain, left shoulder pain, right knee pain, and left ankle pain. He was restricted from work and began physical therapy.

Petitioner presented to Dr. Candido on January 11, 2023. (P's Ex. 3, pg. 6-7/31) Petitioner requested an increase in medications and "was advised he will not receive stronger opioids here." Petitioner complained of head pain, left knee pain, left ankle pain, right knee pain, neck pain, left shoulder pain, left elbow, mid back pain, and lower back pain – and Dr. Candido diagnosed him with neck pain and low back pain. Petitioner followed up with Dr. Candido on January 25, 2023, and continued to be diagnosed with cervicalgia and low back pain, with the addition of headache. (P's Ex. 3, pg. 8-9/31) By a follow up appointment on February 22, 2023, Dr. Candido had petitioner diagnosed with cervicalgia and headache only. (P's Ex. 3, pg. 10-11/31) Dr. Candido's diagnoses continued as cervicalgia and headache on March 22, 2023; April 21, 2023; and May 17, 2023 (plus low back pain on that date) (P's Ex. 3, pg. 12-13, 14-15, 16-17/31) Dr. Candido first diagnosed petitioner with left shoulder pain on June 14, 2023. (P's Ex. 3, pg. 19-20/31)

MRI imaging of the left shoulder was ordered, and petitioner began treating with Dr. Chandrasekhar Sompalli, M.D., orthopedic surgeon at Elite Orthopaedics and Sports Medicine, for the left shoulder. (P's Ex. A9 22WC33512, 5/9/23 OV) Dr. Sompalli read the 1/31/23 MRI of the left shoulder as revealing supraspinatus tendinosis and AC joint separation. He diagnosed petitioner with impingement syndrome of the left shoulder, pain in the left shoulder, and sprain of the left acromioclavicular joint, and performed a cortisone injection into the left shoulder glenohumeral space. Dr. Sompalli ordered an MRI arthrogram and X-ray of the left shoulder to rule out a SLAP tear. Petitioner underwent an MRI arthrogram of the left shoulder on May 23, 2023. Dr. Sompalli read the MRI arthrogram as revealing a Type 2 SLAP tear which Dr. Sompalli opined was either an aggravation of a pre-existing condition or caused by his work injury of 12/21/22. (P's Ex. A9 22WC33512, 5/30/23 OV) On May 30, 2023, petitioner was complaining of 10/10 sharp shoulder pain. As of May 30, 2023, Dr. Sompalli recommended a left shoulder arthroscopy and biceps tenodesis. Petitioner underwent the following procedures with Dr. Sompalli on September 6, 2023: (1) left shoulder arthroscopy; (2) arthroscopic anterior labral repair using one PushLock anchor and FiberWire suture; (3) arthroscopic subacromial decompression with release of the coracoacromial ligament and partial acromioplasty; (4) extensive debridement of the glenohumeral joint and subacromial space; (5) arthroscopic distal 1 cm of the clavicle resection; and (6) PRP injection over the labral repair to help promote healing. (P's Ex. A9 22WC33512, 9/6/23 Operative Report)

Petitioner also treated with neurologist Dr. Ahmad Daif for concussion symptoms and underwent VNG testing. Dr. Daif referred petitioner to an ophthalmologist for reportedly worsening vision/management of orbital bone fracture, a neurosurgeon for possible surgical intervention of C3-C4 flattening cord lesion, and orthopedic surgeon for a possible right ankle ligament tear and to assess bone cystic lesions. Petitioner presented to Dr. Paul De Frino for both

ankles and was released to full duty work with respect to the ankles on June 6, 2023. (P's Ex. A8 22WC33512, 6/6/23 OV)

**IME of Dr. Deutsch**

Petitioner was examined by IME Dr. Deutsch on February 13, 2023. (Tr. 85) Dr. Deutsch is a neurosurgeon from Midwest Orthopedics at Rush. Petitioner testified that he gave a truthful and honest report to Dr. Deutsch. (Tr. 121) Petitioner testified that he reported 10/10 headaches, 10/10 neck pain, and 10/10 low back pain. (Tr. 122) Dr. Deutsch issued a report and opined that petitioner had no objective findings of any work injury and his complaints were not consistent with any work injury. (R. Ex. 6, pg. 4) Dr. Deutsch opined that at most Petitioner had sustained a cervical and lumbar strain injury, but commented that the general examination findings suggested malingering, it was not clear that there was any work injury, and his complaints of vision problems and headaches were not substantiated by the records. (R. Ex. 6, pg. 4) Dr. Deutsch opined that Petitioner had no work restrictions related to either accident and that he could work full duty without restrictions or need for any medical treatment. (R. Ex. 6, pg. 4-5) Dr. Deutsch further reviewed additional medical records on May 30, 2023, and his opinions remained unchanged. (R. Ex. 7, pg. 5) Dr. Deutsch opined that the only reasonable, related, and necessary treatment was treatment for a cervical/lumbar strain in the first week following the alleged work injury. (R. Ex. 7, pg. 5) He specifically found that MRI/imaging of multiple body parts, treatment by Dr. Daif, Dr. Daif's referral to a neurosurgeon for a cervical MRI findings of a mild disc bulge, and chiropractic treatment for diffuse whole-body pain were not reasonable. (R. Ex. 7, pg. 5) Dr. Deutsch again recommended against any additional medical treatment as of May 30, 2023. (R. Ex. 7, pg. 5)

**IME of Dr. Aribindi**

Respondent Walsh also had petitioner examined by IME Dr. Ram Aribindi on June 14, 2023. (R. Ex. 5) Dr. Aribindi is an orthopedic surgeon and as part of his practice he regularly treats shoulders, including surgery. Petitioner testified that he also gave a truthful and honest report to Dr. Aribindi on June 14, 2023. (Tr. 125-126) Dr. Aribindi issued a report, and he reviewed an MRI arthrogram of the left shoulder done on May 23, 2023. (R. Ex. 5, pg. 6) Per Dr. Aribindi the only finding on exam and MRI was a possible labral tear. However, Dr. Aribindi opined that the mechanisms of injuries on both dates of accident 12/19/22 and 12/21/22 were inconsistent with causing an anterior superior labral tear. (R. Ex. 5, pg. 6) In light of Petitioner's complaints Dr. Aribindi indicated that a left shoulder arthroscopy was a treatment option but opined that it would not be related to either date of accident because the reported mechanics of the accident would not cause any pathology that would need surgery. (R. Ex. 5, pg. 6-7) Dr. Aribindi opined that petitioner could return to work full duty without restriction at MMI three months after the surgery. (R. Ex. 5, pg. 6-7) Dr. Aribindi noted that petitioner had a normal exam of the right shoulder, neck, back, and bilateral knees, and recommended against any additional treatment for those body parts as of June 14, 2023. (R. Ex. 5, pg. 6-7)

**Shoulder Surgery of September 6, 2023 & Updated Opinion of Dr. Aribindi**

Petitioner underwent a left shoulder arthroscopy with labral repair, subacromial decompression and extensive debridement of glenohumeral joint, subacromial decompression, distal clavicle excision, and PRP injection over the labral repair on September 6, 2023, with Dr. Sompalli. (R. Ex. 5, pg. 8) Dr. Aribindi reviewed the operative report and opined that only the labral repair was justified by the physical exam findings and MRI arthrogram findings. (R. Ex. 5, pg. 8) Dr. Aribindi found that petitioner had only mild degenerative arthritic changes over the AC joint consistent with patients his age, had no impingement signs, and good passive range of motion of the shoulder. (R. Ex. 5, pg. 8) Dr. Aribindi opined that the acromioplasty/subacromial decompression with lysis of adhesions and PRP injections performed by Dr. Sompalli were all unnecessary. (R. Ex. 5, pg. 8) Only the labral repair was reasonable and that was not related to the accidents because the mechanics of the accident would not have caused it. Dr. Aribindi further opined that the 8/8/23 cervical blocks done were unnecessary considering petitioner's normal neck exam with no tenderness or swelling, good range of motion of the neck, and negative Spurling's sign. (R. Ex. 5, pg. 8)

**Petitioner's Pre-Accident Medical Treatment**

In the two years prior to December 19, 2022, petitioner denied having left shoulder, neck, or radiating low back pain or treatment or reporting to any medical provider any left shoulder symptoms. (Tr. 38-39)

Petitioner testified that he may have treated at the University of Illinois Hospital on Taylor Street in September 2022, but did not recall the treatment. (Tr. 38) However, Petitioner did not recall being in an auto accident where he injured his neck or back and was not sure if he ever gave a recorded statement to an insurance company where he complained that he had back or neck pain. (Tr. 40-41) Petitioner did not recall giving a statement to Geico on 11/11/19 regarding injuries sustained in an auto accident. (Tr. 52-55) Petitioner did not recall going to Rush Oak Park Hospital on 11/11/19 with complaints of low back, neck, and left knee pain after a motor vehicle accident. (Tr. 55)

Petitioner testified that he resides at Phoenix Recovery Services, a sober living facility for patients with substance abuse disorders since March 28, 2022. (Tr. 8-10, 30) Petitioner testified that the facility does not allow the use of unauthorized substances and submits residents to random drug screenings. (Tr. 10) Petitioner testified he had a substance abuse disorder before moving into this facility in March 2022. (Tr. 31)

During his testimony Petitioner was shown photographs depicting what he identified as a syringe in Respondent Exhibits 1 and 2. (Tr. 105-106). Petitioner did not know if the providers at Stroger took blood or urine from him or did a drug test. (Tr. 108-109, 113)

Petitioner testified that he returned to the Walsh construction site to pick up his check and was on crutches. (Tr. 117-118) Petitioner testified that when he saw Dr. Bayran on December 23, 2022, he complained of neck pain, low back pain, right shoulder pain, left shoulder pain, right

knee pain, left ankle pain, pain shooting down the arms, pain shooting down the legs, right foot, and joints of the left foot/ankle, and had headaches. (Tr. 118-121)

Petitioner is a convicted felon. (Tr. 131; R. Ex. 4) Petitioner testified that he pled guilty to domestic battery against his girlfriend. (Tr. 131-132) Petitioner has not looked for light work since the accidents. (Tr. 134)

**Testimony of Joseph Daughrity**

Joseph Daughrity is a union laborer who was working for Walsh on the same project as Petitioner in December 2022. (Tr. 142-143) Mr. Daughrity testified that he observed petitioner working at the project before December 19, 2022, and appeared to be moving slowly, being confused, and not knowing what to do. (Tr. 143-145) Mr. Daughrity testified he saw petitioner return to the job site on crutches like he was hurt within two weeks after the alleged accident. (Tr. 146, 147) and then watched Petitioner pick up the crutches, put them under his arm, and walk off normally once he got around the corner presumably out of the view of the construction site. (Tr. 146-148). Mr. Daughrity volunteered this information to Walsh. (Tr. 155)

**Testimony of Jose Lecea**

Jose Lecea is a union laborer foreman who was working for Walsh on the same project as Petitioner in December 2022 and observed the 12/19/22 accident. (Tr. 157-158) Mr. Lecea testified that he saw petitioner and another coworker dropping a table eight feet in front of him. (Tr. 158) Petitioner was kneeling. (Tr. 161) When the table dropped, the flat section of a 40 pound sheet of plywood peeled off the ceiling in two stages from six feet above and fell down on to both of them with a medium impact after hitting the table first and then broadly bouncing off petitioner on the flat side, not the edge. (Tr. 158-159, 160-161, 162) Mr. Lecea was shown a photograph of a hard hat in Respondent's Exhibit 2 and testified that it truly and accurately depicted the hard hat that petitioner was wearing at the time of the 12/19/22 accident. (Tr. 163-164) After the accident Mr. Lecea looked at the interior and exterior of the hard hat. (Tr. 164) The exterior was not cracked, the inside was not dislodged, and there was nothing wrong with the hard hat after the impact. (Tr. 164-165) Mr. Lecea testified that petitioner continued working after the accident on 12/19/22 and kept using the hard hat the rest of the day without complaints. (Tr. 164-165)

**Testimony of Augustine Najera**

- Augustine Najera is a union carpenter who was working for Walsh on the same project as Petitioner in December 2022 and saw petitioner on the morning of December 21, 2022, before the occurrence. (Tr. 167-168, 169) Mr. Najera testified that he was walking toward work when he saw petitioner sleeping standing up lying back with his head down. (Tr. 170) Mr. Najera thought he was sad or sleeping standing up and let him be. (Tr. 170) Mr. Najera was present when petitioner climbed the ladder. (Tr. 171) Mr. Najera was walking up the ladder, turned, and saw petitioner going up the ladder when he fell backward and hit the plywood. (Tr. 171-172) Mr. Najera testified that he did not see what caused

petitioner to fall. (Tr. 172) Mr. Najera was shown two photographs depicted in Respondents Exhibits 1 and 2. (Tr. 172) Mr. Najera testified that the syringe depicted in Exhibits 1 and 2 was found right after the fall on the landing directly below where petitioner fell. (Tr. 173-175) Mr. Najera walked in that same area 10 minutes before the accident and did not see that syringe there. (Tr. 174, 180-181)

**Testimony of Craig Bender**

Craig Bender is a Walsh safety manager and firefighter/paramedic for Crete Township Fire Protection District. (Tr. 184) In his occupation as a paramedic Mr. Bender testified that he has responded to calls involving individuals abusing drugs. (Tr. 185) Mr. Bender was shown the photographs of the syringes depicted in Respondent's Exhibits 1 and 2. (Tr. 185) Based on his experience and knowledge as a paramedic Mr. Bender identified the object as a pre-filled syringe with a MAD device on the end that is used by people to administer medications intranasally. (Tr. 185-187) .

**Respondent Credit**

Respondent paid $2,114.63 in medical. Respondent paid a disputed PPD advance of $6,000.00.

**FINDINGS OF FACTS AND CONCLUSIONS OF LAW**

**C. Did petitioner sustain an accident arising out of and in the course of employment?**

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. IndustrialCommission*, 44 Ill. 2d 214 (1969). 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.*

**12/19/2022 ACCIDENT**

Petitioner testified that while on the job site, Petitioner was kneeling on one knee with the other leg extended behind him while operating a pump with his left arm for the purpose of separating newly poured concrete from forms. While in this awkward position, Petitioner testified that he was struck by a full-sized sheet of plywood, 8' x 4' x 3/4" thick which fell from above him and struck his head, neck, shoulders, left arm, and upper body.

Petitioner reported the accident to his superintendent and was instructed to sit down in the laborers' office and take an aspirin out of the first aid box.

Petitioner testified that he left the jobsite early and sought treatment on his own at West Suburban Medical Center as the Respondent did not offer Petitioner any formal medical care.

At the emergency room, Petitioner received a physical examination and x-rays. He was released from the hospital with instructions to follow up with Romano Orthopedics.

On December 20, 2022, Respondent took Petitioner to Physicians Immediate Care. Wherein Petitioner once again gave a history of being struck by a piece of plywood at work and voiced complaints of pain in the head, neck, shoulders, back and knees. At Physicians Immediate Care, Petitioner was examined and was discharged with instructions to work light duty, not lift more than 25 lbs. and return for a follow up appointment on December 27, 2022. Petitioner then returned to work on December 21st, 2022, and sustained another accident which is the subject of IWCC Case No. 22 WC 33512. The Arbitrator finds that Petitioner's current condition of ill-being was causally connected to the accident of December 19, 2022.

The Arbitrator notes that respondent entered evidence Petitioners felony conviction. While Arbitrator acknowledges that prior felony convictions can affect credibility of a witness, Arbitrator finds the Petitioners testimony credible as to this accident.

The Arbitrator also finds that the four live witnesses presented by Respondent were credible witnesses. However, Arbitrator notes that none of the Respondents witnesses provided testimony that refuted Petitioner's testimony nor undermined Petitioner's credibility.

With respect to the alleged accident of 12-19-22 the event was witnessed by foreman Jose Lecia. The Arbitrator finds Mr. Lecea's testimony credible that a piece of plywood did fall off a wall, hit a table first and then on the broad flat face of the plywood hit Petitioner and a co-worker. Petitioner continued to use it and keep working until the end of the day after which he took the CTA train to West Suburban where he was released back to work after exam. Petitioner also told several medical providers that the blow was so hard it cracked the hard hat. The Arbitrator give little weight to where on the helmet it was cracked.

**12/21/22 ACCIDENT**

Petitioner's Exhibit (1) are the records of Chicago Fire Department EMS and indicate that on 12-21-22 they responded to a construction site at North Morgan Street and West Lake Street in Chicago, Illinois. The records indicate that Petitioner was picked up at the scene of a construction accident on the 19th floor of the site. The paramedics took the elevator up 16 floors and then found Petitioner unconscious at the bottom of a homemade ladder, hanging by his feet from the ladder and had been pulled off the ladder by his co-workers. Paramedics placed Petitioner on a board and put in a Stokes basket which lowered him to ground level via crane. Respondent argues that Petitioner did not sustain an accident that arose out of and in the course of his employment, claiming that Petitioner was allegedly under the influence of some sort of "substance.".

Illinois law does provide precedent for credible circumstantial evidence of intoxication being sufficient in the absence of direct evidence being available one way or the other. Here there was no toxicology evidence positive or negative in the records. The Respondent attempts to establish that the Petitioner was under the influence of something by introducing testimony that Petitioner was seen sleeping before clocking in the date of the accident, that a syringe was found lying near where the Petitioner had fallen from the ladder and proof that Petitioner was living in a drug facility. Arbitrator does not find any of these theories taken individually or together establishes intoxication. According to Section 11 of the Act, to create a rebuttable presumption that intoxication compensation shall not be payable if (1) the employee's intoxication is the proximate cause of the employee's accident injury or (2) at the time the employee incurred the accidental injury, the employee was so intoxicated that the intoxication constituted a departure from the employment.

Arbitrator notes that Petitioner denied that he was intoxicated and further denied that it was his syringe. There was no evidence to prove otherwise. There is no toxicology report in the record, there is no witness to the occurrence who saw a syringe fall out of Petitioners person during the accident and no witness testifying to Petitioner actions and mannerisms prior to the accident other than he was seen sleeping prior to starting work. Therefore, Arbitrator finds that there is not enough substantial circumstantial evidence to establish intoxication as defined in the act.

For the above-mentioned reasoning, Arbitrator finds Petitioner sustained an injury that arose out of the course of his employment.

**F. Is petitioner's current condition of ill-being causally related to the injury? Did petitioner establish a causal connection between the work accidents of 12/19/ 22 and 12/21/22?**

Arbitrator finds the accidents and injuries are related to the 12-19-23. And 12-21-23.

The petitioner carries the burden of proof to establish the issue of causal connection by a preponderance of the evidence. *Sisbro v. Indus. Comm'n*, 207 Ill. 2d 193 (2003).

As to the 12-19-22 accident Petitioner testified that while on the job site, Petitioner was kneeling on one knee with the other leg extended behind him while operating a pump with his left arm for the purpose of separating newly poured concrete from forms. While in this position, Petitioner testified that he was struck by a full-sized sheet of plywood, 8' x 4' x 3/4" thick which fell from above him and struck his head, neck, shoulders, left arm, and upper body.

Petitioner reported the accident to his superintendent and was instructed to sit down in the laborers' office and take an aspirin out of the first aid box.

Petitioner testified that he left the jobsite early and sought treatment on his own at West Suburban Medical Center as the Respondent did not offer Petitioner any formal medical care.

At the emergency room, Petitioner received a physical examination and x-rays. He was released from the hospital with instructions to follow up with Romano Orthopedics.

On December 20, 2022, Respondent took Petitioner to Physicians Immediate Care Wherein Petitioner once again gave a history of being struck by a piece of plywood at work and voiced complaints of pain in the head, neck, shoulders, back and knees. At Physicians Immediate Care, Petitioner was examined and was discharged with instructions to work light duty, not lift in excess of 25 lbs. and return for a follow up appointment on December 27, 2022. Petitioner then returned to work on December 21st, 2022, and sustained another accident which is the subject of IWCC Case No. 22 WC 33512. The Arbitrator finds that Petitioner's as met his burden and that his current condition of ill-being was causally connected to the 12-19-22 accident.

After the 12-21-22 accident reference to Petitioner's spine, documentation is contained in Petitioner's Exhibit No. 3, the records of The Pain Center of Illinois wherein Petitioner was originally seen on December 23, 2022. During this visit, Petitioner complained of bilateral neck pain with difficulty turning his head to the side along with pain in the middle of the lower back with radiation into the left buttock along with shooting pain irradiating into the leg and feet, bilaterally, along with numbness in the feet, bilaterally. On examination, there was tenderness over the midline along with tenderness over paraspinal muscles bilaterally, said pain being aggravated by extension and loading of cervical joints. With reference to the lower back, there was tenderness over the midline and tenderness over paraspinal muscles bilaterally. Initially, physical therapy was recommended. Thereafter, on September 20, 2023, Petitioner noted that he had had cervical median branch nerve blocks on the right side at C3, C4, and C5 on August 3, 2023. Petitioner stated that upon receiving these injections, his neck was "feeling really good now." However, Petitioner continued to have pain in the lower back that radiated down the back with both legs along with numbness and tingling. He described aggravation when sitting for long periods of time and repeated that the neck was doing better.

Accordingly, the Arbitrator finds that Petitioner has established causal connection between his accident of December 21, 2022, and finds that the recommend lumbar spine injections and finds that the prior treatment rendered to Petitioner's lower back are causally related to the accident and warrant prospective treatment in the form of lumbar epidural injections.

**Left shoulder.**

Petitioner introduces the records of Dr. Sompalli of Elite Orthopedics and Sports Medicine as Petitioners' Exhibit No. 9.

Dr. Sompalli saw Petitioner on May 9, 2023.

Dr. Sompalli notes two accidents. The first was December 19, 2022, when Petitioner was kneeling on the floor pumping a piece of equipment with his left arm when the plywood fell from above, striking Petitioner on his head, left shoulder and back while the Petitioner was engaged in the pumping motion with his left arm. Dr. Sompalli noted that the Petitioner had completed almost five months of conservative physical therapy to the left shoulder with no

improvement and denied any injections to the left shoulder. The Petitioner has not been working and per the orders of his physicians and was having difficulties even with the activities of daily living. Dr. Sompalli notes no prior evidence of left shoulder pain or injury.

Dr. Sompalli had available to him the previous MRI of the left shoulder and initially prescribed an MR arthrogram which he reviewed with the Petitioner during the visit of June 29, 2023. Dr. Sompalli diagnosed a traumatic Type II slap tear in the left shoulder which he deemed either an aggravation of a pre-existing asymptomatic condition or caused by the work injury. Dr. Sompalli endorsed a left shoulder arthroscopy with biceps tenodesis. Dr. Sompalli prescribed a cold therapy unit post-surgery to reduce pain and inflammation and to reduce medication intake along with a shoulder sling which Petitioner wore at the time of trial.

The shoulder surgery took place on September 6, 2023. The preoperative diagnosis included left shoulder Type II slap tear impingement along with joint arthritis and bursitis. The post operative diagnosis was no evidence of any Type II slap tear and no evidence of the detachment of the biceps anchor but was concluded to be left shoulder anterior labral tear from the 9 o'clock to the 11 o'clock positions along with AC joint arthritis and impingement bursitis. The surgical procedures included left shoulder arthroscopic anterior labral repair, arthroscopic subacromial decompression with release of the ligament and partial acromioplasty and extensive debridement of the glenohumeral joint and subacromial space taking in excess of 30 minutes due to adhesions and bursitis. Arthroscopic distal 1 cm resection of the clavicle and PRP injection over the labral repair to promote healing.

Arbitrator notes Dr. Aribindi initially opined that he recommends left shoulder arthroscopy but denies that the need for this procedure is related to the accident of December 19, 2022, or the accident of December 21, 2022.

It is also noted that there is no evidence of prior complaints or injury to Petitioner's left shoulder.

The Arbitrator finds that the opinion of Dr. Sompalli, the orthopedic surgeon who performed the procedure on Petitioner more credible than the opinion of Dr. Aribindi and therefore finds causal connection for Petitioner's accident injuring Petitioner's left shoulder.

**Head injury/traumatic brain injury**

Petitioner testified that on December 19, 2022, Petitioner was struck on the head, neck, shoulders, left arm, and upper body by a full-sized sheet of plywood, 8' x 4' x ¾"thick which fell from above the Petitioner. Petitioner's Exhibit No. 6, the records of Simon Medical Imaging, contain records with reference to an MRI of the brain performed on February 3, 2023. The records indicate a history of severe pain, limited range of motion following falling from a ladder…a few days earlier was hit in the head with a piece of plywood. The conclusion of the MRI was "evidence of a medial left orbital wall fracture with fat herniation without rectus entrapment, similar to prior CT. Similar to the prior CT there is left inferior, posterior scalp swelling adjacent to the inner table. The same records contained documentation of a CT scan performed on January 19, 2023, which was positive for "asymmetric prominence of the left posterior soft tissues of the head along with a left medial orbital blowout fracture with fat herniation." The conclusion of the CT scan was a left medial orbital blowout fracture with fat

herniation with a suspicion for an inferior left orbital floor fracture. The history given to the radiologist was a concussion with loss of consciousness after falling from ladder on December 21, 2022, with memory loss and post traumatic headache, blurred vision and dizziness.

Respondent offered Respondent's Exhibit No. 1, the IME of Dr. Deutsch dated February 13, 2023. It appears from Dr. Deutsch's IME that he failed to review the aforesaid MRI and CT scan findings noted in the Simon Medical Imaging records, introduced into evidence as Petitioner's Exhibit No. 6.

Accordingly, the Arbitrator finds that the Petitioner's current condition of ill-being with reference to a head injury is causally connected to the injury.

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

Per the Arbitrators findings above as to accident and causation medical is awarded and further notes that the Arbitrator finds the medical bills are related, and necessary. Accordingly, respondent is responsible for the medical bills subject to the medical fee schedule.

**K. Is petitioner entitled to any prospective medical care? What temporary benefits are in dispute?**

Based on the above-mentioned reasoning Arbitrator award prospective medical for Petitioners lower back and continued follow up care related to Petitioners left shoulder.

**M. Should penalties or fees be imposed on respondent?**

The Arbitrator finds that penalties and fees are not warranted in this case. Generally, an employer's reasonable and good faith challenge to liability does not warrant the imposition of penalties. *USF Holland v. Industrial Comm'n*, 357 Ill. App. 3d 798, 805 (1st Dist. 2005). When the employer acts in reliance upon reasonable medical opinion or when there are conflicting medical opinions, penalties are ordinarily not imposed. *Reynolds v. Illinois Workers' Compensation Comm'n*, 395 Ill. App. 3d 966, 971-72 (3d Dist. 2009). See also *Global Products v. Illinois Workers Compensation Comm'n*, 392 Ill. App. 3d 408 (1st Dist. 2009) (setting aside penalties based upon employer's reasonable reliance on its IME).

Respondent had a good faith basis to deny benefits based on the full duty release from Stroger Hospital on January 7, 2023, as Petitioner was paid salary up to that date, the IME opinions of Dr. Deutsch and Dr. Aribindi and there being no accident on 12-21-23 due Petitioner's intoxication. Dr. Deutsch's opinion is no accident and no injury and Dr. Aribindi also opined no injury for the alleged accident based on exam and the mechanism of injury would not have caused the shoulder condition that was treated surgically. Accordingly, petitioner's request for penalties is denied.

**N. Is respondent due any credit?**

The Arbitrator hereby awards a general credit to Respondent for a PPD advance of $6,000.00.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 23WC020944 |
| Case Name | Timothy Jordan Jr v.<br>E&R Towing |
| Consolidated Cases | |
| Proceeding Type | Petition for Review under 19(b)<br>Remand Arbitration |
| Decision Type | Commission Decision |
| Commission Decision Number | 24IWCC0596 |
| Number of Pages of Decision | 14 |
| Decision Issued By | Stephen Mathis, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Zachary Kerska |
| Respondent Attorney | Miles Cahill |

DATE FILED: 12/11/2024

/s/Stephen Mathis, Commissioner

Signature

STATE OF ILLINOIS )
) SS.
COUNTY OF COOK )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TIMOTHY JORDAN, JR.,

Petitioner,

vs. NO: 23 WC 020944

E & R TOWING,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission modifies the Arbitrator's Decision and limits the prospective medical care awarded by the Arbitrator to the evaluation and treatment of Petitioner's left eye by an ophthalmologist. Petitioner testified that at the time of the work-related accident a towing winch cable snapped and hit him in the face. Petitioner was transported to St. Bernard Hospital where he was treated and released with instructions to follow-up with an eye specialist. Following the accident Petitioner experienced pain and visual difficulties in his left eye.

At the time of his release from St. Bernard's emergency department he was provided with a referral to Dr. Laura Sanders, M.D. Petitioner was provided with an eye patch and directed to see Dr. Sanders as soon as possible. Petitioner testified that he did not follow up with Dr. Sanders due to financial hardship and transportation issues.

The Commission finds that the referral from St. Bernard's for examination and treatment of the traumatic injury Petitioner received to his left eye was specific, the need for this treatment was related to the facial injury that Petitioner sustained on August 4, 2023. and that this referral still remains pending. For these reasons the Commission awards prospective medical care for the evaluation and treatment of the left eye for injuries arising from the August 4, 2023, work-related accident.

The several additional follow-up recommendations made by AMCI over their course of treatment, to other medical specialties i.e. mental health, neurology, interventional pain management, are denied relying on *Plantation Manufacturing Co. v. Industrial Comm'n,* 178 Ill.2d 595 (1998). In *Plantation* the Commission and the Appellate Court specifically found that the findings of Petitioner's need for care and the specificity of the recommendations of the physician would warrant and support the necessity of prospective medical care. In the present case the Commission finds that Petitioner failed to meet his burden of proof on the specificity of a treatment plan from AMCI and causal connection of the work-related injury to the prospective medical care sought.

The Commission further modifies the Arbitrator's Decision on the award of temporary total disability benefits to Petitioner. The Arbitrator's award purports to award ongoing total temporary disability benefits beyond the last date of arbitration without any finding as to any factual basis for that award of TTD. It is well settled law that awards of the Commission cannot be based on speculation or conjecture. The Arbitrator's award as written authorizes TTD beyond the date of Arbitration As such it is necessarily based upon speculation and conjecture and has been rejected by the courts in *Sylvester v. IWCC* 197 Ill.2d 225 (2001). The Commission therefore modifies the award of TTD benefits to commence August 5, 2023, through January 9, 2024. For the foregoing reasons the Decision of the Arbitrator filed March 4, 2024, is modified, all else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 4, 2024, is hereby modified as stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $20,226.20,for reasonable and necessary medical expenses subject to the medical fee schedule pursuant to Sections §8(a) and 8.2 of the Act.

IT IS FURTHER BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $474.37 per week for a period of 22 and 4/7 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 authorize and pay for prospective medical care in the form of evaluation and treatment of the traumatic injury to Petitioner's left eye as recommended at St. Bernard's emergency department's discharge instructions.

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.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $30,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

**December 11, 2024**

44
o: 9/25/24
SM/msb

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

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

/s/ *Raychel A. Wesley*
Raychel A. Wesley

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

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|---|---|
| Case Number | 23WC020944 |
| Case Name | Timothy Jordan Jr v.<br>E&R Towing |
| Consolidated Cases | |
| Proceeding Type | 19(b) Petition<br>Remand Arbitration |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 10 |
| Decision Issued By | William McLaughlin, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Zachary Kerska |
| Respondent Attorney | Miles Cahill |

DATE FILED: 3/4/2024

/s/William McLaughlin, Arbitrator

Signature

**THE INTEREST RATE FOR THE WEEK OF FEBRUARY 27, 2024 5.13%**

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)**

**Tim Jordan, Jr.** Case # **23** WC **020944**
Employee/Petitioner

v.

**E & R Towing**
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 **McLaughlin**, Arbitrator of the Commission, in the city of **Chicago**, on **January 9, 2024**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

**DISPUTED ISSUES**

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

**FINDINGS**

On the date of accident, **August 4, 2023**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**37,001.12**; the average weekly wage was $**711.56**.

On the date of accident, Petitioner was 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 $**1897.48** for TTD, $**0** for TPD, $**0** for maintenance, and $ for other benefits, for a total credit of $ **1897.48**.

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

Petitioner ***is not*** entitled to penalties under Section 19(k)

**ORDER**

**Respondent shall pay reasonable and necessary medical expenses of $20,226.20 pursuant to the Medical Fee Schedule and in accordance with Sections 8(a) and 8.2 of the Act, and as is set for below.**

**Respondent shall pay back TTD and ongoing TTD as set forth in conclusions.**

**Respondent shall authorize the treatment recommended by AMCI, including any reasonable and necessary referrals for treatment.**

**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.

-0217-2

Signature of Arbitrator

March 4, 2024

ICArbDec19(b)

**Findings of Facts**

On August 4, 2023, while working as a tow truck driver for the Respondent, E&R Towing, Petitioner was injured while a winch snapped and struck him in the face while he was hooking up a car.

As a result of the impact, he fell to the ground. A witness was in the area and an ambulance was called. Petitioner was transported to St. Benard hospital.

. On presentation to the St. Bernard ER, the petitioner reported a history of being struck on the face near his left eye while attempting to hook up a car to a tow winch. The doctors described the petitioner's history of complaints and the treatment that was provided. The records included the evaluations of the petitioner's complaints when he was evaluated at St. Bernard Hospital as documented by the medical professionals including an inventory of symptoms. On the various pages of the records, the petitioner was questioned concerning his various body parts and testing was completed of those body parts to determine if the petitioner had any clinical evidence of damage or disability.

The doctors at the St. Bernard Medical Center indicated that the petitioner at the time of his release from the ER recommended he stay off work for two weeks work. The petitioner did not testify to any other medical care or treatment from the time of his release at the St. Bernard Medical Center until his presentation to both his employer's location and the AMCI Medical Center on August 15, 2023.

At the AMCI Medical Center, the petitioner's records contain a history of the accident which indicates Petitioner said he was “hit by a winch cable while trying to tow a car". The history provided by the petitioner to

the physicians at AMCI Medical Center included a history of being struck and thrown backwards due to the force of the cable that struck him.

When evaluated by the doctors at the AMC1 Center, doctors noted numerous body parts on the initial date of accident including complaints associated with 1) concussion w/ no LOC, 2) left eye contusion, 3) cervical sprain, 4) thoracic sprain, 5) lumbar sprain and left wrist.

On October 9, 2023, the Petitioner attended a follow up. At this appointment he reported improvement with the headaches. The light sensitivity and blurred vision remained. Pain was noted with quick movements of the neck. The mid to low back pain was improving and now rated up to a 4 out of 10. The pain in the left wrist had improved to a 2 out of 10.

The cervical MRI was reviewed by DC Dale Hooten and PA Tracy Tayfel. It was noted that there were 1) multilevel spondylotic changes from C4-C7, 2) Posterior herniations from C3-4 to C6-7 are causing moderate bilateral foraminal stenosis, 3) Straightening of normal cervical lordosis may represent muscle spasm versus strain. The lumbar MRI showed disc bulge with superimposed broad based posterior herniation at L4-5 is indenting the thecal sac and causing moderate narrowing of bilateral neural foramina. These findings were felt to be related to the initial work injury. At the time the brain MRI was not completed so it was not available for review. It was noted that Petitioner may be a candidate for interventional procedures.

Petitioner was referred to a neurologist and a pain treatment professional.

Reports from the section 12 examination performed by Dr. Weber, were introduced into evidence. Dr. Weber noted that the petitioner had an excessive course of medical care with AMCI Group. Dr. Weber also noted the fact that the petitioner's subjective findings did not clinically support the evidence of any operable lesion, and it was her belief that the petitioner could return to full unrestricted work. Dr. Weber did not believe a review of Petitioner imaging was necessary for her opinion.

**CONCLUSIONS OF LAW**

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

Section1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. 820 ILCS 305/1(b)3(d). To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of his claim (*O'Dette v. Industrial Commission*, 79 Ill. 2d 249, 253 (1980), including that there is some causal relationship between his employment and his injury. *Caterpillar Tractor Co. v. Industrial Commission*, 129 Ill. 2d 52, 63 (1989). Decisions of an arbitrator shall be based exclusively on evidence in the record of proceeding and material that has been officially noticed. 820 ILCS 305/1.1

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. Credibility is the quality of a witness which 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 (1968). Internal inconsistencies in a claimant's testimony, as well as conflict's between the claimant's testimony and medical records, may be taken to indicate unreliability. *Gilbert v. Martin & Bayley/Hucks*, 08 ILWC 004187 (2010).

The Arbitrator considered all the evidence presented and found the Petitioners testimony to be credible and consistent with the medical evidence presented.

**(F) WHETHER THE PETITIONERS CURRENT CONDITION OF ILL-BEING CAUSUALLY RELATED TO HIS INJURY. THE ARBITRATOR FINDS AS FOLLOWS:**

The Arbitrator finds the Petitioner has met his burden of proof by the preponderance of the evidence that his current condition is causally connected to the injury of 8/4/2023.

A chain of events suggesting a causal connection may suffice to prove causation. *Consolidation Coal Co. v. Industrial Comm'n,* 265 Ill. App. 3d 830, 839, 639 N.E.2d 886, 892, 203 Ill. Dec. 327 (1994). Prior good health followed by a change immediately following an accident allows an inference that a subsequent condition of ill-being is the result of the accident. *Navistar International Transportation Co. v. Industrial Comm'n*, 315 Ill. App. 3d 1197, 1205 (2000).

Petitioner introduced medical records which demonstrate a clear and unbroken chain of complaints of injury to his left eye, face, neck, lumbar and left wrist and that his ongoing issues were caused by his workplace injury. Arbitrator also considered Petitioners statement Petitioner Dr. Weber that he had never been injured at work before. (*Rx8 p. 30.)*

After being struck in the face by a cable Petitioner immediately sought care at St. Bernard's hospital emergency department complaining of face pain on the date of injury after being transported by ambulance. At St. Benard his facial wound was cleaned, and an eye patch was applied. An x-ray was also ordered of Petitioner's head and ocular orbit. (*Px1 p. 6-8).* He was given prescription Tylenol and discharged by Dr.

Pimente with orders to follow up with a referred doctor or his PCP. The Petitioner testified that he received the name of AMCI from the emergency department at St. Bernard's Hospital. (Tr. *19)*.

The initial AMCI appointment occurred on 8/15/2023, 11 days after the initial injury. At AMCI he reported being struck in the face after a steel cable snapped while he was attempting to tow a car. This lifted off him off his feet, caused him to fall to the ground onto his back while striking his last wrist on the ground while bracing himself. (*Px2 p. 44)*. He was diagnosed with 1) concussion with no loss of consciousness, 2) left eye contusion, 3) cervical, 4) thoracic and 5) lumbar sprain and 6) left wrist sprain. To treat the injuries his doctors ordered a course of physical therapy, fitted Petitioner with a wrist brace and prescribed the medications meloxicam, cyclobenzaprine and lidocaine cream. Referrals were also given to an eye specialist, a neurologist and a mental health specialist. The Petitioner was taken off work. (*Px2 p. 44-46)*.

On 9/13/2023, AMCI ordered x-rays of the cervical, thoracic, lumbar spine as well as the left wrist and MRIs of the brain, cervical and lumbar spine in response to the Petitioner's persistent and worsening pain. (*Px1 p. 54)*.

The results of the X-rays and MRIs were reviewed with Petitioner on 10/9/2023. (*Px2 p. 69-72)*. All x-rays were unremarkable for fracture. The lumbar MRI showed disc bulging at L4-L5 and L5-S1 indenting the thecal sac and causing mild narrowing of bilateral neural foramina. The cervical MRI showed multilevel posterior disc herniations from C3-C4, and C6-C7. The brain MRI was normal. (*Px2 p. 70)*. PA Tracy Tayfel through DC Dale Hooten at AMCI reviewed the lumbar and cervical MRI's and believed the MRI findings were causally related to the initial incident and recommended further treatment. (*Px2 p. 71)*.

Arbitrator did consider the Section 12 examination of Dr. Kathleen Weber. The petitioner was examined by Dr. Weber on 10/30/2023. Dr. Weber believes that there is no ongoing causal connection to the Petitioner's claimed cervical, thoracic and lumbar spine injuries. She based some of her conclusion on the documentation from the emergency room was void of complaints or objective findings related to the cervical thoracic and lumbar spine. Despite considering the head x-ray which was given to the Petitioner on 8/4/2023, in response to tenderness the Petitioner reported head and face pain. (Rx.*8)*.

The Arbitrator also considered the Dr.'s failure to review any MRIs of the Petitioner. For those reasons, the Arbitrator gives less weight to the conclusions of Dr. Weber

Arbitrator gives greater weight to the physicians at AMCI who causally related the objective findings on MRI and the 8/4/2023 work injury.

The Arbitrator notes the Petitioner followed through with his treatment recommendations, until 10/17/2023, at which time his of TTD benefits were stopped and he could no longer afford to transport himself to treatment. (*Tr.71).* He testified that he would have gone to all of his appointments, and he would attend all of his referrals if TTD was paid allowing him to transport himself. (*Tr. 72)*.

Based on the above reasoning, the Arbitrator finds that the Petitioner has met his burden in showing that the injuries to his lumbar, thoracic and cervical spine, left wrist, head, concussion and PTSD symptoms are causally related to the 8/4/2023 work injury.

**(G) WHAT WERE THE EARNINGS, THE ARBITRATOR FINDS AS FOLLOWS:**

A stipulation sheet was submitted where the petitioner contended an average weekly wage of $1,250.00. The Respondent had disputed the petitioner's claim of an average weekly wage. In the presentation of his case, the petitioner did not present any testimony associated with his hourly rate and the typical number of hours worked or any incentive or bonus program. The Respondent introduced the records of the petitioner's earnings from the time of his initiation of employment with the Respondent in October of 2022 through the time of his accident of August 4, 2023. No questions presented by the petitioner or his attorney as it relates to wage calculations or earnings level noted in Rx. 4. No testimony was introduced as it relates to the petitioner's typical or normal work week, work hours or wage payment rate. The Arbitrator notes the calculations of the petitioner's gross earnings in the time preceding the accident for a period of 42 weeks entitled to corresponding TTD rate of $474.37.

**(J) WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES? THE ARBITRATOR FINDS AS FOLLOWS:**

The Arbitrator finds that the Petitioner has proven by the preponderance of the credible evidence that the medical services provided were reasonable and necessary. In doing so, the Arbitrator refers to above mentioned

reasoning as well as notes the emergency care provided by St. Bernard's hospital, and the medical opinions of AMCI, Dale Hooten DC and PA Natalie Dillman and the lack of evidence provided to the contrary.

Regarding outstanding bills, the Arbitrator finds the Respondent to pay the outstanding bills contained in Petitioner's consolidated billing exhibit, which the Arbitrator finds to be reasonable and necessary charges for treatment related to the work injury per the fee schedule. Bills are awarded to Petitioner totaling $12,592.00 due to AMCI, $1,252.00 to St. Bernard's Hospital and $6,382.20 to FedRx. The total amount awarded is $20,226.20.

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

As the Arbitrator has found that the medical services of St. Bernard's Hospital and AMCI were reasonable and necessary, and has adopted the medical opinion of the Petitioner's treating physician, the Respondent shall authorize and approve any reasonable and related treatment related to the work injury

**(L) WHAT TEMPORARY TOTAL DISABILITY BENEFITS ARE IN DISPUTE? THE ARBITRATOR S**

The Petitioner has proven by the preponderance of the credible evidence that he was temporarily totally. disabled from 8/15/2023 when he was first noted to be off work by PA Natalie Dillman. Records and notes submitted into evidence notes show Petitioner was placed off work by his physicians starting. 8/15/2023. He still has not been released to work by his treating physicians.

The Arbitrator therefore awards Petitioner TTD from 8/15/2023 until ongoing until he is released to work by his doctors.

Respondent submitted into evidence their Exhibit 7, which shows evidence it paid TTD from 8/5/2023 to 9/1/2023 in the amount of 1897.48. The Petitioner testified to receiving some TTD benefits. The parties agreed the Respondent shall be entitled to a credit in this amount.

The Arbitrator TTD should have been received by Petitioner through 2/9/2023 and

until he is released from care and able to return to work

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**(M) SHOULD PENALIES AND FEES BE IMPOSED? THE ARBIRTATOR FINDS;**

The petitioner's attorney has filed a claim for Penalties and Attorney's Fees based upon the nonpayment of TTD expenses after the date of September 1, 2023. The petitioner's attorney has filed a claim for Penalties and Attorney's Fees based upon the nonpayment of TTD expenses after the date of September 1, 2023. The petitioner had actually modified his claim for TTD benefits to begin on September 1, 2023, through the date of trial, despite the date of accident occurring on August 4, 2023.

An award of Penalties and Attorney's Fees would be justified when the Commission can make a finding that Respondent has acted in an unreasonable or unjustified manner. Penalties and Attorney's Fees under Sections 16 and 19(k) are deemed to be an actual penalty requiring some finding of fault or a conscious disregard of the facts. In this instance, the Arbitrator finds causation causal connection and the reasonableness of the medical care and TTD finds that the conduct of the Respondent was not unreasonable and unjustified.

Penalties claims under Section 19 are subject to a lower standard in light of the fact that the statutory language at Section 19(l) does not require an actual finding of an unreasonable and unjustified conduct. In the case of *Yellow Freight v. Industrial Commission*, Appellate Court held that a 19(l) penalty could be considered in the nature of a late penalty rather than an actual finding of willful conduct. In this instance, significant questions existed relating to the reasonableness of the petitioner's ability to return to work pursuant to the terms of the release provided by St. Bernard Hospital and the petitioner's initiation of his medical care with the doctors at the AMCI Medical Group.

The Arbitrator finds that reasonable questions exist associated with the petitioner's entitlement to TTD and medical and although the Arbitrator has awarded TTD expenses beyond that of the amount voluntarily paid by the Respondent before the trial of the matter, the Arbitrator finds that those benefits were not unreasonably or unjustifiably delayed. Accordingly, the Arbitrator denies the petitioner's claim for all sections of Penalties and Attorney's Fees under the terms of the Worker's Compensation Act.

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**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 20WC009228 |
| Case Name | James Lloyd v.<br>State of Illinois - Menard Correctional Center |
| Consolidated Cases | |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 24IWCC0597 |
| Number of Pages of Decision | 35 |
| Decision Issued By | Kathryn Doerries, Commissioner,<br>Maria Portela, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Thomas C Rich |
| Respondent Attorney | Kenton Owens |

DATE FILED: 12/12/2024

/s/Maria Portela,Commissioner
Signature

DISSENT: /s/Kathryn Doerries,Commissioner
Signature

STATE OF ILLINOIS )
) SS.
COUNTY OF )
WILLIAMSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JAMES LLOYD,

Petitioner,

vs. NO: 20WC009228

SOI – MENARD CORRECTIONAL CENTER,

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

We affirm the Arbitrator's permanent partial disability awards but change the analysis of two of the five factors in §8.1b(b) of the Act. We modify factor (iv) to give it no weight. Regarding factor (v), we clarify that Dr. Bradley's March 17, 2022 record is not in evidence and add "Petitioner testified that his symptoms are very minimal and he is happy with his recovery. *T.21*."

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 28, 2023 is hereby affirmed and adopted with the changes outlined above.

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

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

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

**December 12, 2024** /s/ *Maria E. Portela*

SE/ /s/ *Amylee H. Simonovich*
O: 10/29/24
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DISSENT

I respectfully dissent from the opinion of the majority and would reverse the Decision of the Arbitrator. I view the evidence differently and would find that Petitioner failed to prove his bilateral carpal tunnel and cubital tunnel syndrome were causally related to his employment activities. Petitioner did not have any symptoms with his hands or upper extremities during the four-year period he worked as a correctional officer from December 2011 through May 2015. Petitioner received a promotion with supervisory duties as a correctional sergeant in May 2015 and later received a second promotion with increased supervisory duties as a correctional lieutenant in August 2017. Petitioner did not develop symptoms until sometime in 2017; about two years after he received his first promotion. Additionally, Petitioner's job duties varied, and between September 2015 and May 2017, Petitioner worked in the armory which did not require significant use of the hands or arms. Before working in the armory, Petitioner spent three months in 2014 working on a catwalk which did not require significant use of the hands. His testimony asserting his physical demands as a correctional sergeant and lieutenant were the same as those of a correctional officer was contradicted by the documented history in the early treatment records and other evidence. Petitioner also failed to present sufficient detailed information regarding the frequency with which he used his hands. Furthermore, Petitioner's treating surgeon did not possess an adequate knowledge of Petitioner's employment activities to render a credible causation opinion. The treating surgeon also incorrectly believed Petitioner did not have any non-occupational risk factors for carpal tunnel and cubital tunnel syndrome when in actuality the early treatment records documented frequent use of alcohol and a past history for cigarette smoking. The treating surgeon also testified that Petitioner did not have a weight-related risk factor despite the early treatment records showing a BMI of 27.12 which placed Petitioner in the overweight category.

In this panel's recently issued decision of *Fenton vs. Graham Correctional Center*, 24 IWCC 0528 (filed November 12, 2024), this Commission determined the claimant failed to prove his bilateral carpal tunnel and cubital tunnel syndrome were causally related to his job duties as a correctional officer, and in so finding, we noted the claimant was "able to provide a

list of the duties" he performed; however, there was no testimony as to the frequency he performed those duties other than vague references to multiple times throughout the day. *Id.* We further observed in *Fenton* that "a key element to proving a repetitive trauma theory is producing clear and detailed evidence of the manner and means in which the work activities alleged to have constituted the repetitive trauma were performed." *Id.* The Commission also found that the treating surgeon possessed only a vague and general description of the claimant's job duties. *Id.* Like the claimant in *Fenton*, I find Petitioner's evidence in the present case similarly deficient.

Petitioner testified he obtained employment with the Department of Corrections after serving in the US Army. After completing his training at the academy, Petitioner's first assignment commenced in December 2011. (T. 26) Respondent admitted into evidence a Staff Assignment History report showing Petitioner's first assignment commenced December 3, 2011. (RX2 at 4) Petitioner testified he was initially employed as a correctional officer for a period of four years from 2011 to 2015. (T. 10, 27) During that period, Petitioner worked in a gallery. (T. 12, 27) Petitioner was presented with a job analysis prepared by Corvel and testified the report accurately reflected his job duties. (T. 10-11) The Corvel Job Analysis report was completed February of 2011 and summarized the job duties for several different work assignments and locations within the facility at Menard Correctional Center. The report did not, however, document the frequency with which the hands and arms were required. (PX10) During his four-year stint as a correctional officer, Petitioner did not have any problems or symptoms involving his hands or upper extremities. (PX3 at 8; Patient Questionnaire/Health History reported symptoms began in 2017.)

Petitioner received a promotion to the position of correctional sergeant in 2015. (T. 14, 27) The Staff Assignment History report reflects Petitioner became a sergeant in May 2015. (RX2 at 3) Petitioner testified he held that position for approximately two years. (T. 14) There was no job description or job analysis for correctional sergeants introduced into evidence. Petitioner testified he continued to perform the same job duties as those of a correctional officer; however, his testimony on this point was contradicted by the history documented in the early treatment records and other evidence. (T. 14-15; PX4 at 2) After promoting Petitioner to the rank of sergeant, Respondent transferred Petitioner from the maximum security unit to the medium security unit. (T. 27) This transfer did not take place immediately; however, Petitioner testified he spent the majority of his two-year stint as a sergeant in the medium security unit. (T. 27-28) Petitioner first noticed symptoms in his hands and upper extremities in 2017; however, he did not seek treatment until March of 2020. Petitioner wrote his symptoms began in "2017" on a patient intake questionnaire he completed when he first sought treatment. (PX3 at 8)

In 2017, Petitioner received a second promotion to the position of correctional lieutenant. (T.15) The Staff Assignment History report reflects Petitioner became a lieutenant in August 2017. (RX2 at 2) Petitioner testified he supervised upwards of eight to ten employees per cell house. (T. 16) Petitioner further testified he performed the "same amount of physical work" when promoted to the rank of lieutenant with a "little bit more" of office work, writing reports, and more computer work; however, this too was contradicted by the early treatment records. (T. 15-16; PX4 at 2) Petitioner did not specify whether the symptoms he first experienced in 2017 started before or after his second promotion to the rank of lieutenant. In any event, Petitioner's

job duties as a sergeant between 2015 and 2017 were already supervisory in nature. As documented by Dr. Kutnik:

> The patient works for the Menard Illinois Department of Corrections as a lieutenant. He has been there for nine years on a full-time basis. He currently is in a supervisory role and has been *for about the last two and a half years doing mostly computer work.* As a sergeant *prior to this, he was more involved with the supervision* and care of inmates. (PX4 at 2) (Emphasis added)

Petitioner testified his job duties as a correctional officer required bar rapping with a metal rod to check the inmate cells for loose cell bars. (T. 11) According to the Corvel job analysis, this task was performed only one time per shift. (PX10 at 4) Petitioner testified the bar rapping produced a vibration and rumbling in his hand and arm; however, Petitioner failed to describe the number of inmate cells he was required to rap per shift. Petitioner testified he used Folger Adams Keys to lock and unlock the cells. (T. 11-12) Petitioner testified the inmate cells were equipped with chuckholes used for delivery of food and interactions between the inmates and staff. (T. 12) Petitioner testified that the cell doors and chuckholes did not work well because the facility was over 100 years old. (T. 12-13) Petitioner further testified that sometimes the cell doors had to be yanked and pulled forcibly. (T. 13) Petitioner did not, however, describe the number of cells there were in the gallery he was assigned and he did not describe the number of times he opened and locked cell doors, nor did he describe the number of times he used the chuckholes. Petitioner testified he worked the 3:00 p.m. to 11:00 p.m. shift and he agreed there was less movement of inmates during that shift compared with the earlier 7:00 a.m. to 3:00 p.m. shift. (T. 27)

Petitioner testified he also performed searches of the inmates' property boxes. (T. 14) This task is performed to ensure the inmates are not in possession of contraband. Petitioner did not describe the size, weight or contents of the property boxes, though presumably the property boxes contain books, magazines, letters, photos, clothing and commissary items. Petitioner did not describe how often he conducts these searches. Aside from "going through an inmate's property," Petitioner did not describe any physical demands or difficulties associated with those inspections. Petitioner denied lifting and he denied bending and stooping on a questionnaire entitled "Detailed Job Description." (PX7) Petitioner further testified he performed shakedowns, which again were inspections to ensure the inmates did not possess contraband or objects that can be used as weapons. (T. 15) The Corvel Job Analysis indicated that shakedowns were performed two times per day with two correctional officers performing that task in each gallery. (PX10 at 6) Petitioner did not describe the physical demands associated with shakedowns.

Petitioner introduced into evidence a "Work History Timeline" questionnaire. (PX8) Petitioner described his duties as a correctional officer as providing security, maintaining and controlling the movement of the inmates, and deadlocking the cells with a key and pushing/pulling the cell doors to ensure they were secured. (PX8 at 2) Petitioner did not describe the number of cells or how often during the course of a shift he performed these tasks. With his promotion to correctional sergeant, Petitioner assumed direct responsibility for housing units/cell houses during his shift. (PX8 at 1) Petitioner described himself as the lead worker who assisted in the orientation of new officers and supervising all assigned officers. Petitioner further

indicated his job as a correctional sergeant required he conduct tours throughout the cell house and ensure the cell doors were secured. He also enforced and maintained discipline and sanitary and custodial measures. With his promotion to correctional lieutenant, Petitioner was responsible for supervising the sergeants. Petitioner maintained and enforced discipline and oversaw safety, sanitary, and custodial measures. (PX8 at 1) As a lieutenant, Petitioner also conducted performance evaluations, audits, and handled roster management and overtime equalization. He also oversaw compliance with departmental rules and directives. (PX8 at 1)

Petitioner testified he gradually began to notice symptoms which worsened over time. On direct examination, Petitioner testified he first consulted with an attorney, Thomas Rich, before seeking treatment. (T. 17) His attorney sent him to Dr. Phillips for nerve testing. (T. 24) Petitioner presented for EMG testing with Dr. Phillips at Neurological & Electrodiagnostic Institute on March 5, 2020. (PX3) At Dr. Phillips' office, Petitioner completed a "Patient Questionnaire/Health History" form. In response to the questions posed, Petitioner complained of numbness and tingling in the arms and hands and reported his symptoms began in "2017." (PX3 at 8; T. 84) He did not specify when in 2017 his symptoms began; though Petitioner indicated he had similar symptoms in the past on more than one occasion. (*Id*.) He reported that typing and turning of hands/arms "aggravated" his symptoms; however, Petitioner circled "unknown" when asked how his symptoms occurred. Petitioner listed his height as 6'0" and weight as 210 pounds. (PX3 at 9) He identified his occupation as a full time lieutenant with IDOC. *(Id*.) Petitioner also listed his hobbies as hunting, fishing, golf, and construction. (*Id*.) Petitioner did not testify regarding the extent and frequency of his outside hobbies. The EMG test showed findings consistent for bilateral carpal tunnel and bilateral cubital tunnel syndrome.

Also on March 5, 2020, Petitioner completed a questionnaire entitled "Detailed Job Description." (PX7) Petitioner indicated he pulled and pushed doors on a daily basis, with the doors varying in weight from 5 to 70 pounds. He did not describe the number of doors he opened and closed each day. He did not describe how often he opened and closed doors at the higher end of this weight range. Petitioner reported he also turned the cell lights on and off on a daily basis; however, he never testified to any problems associated with the light switches. Petitioner further indicated he used keys to open padlocks and cell doors on a daily basis, though he did not describe the number of locks and doors he keyed. Petitioner also reported he spent two hours each day typing reports, evaluations, and checking email. Petitioner did not perform any lifting or loading/unloading.

On March 27, 2020, Petitioner reported a work injury involving his wrists and elbows and completed a "Workers' Compensation Employee's Notice of Injury" report. (T. 18; RX2 at 5-6) Petitioner attributed his injury to repetitive motion of turning keys and typing. Petitioner listed March 5, 2020 (the date of the EMG/NCV test), as the date of accident (manifestation date). Petitioner testified that his attorney, Mr. Rich, sent him to Dr. Kutnik and then to Dr. Bradley. (T. 17)

Petitioner presented to Dr. Kutnik for evaluation on April 13, 2020. (PX4 at 2-3; T.86-87) Dr. Kutnik documented an approximate 5-year history of upper extremity numbness and tingling. (PX4 at 2) This places the start of his symptoms in 2015; however, I place greater reliability on Dr. Phillips' records since Petitioner entered "2017" in his own handwriting on the intake form.

Per Dr. Kutnik's documented history, Petitioner had worked at Menard Illinois Department of Corrections for nine years. As mentioned above, Petitioner reported he served in a supervisory role "*doing mostly computer work*" for the past two and a half years. (PX4 at 2) (Emphasis added) Before that, Petitioner worked as a sergeant where "*he was more involved with supervision* and care of inmates." *Id.* (Emphasis added) Dr. Kutnik noted Petitioner's bilateral upper extremity symptoms began insidiously and worsened over time. *Id*. Dr. Kutnik documented a BMI of 27.12 which falls in the "overweight" category. Dr. Kutnik also noted Petitioner was a frequent "ETOH" user and had a past history for cigarette smoking. *Id*. Dr. Kutnik did not document any causation opinions and his records did not provide any detailed information regarding Petitioner's employment activities.

Petitioner presented to Dr. Bradley on November 8, 2021. (PX5) Dr. Bradley indicated Petitioner had worked as a correctional officer and was now a lieutenant. Dr. Bradley further indicated Petitioner's job duties required repetitive use of the hands which involved opening doors and cells, typing various reports and evaluations. Dr. Bradley commented that Petitioner's job duties utilized fine motor skills to use the keys and locks on cuffs. Dr. Bradley then noted: "Per his report he estimates the repetitive use of his hands 7 to 12 times per hour." (PX5 at 2) Dr. Bradley documented a height of 6'0" and weight of 215 pounds. Dr. Bradley provided a causation opinion in his initial treatment visit record, stating Petitioner's 10-year work history contributed to the development of carpal tunnel and cubital tunnel syndrome. Dr. Bradley noted his opinion was based on the information provided to him and the medical records. (PX5 at 3)

On cross-examination, Petitioner was asked whether the medium security unit was constructed in the 1980s. Petitioner was unable to say when the medium security unit was built but he agreed its construction was completed during the 20th century. (T. 28) Petitioner further agreed that the medium security unit was equipped with electronic control pods enabling the locks to pop open with the press of a button. (T. 29) Petitioner agreed there was much less use of keys in the medium security unit, depending on whether the locking mechanisms were operating. (T. 29) Petitioner further agreed that his role as a correctional sergeant did not require the bar rapping of cells as that task was performed by the correctional officers he supervised. (T. 30) As noted above, Petitioner transferred to the medium security unit with his promotion to sergeant in 2015, about two years before he noticed symptoms in 2017.

Petitioner also agreed there were periods where he as assigned to the catwalk. (T. 31) Working on the catwalk involved observing the staff and monitoring any massive line movements of the inmates to prevent incidents if necessary. The Staff Assignment History shows Petitioner was assigned to the catwalk for a period of three months in 2014 when employed as a correctional officer. (RX2 at 3) The Corvel Job Analysis described the catwalk as similar to a train track going around the outer edge of the gallery from where the officer stands above the areas where the inmates move out of their cells. (PX10 at 6) Petitioner agreed he did not lock or unlock cell doors when assigned to a catwalk. (T. 31) Petitioner further agreed he did not perform any bar rapping when assigned to a catwalk. (T. 31) Petitioner testified he was also assigned to the Sallyport which was the entrance to the facility for trucks. (T. 35)

Petitioner agreed he was also assigned to work in the armory as a correctional sergeant. (T. 35) Petitioner agreed that working in the armory involved checking out keys and munitions for the facility. (T. 35) As reflected in the Staff Assignment History, Petitioner worked in the armory for a cumulative period of 21 months in the armory between September 2015 and May 2017. (RX2) Those time periods in the armory were as follows:

| | | | |
|---|---|---|---|
| * | 09/16/15 | to 11/28/15 | 2 months and 13 days (10-4/7 weeks) |
| * | 12/02/15 | to 07/20/16 | 7 months and 19 days (33-1/7 weeks) |
| * | 08/19/16 | to 11/9/16 | 2 months and 22 days (11-6/7 weeks) |
| * | 11/11/16 | to 5/28/17 | 6 months and 18 days (28-3/7 weeks) |

This is significant as Petitioner worked with limited use of the hands and with little force required for about two years preceding the onset of his symptoms sometime in 2017 (21 months in armory and 3 months on catwalk). As mentioned above, Petitioner received a second promotion to lieutenant in August 2017, about two and half years before he sought treatment.

On further cross-examination, Petitioner agreed that his job duties as a lieutenant were less hand intensive than those of a correctional officer. (T. 33) Petitioner agreed his job as a lieutenant was more supervisory in nature. (T. 33-34) Petitioner also agreed that the job duties for correctional officers, correctional sergeants, and correctional lieutenants were varied. (T. 34) On re-direct, Petitioner testified that regardless of his staff assignments, it was customary to be pulled from an assignment to perform other duties for institutional needs; however, he did not explain how often this occurred. (T. 37)

Dr. Bradley testified via deposition on September 16, 2022. Dr. Bradley testified he relied upon his medical records and those of Dr. Kutnik in forming his opinions in this matter. (PX9 at 5) Dr. Bradley testified he obtained a history from Petitioner which he documented in the "History of Present Illness" section of his records. In that section, Dr. Bradley indicated that Petitioner estimated he used his hands between 7 and 12 times per hour. (PX5 at 2) Dr. Bradley identified the "big three" non-occupational risk factors associated with carpal tunnel and cubital tunnel syndrome, those being gender/age (female over the age of 40), diabetes, and thyroid disorder. (PX9 at 7) Dr. Bradley then testified that Petitioner *did not have any known risk factors or comorbidities* associated with carpal tunnel and cubital tunnel syndrome. (PX9 at 8, 12) Regarding causation, Dr. Bradley testified that Petitioner worked with IDOC for ten years in various different capacities, many of which contribute to the development of carpal tunnel and cubital tunnel syndrome. (PX9 at 11) On cross-examination, Dr. Bradley testified he is board certified in orthopedic surgery but does not possess an added certification for hand surgery. (PX9 at 14) Asked to identify the job duties that contributed to Petitioner's conditions, Dr. Bradley testified the activities Petitioner "listed" involved unlocking of cell doors and locks, pushing and opening cell doors. Dr. Bradley further testified that Petitioner "was on a tactical team and so he had the firing and cleaning and preparation of the weapons." (PX9 at 17) As to the latter, Petitioner never described serving on a tactical team and he never testified to performing repetitive weapons cleaning or frequent firing of weapons as part of his duties as an IDOC

employee. Petitioner did describe serving as master gunner in the US Army; however, that was many years prior to the onset of Petitioner's symptoms and Petitioner never testified to any issues associated with weapons cleaning or firing of weapons. Dr. Bradley testified it was his understanding that the physical demands at the "minimum" security unit were less hand intensive compared to the maximum security unit. (PX9 at 18) Dr. Bradley admitted he did not have any idea what job duties and tasks were involved when working in the armory. (PX9 at 18) Dr. Bradley testified that Petitioner's computer keyboarding did not play a role in the development of his carpal tunnel and cubital tunnel syndrome, though computer use may produce symptoms once a patient has the condition. (PX9 at 21)

Dr. Bradley's testimony that Petitioner did not have any risk factors for carpal tunnel and cubital tunnel syndrome was factually incorrect. Despite saying he possessed Dr. Kutnik's records, Dr. Bradley overlooked Petitioner's status as a "former smoker." (PX4 at 2). Cigarette smoking (current and past usage) is a known risk factor. See e.g., *Noonan vs. Illinois State Police*, 16 IWCC 469; 2016 Ill. Wrk. Comp. LEXIS 359 ("Dr. Greatting was also of the opinion that smokers are at an increased risk of developing carpal tunnel syndrome and petitioner had been a smoker."); *McGuire Vs. St. Clair County*, 11 IWCC 1241; 2011 Ill. Wrk. Comp. LEXIS 1334 (Dr. Mirly "admitted that smokers were more prone to develop carpal tunnel syndrome."); and *Rutledge vs. ADM Trucking*, 2010 Ill. Wrk. Comp. LEXUS 353 (Dr. Fletcher noted many non-occupational risk factors, including claimant's history as a former smoker). Dr. Bradley also overlooked Petitioner's reported "frequent ETOH" consumption. (PX4 at 2) Depending on the extent of consumption, alcohol can also be a risk factor. See e.g., Roberts vs. Peoria Roofing, 16 IWCC 47; 2016 Ill. Wrk. Comp. LEXIS 75 (Dr. Neal testified that alcohol consumption was a risk factor for cubital tunnel syndrome); *Williams vs. Secretary of State*, 14 IWCC 328; 2014 Ill. Wrk. Comp. LEXIS 335 (Dr. Young testified that alcohol consumption was a potential contributory factor for development of carpal tunnel syndrome). Dr. Bradley also testified that Petitioner was not overweight. (PX9 at 8). The records of Dr. Kutnik, however, documented a BMI of 27.12 which placed Petitioner in the overweight category (BMI of 30 and over is obesity). (PX4 at 2) Dr. Bradley's knowledge and understanding of Petitioner's employment activities was limited and lacking in detail. Dr. Bradley was unaware of the 21 months Petitioner was assigned to the armory. Dr. Bradley was also unaware of the time Petitioner was assigned to the catwalk. These positions did not involve any significant use of the hands. Regarding Petitioner's duties as a lieutenant, which involved mostly computer work, Dr. Bradley testified that Petitioner's computer keyboarding did not contribute to the development of carpal tunnel and cubital tunnel syndrome. (PX9 at 21)

In repetitive trauma cases, the issues of accident and causation are intertwined with both issues resolved together. *Boettcher vs. Spectrum Property Group*, 99 IIC 0961; 1999 Ill. Wrk. Comp. LEXIS 409; *Simpson vs. State of Illinois Department of Human Services*, 18 IWCC 255; 2018 Ill. Wrk. Comp. LEXIS 108. Put another way, in repetitive trauma cases there can be no accidental injury arising out and in the course of employment without a causal connection established by credible medical evidence. Thus, at the heart of a repetitive trauma case, the overarching question presented is whether the employment activity was "repeated sufficiently to cause the injury." *Edward Hines Precision Components v. Industrial Comm'n*, 356 Ill. App. 3d 186, 194, 825 N.E.2d 773 (2005). A claimant seeking compensation under a repetitive trauma theory "must prove that his physical structure gave way under the repetitive stresses of his usual

work tasks." *Darling vs. Industrial Comm'n,* 176 Ill. App. 3d 186, 192, 530 N.E.2d 1135 (1988). Claimants alleging injury based on repetitive trauma must still meet the same standard of proof as in claims involving a single traumatic accident. *Peoria County Bellwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524, 530, 505 N.E.2d 1026 (1987); *Williams vs. Industrial Commission*, 244 Ill. App. 3d 204, 209, 614 N.E. 177 (1993). There must be a showing that the disabling injury or condition was related to the employment and not the result of a normal degenerative process. *Peoria County Bellwood Nursing Home vs. Industrial Commission*, 115 Ill. 2d at 530 (1987); *Williams vs. Industrial Commission*, 244 Ill. App. 3d 204, 209 (1993).

In assessing causality, the Commission may consider evidence, or the lack thereof, of the manner and method of a claimant's job to determine if the employment duties were sufficiently repetitive to establish a compensable injury. *Williams vs. Industrial Comm'n*, 244 Ill. App. 3d 204, 211, 614 N.E.2d 177 (1983). The Commission may also consider the degree to which the employment activity varied. *Id*. at 209. Although evidence of variability in the employment activities can and should be considered, the variability of the tasks involved does not necessarily negate causation if the employment activities taken as a whole are repetitive in nature. *City of Springfield vs. Ill. Workers' Comp. Comm'n*, 388 Ill. App. 3d 297, 901 N.E.2d 1066 (2009). In *City of Springfield*, the Court noted that "although the evidence showed that claimant's work was not repetitive in the sense that he worked on an assembly line and performed the same task over and over again, claimant's work was repetitive enough to support the finding that claimant suffered a repetitive trauma injury." *Id.* at 314 It is also well settled that there is no minimum legal requirement that a certain percentage of the workday be spent on repetitive tasks in order to establish the repetitive nature of a claimant's job duties. *Edward Hines Precision Components v. Industrial Comm'n*, 356 Ill. App. 3d 186, 194, 825 N.E.2d 773 (2005). That said, while there is no such minimum requirement, evidence of the frequency, force, duration of the employment activity, and the percentage of the workday devoted to such tasks is certainly relevant and may be considered. In an unpublished Rule 23 decision, *Fisher vs. Illinois Workers' Compensation Commission*, the Appellate Court clarified this point:

> Claimant contends he has set forth a 21-year course of repetitive activities. However, a number of them do not appear to be repetitive on their face. For example, claimant points to having to pull himself up into a truck. Similarly, claimant points to the fact that he "threw used materials away" and "dug with shovels." ***How many times per day did these activities occur?*** Indeed, claimant points to no evidence concerning the frequency or duration that he engaged in any activity he claims was repetitive. While "[t]here is no requirement that a certain percentage of time be spent on a task in order for the duties to meet a legal definition of 'repetitive,'" (*Edward Hines Precision Components v. Industrial Comm'n*, 356 Ill. App. 3d 186, 194 (2005)), to make out a repetitive trauma claim claimant needed to present some evidence he engaged [in] repetitive activities. *Fisher vs. Ill. Workers' Comp. Comm'n*, 2017 IL App (4th) 160929WC-U, P 20 (Emphasis added)

See also *Caterpillar Tractor Co. v. Industrial Comm'n.*, 98 Ill. 2d 400, 405-406, 456 N.E.2d 1366 (1983). Compare, *Crayton vs. State of Illinois -DHS*, 18 IWCC 683; 2018 Ill. Wrk. Comp. LEXIS 1215 (where claimant alleged non-ergonomic workstation contributed to her carpal

tunnel syndrome but failed to provide a detailed description.) The question of whether a claimant's work activities are sufficiently repetitive in nature to establish a compensable accident under a repetitive trauma theory must be decided on a case-by-case basis given the particular facts in each case. *Williams*, 244 Ill. App. 3d at 210-11.

Claimants generally rely on expert medical testimony to establish a causal connection. See *Peoria County Bellwood Nursing Home*, 115 Ill. 2d at 530. Though medical testimony is not always required, it is firmly established that expert medical testimony is necessary where the questions involved are within the experts' knowledge only and outside the knowledge of laypersons. *Nunn v. Industrial Com.*, 157 Ill. App. 3d 470, 510 N.E.2d 502 (1987) The Commission has recognized that compression neuropathy via repetitive trauma falls in this area requiring such expert testimony. *Jones vs. State of Illinois, Menard Correctional Center*, 19 IWCC 0521; 2019 Ill. Wrk. Comp. LEXIS 898, citing *Johnson vs. Industrial Comm'n*, 89 Ill. 2d 438 (1982). Expert testimony must be weighed like other evidence with its weight determined by the character, capacity, skill and opportunities for observation, as well as the state of mind of the expert and the nature of the case and its facts. *Madison Mining Company v. Industrial Comm'n*, 309 Ill. 91, 138 N.E. 211 (1923). The proponent of expert testimony must lay a foundation sufficient to establish the reliability of the bases for the expert's opinion. *Gross v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100615WC.

In repetitive trauma claims, physicians must have sufficient knowledge of the employment activities to form a credible opinion. "The Commission has determined that a claimant fails to prove causation from repetitive trauma when the treating physician testified repetitive motions caused the injuries but failed to detail what the repetitive motions the petitioner engaged in and the frequency of the motions." See *Jones*, supra, and *Rutherford vs. State of Illinois, Pinckneyville Correctional Center*, 15 IWCC 119; 2015 Ill. Wrk. Comp. LEXIS 118, both citing *Gambrel vs. Mulay Plastics*, 97 IIC 238. Medical causation opinions may also be rejected where the physician provides a causation opinion based on facts that are not in the record, or provided in response to hypothetical questions premised on a job description inconsistent with, or not supported by, the facts. *Session vs. Industrial Comm'n*, 124 Ill. App. 3d at 718 (1984), citing *Caterpillar Tractor Co. v. Industrial Comm'n*, 98 Ill. 2d 400, 405-06 (1983). See also *Tyson vs. State Journal Register*, 2010 Ill. Wrk Comp. LEXIS 65. Additionally, if the basis of an expert's opinion is grounded in guess or surmise, it is too speculative to be reliable. Expert opinions must be supported by facts and are only as valid as the facts underlying them. *In re Joseph S.*, 339 Ill. App. 3d 599, 607, 791 N.E.2d 80, 87 (2003). A finder of fact is not bound by an expert opinion on an ultimate issue and may look "behind" the opinion to examine the underlying facts.

In the present matter, Petitioner failed to provide detailed information regarding the use of his hands and arms. He never described the number of cell doors and chuckholes he opened and closed on a daily basis as a correctional officer and he failed to provide credible testimony as to the frequency of those tasks as a sergeant and then lieutenant. Petitioner testified the physical demands of his job did not diminish after his promotions; however, the evidence taken as a whole conflicts with this assertion. Petitioner's use of his hands and arms was limited with little

force required during the approximate two-year period preceding the onset of symptoms (21 months in the armory and 3 months on the catwalk). Dr. Bradley's knowledge of the employment activities and various job assignments was incomplete and he did not possess sufficient information regarding Petitioner's work history and the details of Petitioner's employment activities. Dr. Bradley also incorrectly believed Petitioner did not have any risk factors for carpal tunnel and cubital tunnel. Finally, Petitioner reported to Dr. Bradley that he used his hands between 7 and 12 times per hour which I do not find sufficiently repetitive in nature. (PX5 at 2)

Parenthetically, in forming his causation opinion, Dr. Bradley relied in part on his having previously treated IDOC workers. After admitting he did not know the job duties involved with working in the armory, Dr. Bradley testified, "I'm kind of familiar with it through multiple, multiple patients that have reported various job duties and – work at Menard – very familiar with all of them." (PX9 at 19) Dr. Bradley also testified, "I've got two patients that their sole job is to fix the locks on the gates because they're so problematic." (PX9 at 19-20) Although a degree of familiarity with a particular work environment derived from treating other patients working for the same employer can be relevant and potentially helpful, this type of evidence is not a credible supporting rationale in the absence of a detailed understanding of the claimant's employment, as each claimant's work history and activities may differ and each claimant's case must be decided on a case-by-case basis. See e.g., *Dobbs vs. State of Illinois, Menard Correctional Center*, 23 IWCC 0467; 2023 Ill. Wrk. Comp. LEXIS 582 (where the arbitrator's findings, affirmed on review, reflected, "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.")

I also wish to comment on one of the appellate court decisions cited in the arbitrator's decision and Petitioner's brief on review, *Darling vs. Industrial Commission*. In *Darling*, the Appellate Court determined that the Commission erred in demanding quantitative proof of the effort required and the exertion needed to establish causation supporting the claimant's repetitive trauma claim. *Darling vs. Industrial Comm'n*, 176 Ill. App. 3d 186, 194-195, 530 N.E.2d 1135 (1988). This ruling did not, however, set forth a blanket rule precluding the Commission from considering quantitative evidence of force, effort, frequency, and duration. Indeed, as demonstrated in *Fisher*, supra, the Appellate Court raised the rhetorical question – "*How many times per day did these activities occur?" Fisher,* 2017 IL App (4th) 160929WC-U, P 20.

In *Darling*, the claimant was employed as a machine operator when he developed left arm pain after his employer assigned him to work exclusively on a degreaser machine which required "repeated motions" to operate the hoist of the machine. The Arbitrator denied benefits and the Commission affirmed. The Appellate Court found the Commission's decision was contrary to the manifest weight of the evidence. In so ruling, the *Darling* Court found the Commission's insistence on there being quantitative evidence of "weight" and "the number of times" and the "effort required" was improper because the claimant's repetitive trauma claim was only predicated on the frequency with which "unusual" movements of the hands above the head were required to operate the degreaser machine. As such, questions concerning effort and exertion on a quantitative basis were deemed irrelevant in light of the alleged mechanism of

injury. As the Court observed, "No evidence here suggests that the *weight of the hoist* played any role in causing the repetitive trauma." *Id.* at 195. (Emphasis added) The Court thus concluded: "[t]o demand proof of 'the effort required' or the 'exertion needed' to operate the hoist would be meaningless" since "this case includes *no allegation that weight-related factors* caused the injury." *Id.* at 195. (Emphasis added) The Court found that the claimant established causation because the evidence "*demonstrate[d] the unusual nature of the movements* required by petitioner's work duties" and which are repetitive in nature. *Id.* at 195. (Emphasis added.) The Court further ruled that "no expansion of proof requirements is to be imposed in an accidental injury case *such as the present case*." *Darling*, 176 Ill. App. 3d at 196. (Emphasis added)

In the body of its decision, the *Darling* Court also observed that, even in repetitive trauma claims based on weight-related job tasks, knowing the amount of weight involved and the exact number of times the task was performed are not always necessary depending on the nature of the work, as in *Northern Illinois Gas Co. vs. Industrial Comm'n*, 148 Ill. App. 3d 48, 498 N.E.2d 327 (1986), where the employee suffered a fatal heart attack after repeatedly shoveling dirt for a full hour while digging to locate an underground pipe for natural gas service. The *Darling* Court noted that the evidence of causation was sufficient in the *Northern Illinois Gas* case without requiring the weight of each shovelful of dirt and the exact number of times the decedent lifted the shovel. *Darling*, 176 Ill. App at 196. The *Darling* Court also went on to say that quantitative proof may "carry great weight" where the work duty complained of is a "common movement made by the general public." *Darling*, 176 Ill. App. 3d at 195.

Thus, when read in its entirety, the Court in *Darling* simply noted that quantitative evidence concerning force and exertion is irrelevant where the claimant does not put forth those factors as a medical basis for the ensuing injury. Conversely, the *Darling* decision does not prohibit consideration of quantitative evidence of force and exertion, or the lack thereof, where the claimant's alleged theory of repetitive trauma rests on weight-related factors or exertional force. Additionally, quantitative evidence remains relevant where the repeated involvement of common bodily movement forms the basis for a claimant's alleged repetitive trauma. The *Darling* decision, along with the Court's decisions in *Williams*, *Edward Hines Precision Components,* and *City of Springfield*, collectively direct us to assess each repetitive trauma claim on a case-by-case basis without resorting to any precise evidentiary formula for determining whether a claimant has met his or her burden of proof.

Finally, in Petitioner's brief on review, numerous Commission level decisions are cited to demonstrate prior awards entered in favor of IDOC officers alleging repetitive trauma injuries, the implication being that Petitioner should prevail because similarly situated claimants have prevailed in the past. The existence of prior awards for claimants employed with the same employer does not eliminate or diminish the burden of proof for current and future claimants. 820 ILCS 305/1(d). Decisions of the Commission must 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). Employees seeking benefits under the Act bear the burden to prove all elements of their claims by a preponderance of the evidence, including that a causal connection exists between the condition of ill-being and the work accident. *Bahler Trucking v. Illinois Workers' Compensation Comm'n*, 2024 IL App (5th) 231008WC-U, P 64. It is my assessment that Petitioner failed to prove his claim by a preponderance of the credible evidence in this case.

For the above reasons, I dissent from the majority's opinion and would reverse the Arbitrator's decision.

/s/*Kathryn A. Doerries*

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 20WC009228 |
| Case Name | James Lloyd v. State of IL/Menard Correctional Center |
| Consolidated Cases | |
| Proceeding Type | |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 21 |
| Decision Issued By | Edward Lee, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Thomas C Rich |
| Respondent Attorney | Kenton Owens |

DATE FILED: 9/28/2023

**THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 26, 2023 5.31%**

/s/ Edward Lee, Arbitrator

Signature

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

September 28, 2023

/s/ Michele Kowalski

Michele Kowalski, Secretary

Illinois Workers' Compensation

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**

**James Lloyd**
Employee/Petitioner

v.

**State of IL / Menard Correctional Center**
Employer/Respondent

Case # **20** WC **09228**

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 **Herrin, Illinois**, on **August 2, 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 **3/5/2020**, 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 $**78,149.96**; the average weekly wage was $**1,502.88**.

On the date of accident, Petitioner was **34** years of age, ***married*** with **3** dependent children.

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

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

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

**ORDER**

Respondent shall pay Petitioner temporary total disability benefits of $1,001.92/week for 1 3/7 weeks, commencing 12/8/2021 through 12/10/2021 and from 01/14/2022 through 01/21/2022, as provided in Section 8(b) of the Act.

Respondent shall pay the reasonable and necessary medical services outlined in Petitioner's group exhibit, as provided in Sections 8(a) and 8.2 of the Act.

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

Respondent shall pay Petitioner compensation that has accrued from 03/17/2022 through 8/2/2023, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall pay Petitioner permanent partial disability benefits of $836.69/week for 101.25 weeks, because the injuries sustained caused the 10% loss of Petitioner's right hand, the 10% loss of Petitioner's left hand, the 12.5% loss of Petitioner's right arm and the 12.5% loss of Petitioner's left arm, as provided in Section(s) 8(e)9 and 8(e)10 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

**SEPTEMBER 28, 2023**

## FINDINGS OF FACT

This matter came before an Arbitrator appointed by the Commission pursuant to Petitioner's Motion for a hearing on all issues. (AX1) The issues in dispute were accident, causal connection, liability for medical expenses, liability for temporary total disability payments and the nature and extent of Petitioner's injuries. (AX1; T. 4, 5)

Petitioner testified that he is currently employed as a Correctional Lieutenant at Respondent's Menard Correctional Center facility. (T. 7)

Regarding his past job duties, Petitioner testified that after high school, he attended Southwestern Illinois College and then joined the United States Army, where he served in light infantry at Fort Noble, Kentucky for four years. (T. 8, 9) He testified that he used his hands and arms extensively while serving in the Army. (T. 9) After receiving an honorable discharge from the Army, Petitioner was hired by Respondent to work as a Correctional Officer at Menard Correctional Center. (T. 9, 10)

Petitioner testified that as a Correctional Officer, he performed bar rapping, which involves holding a metal rod and running it across each individual bar on a cell to make sure no bars are loose. (T. 11) He stated that this produces "[v]ibration and rumbling of your whole arm." (T. 11) Petitioner testified that he uses Folger Adams keys for locking, deadlocking and opening cells, and that the keys are roughly five inches long. (T. 11, 12) Petitioner testified that the doors and chuckholes at Menard do not work easily, as the facility is over 100 years old. (T. 12, 13) He stated, "[s]ometimes you have to yank on them and pull forcibly. Sometimes you don't get them open at all. You have to call a maintenance craftsman." (T. 13) He testified that property box searches involve using your upper extremities to go through an inmate's property to search for contraband and ensure compliance. (T. 14, 15) He testified that when he served as a Correctional Officer, "[e]very single bit" of his time was spent on the gallery. (T. 12) Petitioner testified that Menard has maximum and medium security units and that the majority of his work took place in the maximum security unit. (T. 10)

Petitioner testified that he was assigned to the sallyport, which is the entrance facility for trucks, and to the armory, where keys and munitions are checked out. (T. 34, 35) Petitioner testified that the catwalk assignment does not involve keying and un-keying inmates. (T. 31) Petitioner agreed that the healthcare unit building was built in the 20th century, but when asked if he agreed that the healthcare unit did not have problems with its doors, Petitioner disagreed, and testified that it does not have electronic locks or sliding doors. (T. 31, 32) He testified that although there are no cells in healthcare, you still have to bar rap on the windows. (T. 32, 33)

Petitioner served as a Correctional Officer for four years before being promoted to a Correctional Sergeant in 2015. (T. 7, 8, 10, 11, 27) He testified that a conscientious Correctional Sergeant performs the same duties as a Correctional Officer, and that he performed the same locking and unlocking duties as a Sergeant that he had performed as an Officer. (T. 14, 15)

Petitioner testified that he spent the majority of his time as a Sergeant at the medium security unit, which was built in the 20th century. (T. 28) He agreed that there is less keying in the medium security unit in comparison to the maximum-security unit, but stated that it depended on if the locking mechanisms were working. (T. 29) When asked if the duties of a Correctional Sergeant were less hand-intensive than those of a Correctional Officer, he disagreed. (T. 30)

After serving as a Correctional Sergeant for two years, Petitioner was promoted to a Correctional Lieutenant in 2017. (T. 15) He testified that his job duties as a Lieutenant involved the same amount of physical work, but more computer work and paperwork, but agreed that his duties as a Lieutenant are less hand intensive than those of a Correctional Officer. (T. 15, 16, 33)

Petitioner testified that a conscientious Correctional Lieutenant performs the same duties as a Correctional Officer with regard to keying, cuffing, un-cuffing, use of keys and performing shakedowns. (T. 16) He testified that he supervises upwards of eight or 10 officers per cell house and that he leads by example. (T. 16)

Petitioner reviewed Respondent's exhibit two, which consisted of Petitioner's staff assignment history from December 3, 2011 through March 31, 2020. (RX2) It indicates that Petitioner received various assignments, including the gallery, armory, MSU (medium security unit), sally port, dietary, yard, and segregation. *Id.* Petitioner agreed that his job assignment history varied, however, he stated, "Those assignments [sic] sheets are just where you are assigned on paper. You get pulled from the assignment regularly very often to go perform other duties that are institutional needs." (T. 37) He testified that throughout his whole career at Menard Correctional Center, 95% of his time has been spent on a wing or gallery. (T. 37)

Petitioner testified that during the course of his job duties, he began to notice symptoms in his hands and elbows that gradually worsened. (T. 16, 17) He indicated that his symptoms were not "like a flip of a light switch," but he noticed tingling that would be relieved if he moved his arm a certain way. (T. 17) As he continued to work, his symptoms progressed. (T. 17) He testified that his symptoms became unbearable and he sought medical treatment. (T. 19, 20)

On March 5, 2020, Petitioner presented to Dr. Daniel Phillips for electrodiagnostic testing. (PX3) Dr. Phillips noted that Petitioner had a several-year history of progressive bilateral intermittent numbness and tingling in his hands and arms and bilateral shoulder pain. *Id.* at 2. Petitioner indicated that his numbness and tingling began in 2017. *Id.* at 8. He indicated that the pain woke him at night, and that it was aggravated by typing, writing and turning of his hands and arms. *Id.* at 8. At the time of his testing, his weight was 210 pounds and his height was six foot. *Id.* at 9.

Dr. Phillips performed EMG and nerve conduction velocity studies on Petitioner, and his impression was that there was significant moderate chronic sensory motor median neuropathy across the right carpal tunnel and mild to moderate, predominantly demyelinative, median

sensory neuropathy across the left carpal tunnel. *Id.* at 3. There were also mild, predominantly demyelinative, ulnar neuropathies across the elbows. *Id.* at 3.

On April 13, 2020, Petitioner saw Dr. Shawn Kutnik, who noted that Petitioner had a multi-year history, approximately five years, of right-greater-than-left numbness and tingling, and decreased dexterity and fine motor skills. (PX4, p. 2) Petitioner stated his symptoms began somewhat insidiously, but continued to progress over the course of time. *Id.* He reported there were moments where his entire arm would feel numb, but his symptoms mostly involved the small finger to the right side. *Id.* He was able to "pop" his elbow, which resulted in improvement of the symptoms. *Id.* He had nocturnal symptoms that included his hand and arm falling asleep, as well as general generalized soreness to his palms. *Id.* His symptoms were burning and aching and quality. *Id.* Dr. Kutnik noted that Petitioner had no formal treatments beyond taking anti-inflammatories, which did not result in much benefit. *Id.*

Dr. Kutnik noted that Petitioner worked for Menard Department of Corrections as a Lieutenant and had been in a supervisory role for the last two-and-a-half years doing mostly computer work. *Id.* Dr. Kutnik indicated that prior to this, Petitioner was a Sergeant and was more involved with the supervision and care of inmates. *Id.* Dr. Kutnik noted that Petitioner did not have a past medical history of diabetes, autoimmune conditions, endocrine disorders, thyroid disease, gout or vitamin deficiencies, and that outside of work, Petitioner had hobbies of hunting, fishing, playing golf and baseball, and engaging in basic outdoor activities. *Id.* Petitioner's height was six feet and his weight was 200 pounds with a body mass index of 27.12. *Id.*

On exam, Petitioner had negative Tinel's, Phalen's and Durkan's compression testing over the carpal tunnels; however, had positive Tinel's over the cubital tunnels to both sides, more significantly on the right. *Id.* at 3. Dr. Kutnik was able to sublux the ulnar nerve to both sides, which increased Petitioner's discomfort. *Id.* Dr. Kutnik reviewed the EMG and nerve conduction study from Dr. Phillips and indicated it showed significantly moderate and chronic right carpal tunnel syndrome, mild to moderate carpal tunnel syndrome on the left and mild bilateral cubital tunnel syndrome. *Id.* Dr. Kutnik stated that although it was mild on testing, Petitioner's main issue was to the right side involving the ulnar nerve, given the numbness to his small finger and decreased dexterity in his hand. *Id.* He indicated that the study clearly showed underlying carpal tunnel syndrome as well; however, felt that this was contributing less to his symptomatic complaints than the cubital tunnel. *Id.* He recommended basic nighttime splinting for the carpal tunnel and avoidance of prolonged elbow flexion and resting the elbows on hard surfaces. *Id.* He indicated that if these treatments failed to resolve Petitioner symptoms, operative intervention would be indicated. *Id.* Given the instability of the ulnar nerves, he believed Petitioner would likely require a transposition. *Id.*

On July 23, 2021, Petitioner returned to Dr. Kutnik and reported that his symptoms were about the same as at his previous visit, as he still had ongoing numbness and tingling to the hands. *Id.* at 4. On exam, Dr. Kutnik noted significantly positive Tinel's over the cubital tunnels,

especially on the left side, and subluxable ulnar nerve. *Id.* He recommended surgical intervention in the form of bilateral carpal and cubital tunnel releases, and possibly submuscular transposition given Petitioner's questionable stability of his nerves. *Id.* at 5.

On November 8, 2021, Petitioner presented to the office of Dr. Matthew Bradley. (PX5) Dr. Bradley noted that Petitioner had symptoms of left worse than right hand, wrist and elbow pain and tingling, particularly in his fourth and fifth digits. *Id.* at 2. He also had occasional popping in his elbow that had gradually worsened. *Id.* He had previously been able to shake out the tingling in his hands, but this was no longer working. *Id.* He denied hobbies or activities that required repetitive motion and did not have a history of diabetes, thyroid disease or obesity. *Id.* Dr. Bradley noted that Petitioner had seen Dr. Kutnik, who prescribed nighttime bracing; however, this did not result in any significant relief of his symptoms. *Id.*

Dr. Bradley noted that Petitioner had previously worked as a Correctional Officer and was now a Lieutenant. *Id.* He indicated Petitioner's job required repetitive use of his hands, including opening doors in cells, typing reports and utilizing fine motor skills to manipulate keys on locks and cuffs. *Id.* He estimated repetitive use of his hands seven to 12 times per hour. *Id.*

Exam of the bilateral elbows showed pain to palpation over the lateral epicondyle and the insertion of the extensor wad. *Id.* at 3. Exam of the bilateral hands was normal. *Id.* Dr. Bradley reviewed Petitioner's previous treatment recommendations by Dr. Kutnik and agreed that his symptoms were consistent with carpal and cubital tunnel syndrome and that he had failed nonoperative treatment. *Id.* at 4. Dr. Bradley indicated that Petitioner's symptoms had moved from intermittent to chronic, as he was experiencing weakness and difficulty holding on to objects. *Id.* He recommended carpal and cubital tunnel surgery. *Id.* He stated that with the information and medical records that had been provided to him, he felt that the work Petitioner had been engaged in during the past 10 years had contributed and was possibly related to the development of his bilateral carpal and cubital tunnel syndromes and need for treatment. *Id.*

On December 8, 2021, Petitioner underwent an open right carpal tunnel release and open ulnar nerve release at the elbow. *Id.* at 5. Intraoperatively, Dr. Bradley noted that there was a significant amount of adhesions and chronic inflammatory scar-type tissue changes around the medial epicondyle that were possibly indicative of an unstable nerve. *Id.* at 6. The release proximally was tight around the ligament band and was released a centimeter to a centimeter and a half in length. *Id.* at 6. At the carpal tunnel, Dr. Bradley noted that the transverse carpal ligament opened up slightly greater than a centimeter and upon release, it was very thickened. *Id.*

At Petitioner's initial postoperative visit with Dr. Bradley, he reported that his right upper extremity symptoms had significantly improved. *Id.* at 8. Dr. Bradley recommended a daily home exercise program, wearing of his wrist brace and utilizing over-the-counter ibuprofen or Tylenol. *Id.* at 10. He kept conditioner off work until his next follow-up appointment and scheduled him for operative intervention on the left upper extremity. *Id.*

On January 14, 2022, Petitioner underwent a left ulnar neurolysis at the elbow and an open left carpal tunnel release with Dr. Bradley. *Id.* at 12. Intraoperatively, there was chronic inflammatory scarring around the ulnar nerve posterior to the medial epicondyle, and Dr. Bradley noted that the chronic, inflammatory scar-type tissue had caused significant tethering. *Id.* at 13. The carpal tunnel revealed that the median nerve was flattened. *Id.*

On January 24, 2022, Petitioner returned to Dr. Bradley and reported that his symptoms had significantly improved and had mostly resolved. *Id.* at 15. Dr. Bradley recommended one week of focusing on strengthening his hands and wrists and that following this, it would be safe for him to return to full duty. *Id.* at 16. He indicated that Petitioner would likely be at maximum medical improvement at his next follow up in four to six weeks. *Id.*

On March 17, 2022, Petitioner followed up with Dr. Bradley and reported that his symptoms had significantly improved. Dr. Bradley noted that Petitioner had some weakness in his bilateral upper extremities but this had improved significantly from preoperatively. Petitioner reported that he previously had pain in his forearm, but this had been alleviated and he was working full-duty with no complaints. Dr. Bradley noted that Petitioner would continue with his daily home exercise program to regain strength. He indicated Petitioner could continue to work full-duty without restriction and placed him at maximum medical improvement.

On June 10, 2022, Respondent hired Dr. Mark Cohen to perform a medical records review. (RX4) He reviewed Petitioner's injury reports, electrodiagnostic testing and records from Dr. Kutnik and Dr. Bradley. *Id.* He also indicated that he reviewed only a job description of Petitioner's position as a Correctional Lieutenant that was completed in 2014. *Id.* at 2. Dr. Cohen stated that the majority of carpal tunnel conditions are idiopathic; however, noted that the conditions are seen in association with certain medical conditions, including obesity, and drew attention to Petitioner's BMI of 28.5, which he said placed him in the overweight category. *Id.* at 3.

Dr. Cohen opined that carpal and cubital tunnel syndromes could be seen in association with certain occupational activities, such as jobs that involve forceful and repetitive grasping and squeezing against resistance, heavy vibrational tools and activities that involve forceful and repetitive flexion of the elbow against resistance throughout the day. *Id.* at 3. He indicated that it was currently clear utilizing evidence-based medicine that carpal tunnel syndrome was neither caused nor specifically associated with the simple repetitive use of one's hands. *Id.* He indicated that Petitioner's upper extremity compressive neuropathies had been attributed to the "repetitive motion of turning keys and typing," and that based on the information available, he did not believe that those occupational activities were in any way associated with the development of carpal or cubital tunnel syndromes. *Id.* However, he agreed with a diagnosis of bilateral carpal and cubital tunnel syndromes and agreed that Petitioner's treatment had been reasonable. *Id.*

Dr. Cohen testified via deposition on October 17, 2022. (RX5) On direct examination, he testified consistently with his report. He stated that while he does perform independent evaluations for petitioners, most of his medicolegal examinations were for insurance companies. *Id.* at 20, 21. He believed that he was paid approximately $1,000 for records review and $1,200 to $1,250 per hour for depositions. *Id.* at 20.

Dr. Cohen agreed with Petitioner's diagnosis of carpal and cubital tunnel syndrome and testified that his symptoms appeared to warrant the surgical treatment he underwent, and agreed that Petitioner improved following surgery. *Id.* at 15, 16. He testified that he never met or examined Petitioner. *Id.* at 16. He admitted that Petitioner did not have diabetes, gout, hypothyroidism or rheumatoid arthritis. *Id.* at 16, 17. He did not think the age of 34 would be considered a comorbid risk factor for the development of bilateral compression neuropathies. *Id.* at 19.

Dr. Cohen agreed that work-associated carpal tunnel was typically a cumulative activity. *Id.* at 17, 18. However, he testified that he was unaware if Petitioner had previously served in the military. *Id.* at 18. He did not know how long Petitioner had served as a correctional employee. *Id.* at 18. When asked what Petitioner's rank was at the time of his records review, he responded, "I thought a correctional lieutenant, but I could be wrong." *Id.* at 18. He did not know how many years Petitioner had worked as a Correctional Officer. *Id.* at 18.

When asked if he knew what bar-rapping was, he responded, "I have an idea, but maybe not. Maybe." *Id.* at 18, 19. He testified that he did not know what a Folger Adams key was. *Id.* at 19. He did not know how services were rendered to prisoners in segregation at Menard. *Id.* at 19. He did not know what a property box check was. *Id.* at 19. He did not know if Menard Correctional Center was a maximum, medium or minimum-security facility. *Id.* at 19.

Dr. Bradley testified via deposition on September 16, 2022. (PX9) He testified that he is a board-certified orthopedic surgeon who performs surgeries on a weekly basis. *Id.* at 4, 5. He testified that Petitioner's nerve conduction study results combined with his symptoms and physical examination findings led to his clinical picture as being that of carpal and cubital tunnel syndrome. *Id.* at 6.

Dr. Bradley testified that intraoperatively, Petitioner had carpal and cubital tunnel, as his findings showed mostly adhesions and chronic inflammatory scar tissue, but no cysts, masses or anything else that would have led to his conditions. *Id.* at 9. He testified that he had last seen Petitioner on March 17, 2022, that his symptoms had significantly improved, that he was back to work full duty, and that he had been placed at maximum medical improvement at that time. *Id.* at 9. Dr. Bradley was asked if he agreed that a good response to surgery does not prove the diagnosis of carpal tunnel syndrome, and he replied that it may not prove it, but if the patient gets better, it is a pretty good indication that you treated the right diagnosis. *Id.* at 28.

Dr. Bradley was asked if a person would get better after they are removed from the activity that caused microtrauma, and he replied that both he and Dr. Kutnik found that Petitioner had unstable ulnar nerves, and in that case, he would not get better. *Id.* at 20. He stated that the ulnar nerve would be unstable whether Petitioner was removed from the activity or continued to perform same. *Id.* at 20. He indicated that a person's carpal tunnel might occasionally get better or become less symptomatic, however, quite frequently, there are anatomic changes and the carpal ligament becomes thickened and scarred and remains that way. *Id.* at 20. He stated that if a person quits the activities, the symptoms may improve, but the actual physiology inside the wrist generally does not change too much. *Id.* at 20, 21.

Although Dr. Bradley did not feel the computer work played a role in the development of carpal tunnel, he stated that once a person has carpal tunnel as severe as Petitioner's was, even fine motor activities like computer work could continue the symptoms. *Id.* 21. He explained:

> I think that he had developed carpal, cubital tunnel prior to that, and they just – you know, it's kind of like if you get a bruise and you keep tapping on the bruise, the bruise still hurts. The tapping may not have caused the bruise, but the bruise still hurts when you tap on it. I think that's what happened here. He -- he already had developed it. The keying kind of -- just aggravated it enough that it was symptomatic. *Id.* at 21, 22.

Dr. Bradley testified that carpal tunnel could develop acutely with trauma; however, more times than not, it is a cumulative disease that develops gradually over time and worsens with time. *Id.* at 7. He testified that there are non-work related causes of carpal and cubital tunnel, and that the "big three" are being a female of increasing age over 40 or 50, diabetes and thyroid disorder. *Id.* at 7. He testified that Petitioner did not have any of the comorbidities or medical conditions that would be risk factors for the development of his condition other than his work activities. *Id.* at 8, 12. He stated that Petitioner did not have any activities outside of his work that would have significantly contributed to his condition. *Id.* at 12. He disagreed with Dr. Cohen that Petitioner's condition developed idiopathically. *Id.* at 13.

Dr. Bradley testified that Petitioner's job activities contributed to the development of his carpal and cubital tunnel, as he had worked for the Illinois Department of Corrections for 10 years, performing various activities throughout that time, many of which would contribute to the development of his condition. *Id.* at 11. Dr. Bradley testified it was his understanding that when he saw Petitioner, he had been a Correctional Lieutenant for a couple of years, prior to that, he was a Sergeant, and prior to becoming a Sergeant, he was a Correctional Officer. *Id.* at 11, 12.

Dr. Bradley testified that Petitioner's job duties of unlocking cell doors and locks, pushing and pulling of cell doors and the firing, cleaning and preparation of weapons contributed to his conditions. *Id.* at 17. He agreed that Petitioner's job duties were varied, and understood that the job duties at the minimum-security facility at Menard were a little less hand intensive than at the maximum-security facility. *Id.* at 17, 18.

Dr. Bradley testified that the biggest things that lead to microtrauma are the locking and unlocking of doors, pulling on gates that are very large and thick, bar-rapping, firing pistols, repetitive or forceful flexion-extension of the elbow *Id.* at 19, 20. He testified that he has two patients whose sole job it is to fix locks on the gates because they are so problematic. *Id.* at 19, 20. He stated that if you pull on a gate that is stuck or does not move and you pop your ulnar nerve one time, then you have an unstable ulnar nerve and have cubital tunnel, and that it does not really take much to do so. *Id.* at 20.

Regarding his familiarity with Menard Correctional Center, Dr. Bradley stated:

> I've just seen many, many correctional officers that have worked at Menard and gotten job duties and, you know, seen -- seen the history of 10 or 15 years ago there. So it's -- I'm kind of familiar with it through multiple, multiple patients that have reported various job duties and -- and work at Menard -- very familiar with all of them. *Id.* at 19.

At Arbitration, Respondent tendered a workers' compensation documentation log as its exhibit one, and same indicates that Petitioner reported injury to his hands and arms due to repetitive motion of turning keys/typing. (RX1) The date of accident was noted to be March 5, 2020 and the report was signed by Petitioner on March 27, 2020. (RX1, p. 5) An incident report completed by Petitioner stated that after years of experiencing symptoms and multiple tests, Petitioner had a nerve conduction test and received the results, which were positive, on March 26, 2020. (RX1, p. 10) The report also noted that Petitioner had held his position as a Lieutenant for 2.5 years at that time, and had previously been a Sergeant for two years prior to that. *Id.*

Petitioner's exhibit seven is a detailed job description regarding Petitioner's current job title of a Lieutenant. (PX7) Petitioner indicated that he performs daily pushing and pulling of doors, the weight of which varies from five to 70 pounds. *Id.* at 1. He indicated he reaches above shoulder level when performing searches during tactical operations. *Id.* at 1. He uses his hands for gross manipulation on a daily basis, while keying open padlocks and cell doors. *Id.* at 2. He indicated that he uses his hands for fine manipulation on a daily basis while typing reports, performing evaluations and checking emails. *Id.* at 2.

Petitioner's exhibit eight is Petitioner's work history timeline, which indicates that during his tenure with the United States Army, he was a team/squad leader and served as the senior brief instructor to plan and coordinate mission operations, controlled and maintained the operations of eight soldiers and their equipment, led patrols by serving as point man, served as master gunner in a platoon and insured that every crew-served weapon system was operational. (PX8, p. 2)

During Petitioner's history with Menard, he indicated that in each position, he enforced and maintained disciplinary, safety, security, sanitary, and custodial measures. (PX8, pp. 1, 2) As a Correctional Lieutenant, Petitioner instructs and supervises Correctional Sergeants and

Officers, monitors compliance with rules and directives, files reports, and conducts performance evaluations, audits, overtime justification, roster management and overtime equalization. *Id.*

The work history timeline indicates that as a Correctional Sergeant, Petitioner was directly responsible for housing units and cell houses on an assigned shift, and he served as the lead worker within the cell house. (PX8, p. 1) This involved supervising all officers assigned to a particular unit and touring the cell house and ensuring the cells are secured by pulling/pushing on the cell doors. *Id.*

As a Correctional Officer, Petitioner performed security and custodial duties in order to maintain and control the movement of individuals in custody and he performed deadlocking on every cell by turning a key and pulling/pushing on the cell door to ensure its security. *Id.*

Petitioner's exhibit 10 is a Corvel job analysis for a Correctional Officer at Menard Correctional Center, which indicates that an Officer's job duties require frequent lifting and/or carrying of up to 25 pounds and lifting up to 50 pounds, frequent pushing of carts, frequent pulling to open doors from 2 ½ hours to 5 ½ hours per day, up to 66% of the time, or up to 200 times per day. (PX10, p. 14) This includes pulling open chuckhole doors as needed during lockdowns for dining, and cuffing and uncuffing residents. *Id.* Wrist turning is required 34-66% of the time, 2 ½ to 5 hours per day, or 33 to 300 times per day. *Id.* Petitioner testified that the Corvel Corporation job description accurately reflects his job duties. (T. 10, 11; PX10)

Petitioner testified that the surgeries "absolutely" helped his condition, and that he is very happy with his recovery. (T. 20, 21) He testified that despite the improvement, he still has some tenderness in his elbows when the ligament is touched. (T. 21) He testified that after a strenuous day of work, his forearms and wrists become tight. (T. 21) Holding objects for extended periods of time increase his symptoms. (T. 22)

## CONCLUSIONS OF LAW

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

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

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*. Compensation may be allowed where a workman's existing physical structure, whatever it may

be, gives way under the stress of his usual labor. *Laclede Steel Co. v. Indus. Comm'n*., 6 Ill.2d 296 at 300, 128 N.E.2d 718, 720 (Ill. 1955)

In a repetitive trauma case, issues of accident and causation are intertwined. *Elizabeth Boettcher v. Spectrum Property Group and First Merit Venture*, 99 I.I.C. 0961. In order to better define "repetitive trauma" the Commission has stated:

> The term "repetitive trauma" should not be measured by the frequency and duration of a single work activity, but by the totality of work activity that requires a specific movement that is associated with the development of a condition. Thus, the *variance in job duties* is not as important as the specific force, flexion and vibratory movements requisite in Petitioner's job. *Craig Briley v. Pinckneyville Corr. Ctr*., 13 I.W.C.C. 0519 (2013). [emphasis ours]

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, 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*. "[I]n no way can quantitative proof be held as the sine qua non of a repetitive trauma case." *Christopher Parker v. IDOT*, 15 I.W.C.C. 0302 (2015).

The Appellate Court's decision in *Edward Hines Precision Components v. Indus. Comm'n* further highlights that there is no standard threshold which a claimant must meet in order for his or her job to classify as sufficiently "repetitive" to establish causal connection. *Edward Hines*, 365 Ill.App.3d 186, 825 N.E.2d 773, 292 Ill.Dec. 185 (Ill.App.2d Dist. 2005). In fact, the Court expressly stated, "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." *Id*. at N.E.2d 780. Similarly, the Commission noted in *Dorhesca Randell v. St. Alexius Medical Center*, 13 I.W.C.C. 0135 (2013), a repetitive trauma claim, that a claimant must show that work activities are a cause of his or her condition; the claimant does not have to establish that the work activities are the sole or primary cause, and there is no requirement that a claimant must spend a certain amount of time each day on a specific task before a finding of repetitive trauma can be made. *Randell* citing *All Steel, Inc. v. Indus. Comm'n*, 582 N.E.2d 240 (1991) and *Edward Hines*, supra.

The Appellate Court in *Darling v. Indus. Comm'n* even stipulated that quantitative evidence of the exact nature of repetitive work duties is not required to establish repetitive trauma injury in reversing a denial of benefits, stating that demanding such evidence was improper. *Darling v. Industrial Comm'n*, 530 N.E.2d 1135, 1142 (1st Dist. 1988). The Appellate Court found that requiring specific quantitative evidence of amount, time, duration, exposure or "dosage" (which in Petitioner's case would be time, duration, and "dosage") would expand the requirements for proving causal connection by demanding more specific proof requirements, and the Appellate Court refused to do so. *Id*., at 1143. The Court further noted, "To demand proof of 'the effort required' or the 'exertion needed' . . . would be meaningless" in a case where such

evidence is neither dispositive nor the basis of the claim of repetitive trauma." *Id*. at 1142. Additionally, the Court noted that such information "may" carry great weight "only where the work duty complained of is a common movement made by the general public." *Id*. at 1142. The evidence shows that Petitioner's job duties involve the performance of tasks distinctly related to his employment for Respondent, many of which are not activities that are even performed by the general public, let alone ones to which the public would be equally exposed.

In *City of Springfield v. Illinois Workers' Comp. Comm'n*, the Appellate Court issued a favorable decision in a repetitive case to a claimant in which the claimant's work was "varied" but also "repetitive" or "intensive" in that he used his hands, albeit for different task, for at least five (5) hours out of an eight (8) hour work day. *City of Springfield v. Illinois Workers' Comp. Comm'n*, 901 N.E.2d 1066, (Ill.App. 4th Dist., 2009). As was noted by the Commission and reiterated in the Appellate Court decision in *City of Springfield v. Illinois Workers' Compensation Comm'n*, "while [claimant's] duties may not have been 'repetitive' in a sense that the same thing was done over and over again as on an assembly line, the Commission finds that his duties required an intensive use of his hands and arms and his injuries were certainly *cumulative*." *Id*. [Emphasis ours]

The Commission has also recognized that a claimant's employment may not be the only factor in his or her development of a condition of ill-being. The Commission awarded benefits in a case where the claimant was involved in martial arts activity outside of his employment (see *Samuel Burns v. Pinckneyville Corr. Ctr*., 14 I.W.C.C. 0482 (2014)), and in another case where the claimant was involved in weight lifting outside of his employment. See *Kent Brookman v. State of Illinois/Menard Corr*. Ctr., 15 I.W.C.C. 0707 (2015). In the repetitive trauma case of *Fierke*, the Appellate Court specifically held that non-employment related factors that contribute to a compensable injury do not break the causal connection between the employment and a claimant's condition of ill-being. *Fierke v. Indus. Comm'n*, 309 Ill.App.3d 1037; 723 N.E.2d 846, 849. The Court stated, "The fact that other incidents, whether work related or not, may have aggravated a claimant's condition is irrelevant." *Id*. at 723 N.E.2d 846, 849.

Under Illinois law an injury need not be the sole factor, or even the primary factor of an injury, as long as it is *a* causative factor. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill.2d 193, 205 (Ill. 2003) [Emphasis ours]. Even when other non-occupational factors contribute to the condition of ill-being, "[A] Petitioner need only show that some act or phase of the employment was a causative factor of the resulting injury." *Fierke v. Indus. Comm'n*, 309 Ill.App.3d 1037 (3rd Dist. 2000). Allowing a claimant to recover under such circumstances is a corollary of the principle that employment need not be the sole or primary cause of a claimant's condition. *Land & Lakes Co. v. Indus. Comm'n*, 834 N.E.2d 583 (2d Dist. 2005). Employers are to take their employees as they find them. *A.C.& S. v. Industrial Comm'n*, 710 N.E.2d 837 (Ill. App. 1st Dist. 1999) citing *General Electric Co. v. Industrial Comm'n*, 433 N.E.2d 671, 672 (1982). The Supreme Court in *Durand v. Indus. Comm'n* noted that the purpose of the Illinois Workers' Compensation Act is

best served by allowing compensation where an injury is gradual but linked to the employee's work. *Durand v. Indus. Comm'n*, 862 N.E.2d 918, 925 (Ill. 2006).

Expert testimony shall be weight like other evidence with its weight determined by the character, capacity, skill, and opportunities for observation, as well as the state of mind of the expert and the nature of the case and its facts. *Madison Mining Company v. Industrial Commission*, 309 Ill. 91, 138 N.E. 211 (1923). The proponent of expert testimony must lay a foundation sufficient to establish the reliability of the bases for the expert's opinion. *Gross v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100615WC, 960 N.E.2d 587, 355 Ill. Dec. 705. If the basis of an expert's opinion is grounded in guess or surmise it is too speculative to be reliable. Expert opinions must be supported by facts and are only as valid as the facts underlying them. *In re Joseph S.*, 339 Ill. App. 3d 599, 607, 791 N.E.2d 80, 87, 274 Ill. Dec. 284 (2003). Not only may the Commission decide which medical view is to be accepted, it may attach greater weight to the opinion of the treating physician. *International Vermiculite Co. v. Industrial Comm'n*, 77 Ill.2d 1, 31 Ill. Dec. 789, 394 N.E.2d 1166 (1979); *ARA Services, Inc. v. Industrial Comm'n*, 226 Ill. App. 3d 225, 168 Ill. Dec. 756, 590 N.E. 2d 78 (1992).

Commission decisions holding that the duties of a Correctional Officer at Menard Correctional Center aggravate and contribute to peripheral compression neuropathies, including carpal tunnel and cubital tunnel syndrome abound. *See Jeff Broshears v. State of Illinois/Menard Corr. Ctr.*, 13 I.W.C.C. 0063 (2013); *James Ryan v. State of Illinois/Menard*, 13 I.W.C.C. 0705 (2013); *Larry Hale v. State of Illinois/Menard Corr. Ctr*., 13 I.W.C.C. 0201 (2013); *Jimmie Smith v. State of Illinois/Menard Corr. Ctr*., 12 I.W.C.C. 0959 (2012); *Renee Veath v. State of Illinois/Menard Corr. Ctr*., 12 I.W.C.C. 1347 (2012); *Misti Langston v. State of Illinois/Menard Corr. Ctr*., 12 I.W.C.C. 1161 (2012); *Sean Wolters v. State of Illinois/Menard Corr. Ctr*., 12 I.W.C.C. 1159 (2012); *Timothy Roy v. State of Illinois/Menard Corr. Ctr*., 12 I.W.C.C. 1114 (2012); *Virgil Smith v. State of Illinois/Menard Corr. Ctr.*, 12 I.W.C.C. 0786 (2012); *Matthew Lavender v. State of Illinois/Menard Corr. Ctr*., 12 I.W.C.C. 0663 (2012); *Andrea Pasquino v. State of Illinois/Menard Corr. Ctr.*, 12 I.W.C.C. 0809 (2012); *Darl Prange v. State of Illinois/Menard Corr. Ctr*., 12 I.W.C.C. 0629 (2012); *Minh Scott v. State of Illinois/Menard Corr. Ctr*., 12 I.W.C.C. 0888 (2012); *Jason Lane v. State of Illinois/Menard Corr. Ctr.*, 12 I.W.C.C. 0146 (2012); *Shane Lair v. State of Illinois/Menard Corr. Ctr.*, 12 I.W.C.C. 0115 (2012); *Javelins Lewis v. Menard Corr. Ctr.*, 12 I.W.C.C. 0173 (2012); *Frederick Scott Carter v. State of Illinois/Menard Corr. Ctr.*, 12 I.W.C.C. 0342 (2012); *Lucas Mennerich v. State of Illinois/Menard Corr. Ctr.*, 12 I.W.C.C. 0272 (2012); *James Bauersachs v. State of Illinois/Menard Corr. Ctr.*, 12 I.W.C.C. 0411 (2012); *David Couty v. State of Illinois/Menard Corr. Ctr.*, 12 I.W.C.C. 0531 (2012); *Michael Danley v. State of Illinois/Menard Corr. Ctr*., 12 I.W.C.C. 0434 (2012); *Troy Rushing v. State of Illinois/Menard Corr. Ctr.*, 12 I.W.C.C. 0456 (2012); *Travis Lindsey v. State of Illinois/Menard Corr. Ctr.*, 12 I.W.C.C. 0706 (2012); *Billy Rose v. State of Illinois/Menard Corr. Ctr.*, 12 I.W.C.C. 0459 (2012); *Scott Montroy v. State of Illinois/Menard Corr. Ctr.*, 12 I.W.C.C. 0576 (2012); *Leroy Sumnicht v. State of Illinois/Menard*

*Corr. Ctr.*, 12 I.W.C.C. 0338 (2012); *Jeremy Colvin v. State of Illinois/Menard Corr. Ctr.*, 12 I.W.C.C. 1158 (2012); *James Wingerter v. State of Illinois/Menard Corr. Ctr.*, 11 I.W.C.C. 0669 (2011); *Sean Starkweather v. State of Illinois/Menard Corr. Ctr.*, 11 I.W.C.C. 0670 (2011); *Greg Mayhugh v. State of Illinois/Menard Corr. Ctr.*, 11 I.W.C.C. 0970 (2011); *Cynthia Pickering v. State of Illinois/Menard Corr. Ctr.*, 11 I.W.C.C. 0671 (2011); *Rachel Vasquez v. State of Illinois/Menard Corr. Ctr.*, 10 I.W.C.C. 0826 (2010); *Robert Walker v. State of Illinois/Menard Corr. Ctr.*, 10 I.W.C.C. 0233 (2010); *Virgil Taylor v. State of Illinois/Menard Corr. Ctr.*, 13 I.W.C.C. 0179 (2012).

In the 2013 case of *Jeff Broshears v. SOI/Menard Corr. Ctr.*, the Commission awarded benefits to a claimant who sustained repetitive injuries while he held positions as a Correctional Officer, Sergeant, and Lieutenant. *Jeff Broshears v. SOI / Menard C.C.*, 13 I.W.C.C. 0063. He had worked as a Correctional Lieutenant for 15 years until he retired. *Id.* The injuries of the claimant in *Broshears* manifested two (2) years and six (6) months after his retirement. *Id.* The Commission found that the claimant sustained compensable accidental injuries that accumulated during his tenure with Respondent and that these manifested when he sought treatment for his injuries and was advised of their relation to work. *Id.*

In *Timothy Veath v. SOI / Menard Corr. Ctr.*, the Commission awarded benefits to a claimant who held the position of a Correctional Officer for four and a half to five years, a Sergeant for four and a half years, and a Lieutenant beginning in 1999, and did not seek treatment for his condition until November 2010. *Id. Timothy Veath v. SOI / Menard C.C.*, 14 I.W.C.C. 0896. The claimant testified that most of the doors at the facility do not open easily. *Id.* Similar to Petitioner in the instant case, in *Veath*, the claimant testified that as a Sergeant, he performed the exact same job as a Correctional Officer, except that as Sergeant, he was responsible for more paperwork. *Id.* He testified that the job of a Lieutenant was also similar, except he was responsible for more paperwork and supervision. *Id.*

Similarly, in *Kent Brookman v. SOI / Menard Corr. Ctr.*, the Commission awarded benefits to a claimant that was promoted several times into more supervisory positions. *Kent Brookman v. SOI / Menard C.C.*, 15 I.W.C.C. 0707. The claimant testified that he performed many of the same duties, though not as often, and that these included keying doors, using a crank box to open doors, rapping bars, gripping and pulling heavy cell doors, and keying and cuffing/uncuffing. *Id.* The Commission stated:

> While it appears that the activities that could have contributed to his upper extremity conditions have been reduced as Petitioner has been promoted through the ranks of correctional officer, it also appears that the Petitioner has continued to work for a significant number of years with symptoms. As stated in the seminal case of *Peoria Belwood Nursing Home v. Industrial Commission*, 115 Ill.2d 524, 505 N.E.2d 1026, 106 Ill.Dec. 235 (1987): "We believe the purpose behind the Workers' Compensation Act is best served by allowing compensation in a case like the instant one where an injury has been shown to be caused by the

> performance of the claimant's job and has developed gradually over a period of time, without requiring complete dysfunction." The Court also noted in *Durand v. Industrial Commission*, 224 IU.2d 53, 862 N.E.2d 918, 930, 308 Ill.Dec. 715 (2006): "We decline to penalize an employee who diligently worked through progressive pain until it affected (his) ability to work and required medical treatment." *Kent Brookman v. SOI / Menard C.C.*, 15 I.W.C.C. 0707, citing *Peoria Belwood Nursing Home v. Industrial Commission*, 115 Ill.2d 524, 505 N.E.2d 1026, 106 Ill.Dec. 235 (1987) and *Durand v. Industrial Commission*, 224 IU.2d 53, 862 N.E.2d 918, 930, 308 Ill.Dec. 715 (2006).

As with Correctional Officers, there are numerous cases where the Commission has awarded benefits to Menard Correctional Lieutenants who, like Petitioner, have worked diligently, climbing through the ranks and performing the duties required by an Officer, Sergeant and Lieutenant at Menard, which include pushing and pulling heavy cell doors and gates, locking and unlocking doors that do not work smoothly, bar-rapping, turning large Folger-Adams keys, and cuffing and un-cuffing inmates. SEE *Timothy Knop v. SOI / Menard C.C.*, 14 I.W.C.C. 0303; *Josh Mileur v. SOI / Menard C.C.*, 17 I.W.C.C. 0673; *Charles Parnell v. SOI / Menard C.C.*, 12 I.W.C.C. 0797; *Jacqueline Lashbrook v. SOI / Menard C.C.*, 12 I.W.C.C. 1146; *Jeff Broshears v. SOI / Menard C.C.*, 13 I.W.C.C. 0063; *Timothy Veath v. SOI / Menard C.C.*, 14 I.W.C.C. 0896; *Kent Brookman v. SOI / Menard C.C.*, 15 I.W.C.C. 0707; *Virgil Taylor v. SOI / Menard C.C.*, 13 I.W.C.C. 0179; *Beau Purtle v. SOI / Menard C.C.*, 13 I.W.C.C. 0077.

In the instant case, Petitioner had a history of serving for four years in the United States Army and testified that he used his hands and arms extensively during his service. (T. 8, 9) Other than his BMI of 28.5, which does not place him in the category of obesity, Petitioner is a younger individual with no comorbidities or conditions associated with the development of carpal and/or cubital tunnel syndrome. (RX4, p. 3; AX1)

The Arbitrator notes that Dr. Cohen agreed with Petitioner's diagnoses of carpal and cubital tunnel and that his surgical treatment had been reasonable and admitted that he did not have comorbid the risk factors of age, sex, history of diabetes, gout, hypothyroidism or rheumatoid arthritis. *Id.* at 15-17, 19. He agreed that work-associated carpal tunnel was a cumulative activity and opined that carpal and cubital tunnel syndromes could be seen in association with jobs that involved forceful and repetitive grasping and squeezing against resistance, use of vibrational tools and forceful and repetitive flexion of the elbow against resistance. (RX4, p. 3; RX5, pp. 17, 18)

The Arbitrator finds that Petitioner's varied job assignments are irrelevant to causation, as his four-year work history as a Correctional Officer and two-year history as a Sergeant provided ample time for Petitioner to be exposed to forceful, repetitive grasping and squeezing against resistance while keying locks that regularly malfunctioned, repetitive elbow flexion while pulling on heavy cells and gates and performing property box searches, and vibration from bar-rapping. (T. 11-15) Further, despite the assignments listed on paper, Petitioner testified that

"regularly very often" he would get pulled from the assignment to perform other institutional needs. (T. 37) Likewise, he testified that the majority of his work took place at the maximum-security unit at Menard, and that 95% of his time has been spent on a wing or gallery. (T. 10, 37)

The Arbitrator notes that at the time Petitioner saw Dr. Phillips in March 2020, he indicated that his numbness and tingling had begun in 2017. (T. 3, p. 8) When he saw Dr. Kutnik in April 2020, he reported that he had experienced symptoms for approximately five years, and that same continued to progress over time. (PX4, p. 2) Although there is some discrepancy between whether Petitioner's symptoms began in 2015 or 2017, the Arbitrator notes that inconsistency and error are inherent in the history taking process. See *Danny Farris v. Phoenix Corp. of Quad Cities*, 11 I.W.C.C. 0610 (2011), aff'd by *Farris v. Illinois Workers' Comp. Comm'n*, 2014 IL App (4th) 130767WC, 22 N.E.3d 54; *Jamie Blommaeet v. Ford Motor Co*., 06 I.W.C.C. 0682 (2006).

Particularly in a repetitive trauma claim, rather than being adverse to Petitioner's claim, the fact that the onset of Petitioner's symptoms occurred somewhere between three and five years prior to his EMG and nerve conduction studies serves to prove that he had a multi-year and gradual onset of symptoms. Further, it appears that the onset of his symptoms occurred prior to spending any significant amount of time as a Correctional Lieutenant. This history correlates with Dr. Bradley's opinion that Petitioner developed his conditions prior to his job as a Lieutenant, but that his duties as a Lieutenant, while not causative on their own, aggravated his already-present condition. (PX9, pp. 21, 22) Petitioner's cumulative, multi-year history of hand-intensive job duties in relation to his symptoms is also consistent with Dr. Bradley's opinion that his unstable ulnar nerve would not be expected to improve and that anatomic changes such as scarring and thickening in the carpal tunnel generally remain the same, even if a person is removed from the causative trauma. *Id.* at 20, 21. The Arbitrator finds these opinions of Dr. Bradley to be logical and persuasive.

Of great import, the Arbitrator notes that Dr. Cohen's knowledge of the duties of a Correctional Officer, Sergeant or Lieutenant at Menard Correctional Center was severely lacking. Dr. Cohen did not examine Petitioner or take a work history from him. (RX5, p. 16) During his testimony, Dr. Cohen admitted that he did not know that Petitioner had previously served in the military, how long he had been a Correctional employee or how long he had worked as a Correctional Officer. *Id.* at 18. He was unsure what bar-rapping was and did not know what a Folger-Adams key was, what a property box search was, how segregation services were rendered to prisoners, or if Menard was a maximum, medium or minimum-security facility. *Id.* at 18, 19.

Dr. Cohen's report stated that he reviewed a job description for a Correctional Lieutenant from 2014; however, when asked what Petitioner's rank was at the time of his records review, he responded, "I thought a correctional lieutenant, but I could be wrong." *Id.* at 18.

Further, in Dr. Cohen's review of Petitioner's Notice of Injury report, he noted that the duties performed at the time of injury were "repetitive motion of turning keys/typing" and opined that these activities were not associated with the development of carpal or cubital tunnel. (RX4, p. 1, 3) Dr. Cohen appears to have focused on this ambiguous one-sentence statement on Petitioner's injury report and based his opinions on same rather than the facts of his work history and actual job duties. This was demonstrated when Dr. Cohen opined, without referencing any source material, that these conditions were "no longer felt to be caused or directly associated with the *simple repetitive use* of one's hands." *Id.* at 3. The fact that Dr. Cohen had not reviewed the job descriptions of a Correctional Officer or Correctional Sergeant, had no knowledge of Petitioner's work history outside of his review of a Lieutenant position document, and had very little knowledge of the normal job duties of a corrections employee demonstrates that his opinions are not credible or reliable.

On the contrary, Arbitrator notes that Dr. Bradley was familiar with Petitioner's history as a Correctional Officer, Sergeant and Lieutenant, his varied job assignment history, his history at both the maximum and minimum security facilities at Menard, and the activities he performed. (PX9, pp. 11, 12, 17-20) Further, Dr. Bradley testified that he has treated "many, many" Menard Correctional Officers over the years and is very familiar with their various job duties. *Id.* at 19. Therefore, the Arbitrator finds the opinions of Dr. Bradley with regard to causation more knowledgeable and reliable than those of Dr. Cohen.

Based on the aforementioned, the Arbitrator finds that Petitioner has met his burden of proof with regard to accident and causation, and finds that Petitioner sustained an accident that arose out of and in the course of his employment with Respondent and that his current condition of ill-being is causally related to his injury.

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

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).

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).

Petitioner tried and failed conservative treatment for his condition and eventually required surgical intervention. (PX4, p. 3; PX5, p. 4) Petitioner testified that the surgeries

"absolutely" helped his condition, and even Dr. Cohen agreed that Petitioner's treatment had been reasonable and warranted. (T. 20, 21; RX4, p. 3; RX5, pp. 15, 16)

Therefore, based on the aforementioned findings on causal connection, the Arbitrator finds that Petitioner's medical treatment has been reasonable and necessary, and that Respondent is liable for the payment of same.

**Issue (K): What temporary benefits are in dispute? (TTD)**

The law in Illinois holds that "[a]n employee is temporarily totally incapacitated from the time an injury incapacitates him for work until such time as he is as far recovered or restored as the permanent character of his injury will permit." *Archer Daniels Midland Co. v. Indus. Comm'n*, 138 Ill.2d 107, 561 N.E.2d 623 (Ill. 1990). The ability to do light or restricted work does not preclude a finding of temporary total disability. *Archer Daniels Midland Co. v. Indus. Comm'n*, 138 Ill.2d 107, 561 N.E.2d 623 (Ill., 1990) citing *Ford Motor Co. v. Industrial Comm'n*, 126 Ill.App.3d 739, 743, 467 N.E.2d 1018, 81 Ill.Dec. 896 (1984).

Based on the findings on causal connection, the Arbitrator finds that Respondent is liable for payment of temporary total disability benefits for the period of 1 3/7 weeks, commencing December 8, 2021 through December 10, 2021 and from January 14, 2022 through January 21, 2022.

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

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

(i) **Level of Impairment**: Neither Party submitted an AMA rating. Therefore, the Arbitrator uses the remaining factors to evaluate Petitioner's permanent partial disability.

(ii) **Occupation**: Petitioner continues to serve as a Correctional Lieutenant for Respondent. (T. 7) He testified that he still has tightness in his forearms and wrists after a strenuous day at work. (T. 21) The Arbitrator places some weight on this factor.

(iii) **Age**: Petitioner was 34 years of age at the time of his injury. (AX1) 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**: While there is no direct evidence of reduced earning capacity contained in the record; based on the severity of Petitioner's injuries, the requisite treatment and the resulting disability, it is reasonable to conclude that such repercussions will manifest in the near future. The Arbitrator places little weight on this factor.

(v) **Disability**: As a result of his injury, Petitioner sustained bilateral carpal and cubital tunnel syndromes that resulted in bilateral open carpal tunnel releases, an open ulnar nerve release on the right elbow and an ulnar neurolysis on the left elbow. (PX5, pp. 5, 6, 12, 13) Petitioner testified that he still has tenderness in his elbows when the ligament is touched, that he experiences tightness in his forearms and wrists after a strenuous day of work, and that he experiences increased symptoms while holding objects for extended periods of time. (T. 21, 22) Dr. Bradley's final note indicates that Petitioner still had some weakness in his bilateral forearms. (PX5) The Arbitrator places significant weight on this factor.

Based upon the foregoing evidence and factors, the Arbitrator finds that Petitioner sustained serious and permanent injuries that resulted in the 10% loss of Petitioner's right hand, the 10% loss of Petitioner's left hand, the 12.5% loss of Petitioner's right arm and the 12.5% loss of Petitioner's left arm.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 18WC019948 |
| Case Name | Sharon Craig v.<br>Chicago Transit Authority |
| Consolidated Cases | |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 24IWCC0598 |
| Number of Pages of Decision | 15 |
| Decision Issued By | Amylee Simonovich, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Jason M. Whiteside |
| Respondent Attorney | Andrew Zasuwa |

DATE FILED: 12/13/2024

/s/Amylee Simonovich,Commissioner

Signature

24IWCC0598

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

Sharon Craig,

Petitioner,

vs. NO: 18 WC 019948

Chicago Transit Authority,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses, temporary total disability, 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.

In the interest of efficiency, the Commission primarily relies on the detailed recitation of facts provided in the Decision of the Arbitrator, except as stated below. The Commission agrees with the Arbitrator's finding that Petitioner's lumbar strain/contusion was causally related to the June 25, 2018 accident, however, the Commission disagrees with the finding that the condition resolved as of June 10, 2019. The Commission also modifies the award of medical expenses to expand the award to January 10, 2020. Finally, the Commission modifies the permanent partial disability award to reflect an award of 25% loss of use of the person as a whole.

Causal Connection to Current Condition of Ill-being

The Commission finds that Petitioner's lumbar spine condition and need for recommended treatment was causally related to the June 25, 2018 accident and continued to be related to the aforementioned accident through January 20, 2020. The Commission primarily relies upon the opinions of Petitioner's treating physician, Dr. Luken, in reaching this conclusion.

The Commission does not agree with the Arbitrator's reliance on the opinions of Dr. Bernstein, Dr. Lim and Dr. Schaible with regard to rejection of surgery as a treatment option. While we agree there were several medical opinions that Petitioner was not a candidate for surgery, it is important to note that even when Dr. Lim and Dr. Schaible opined Petitioner was not a

candidate for surgery, they did not release her from care and did not change her work restrictions. The records demonstrate that both the orthopedic surgeon, Dr. Lim (2/1/19), and, neurosurgeon, Dr. Schaible (11/20/18) recommended Petitioner continue with pain management and seek a second opinion. PX5, p.12-14, PX3, p.125. The medical records also suggest that Dr. Schaible stated in his November 20, 2018 note that Petitioner was not a candidate "at this time". PX3, p.125. The qualifying language does not rule out the possibility of a surgical consideration as treatment progressed. At the time of his evaluation on February 1, 2019, Dr. Lim recommended additional physical therapy. PX5, p.12-14. As such, the treatment recommended by Dr. Lim was not completed and may have ultimately reached a surgical recommendation. It is also unclear if Dr. Lim had the opportunity to review the actual MRI films or only the report and whether that may have impacted his recommendation.

Further, the Commission finds the opinions of Dr. Bernstein to be unpersuasive, as his opinions rely upon a misstatement or understatement of the findings contained in the objective imaging studies. Dr. Bernstein noted that Petitioner's September 8, 2018 MRI showed minor degenerative changes from L4 to S1, with disk bulges at L4-5 and L5-S1 with no nerve root compression. RX1, p.2. He also noted that the September 25, 2018 CT scan showed some facet degenerative changes and adjacent bone cysts. *Id*. After re-evaluating those studies in his supplemental report, he again noted no evidence of nerve root compression, impingement or neuroforaminal stenosis. RX2, p.2. However, the CT scan of September 25, 2018, specifically detailed mild disc bulging with posterior facet hypertrophy and facet degenerative changes including central stenosis at L4-5 and an asymmetric leftward disc bulge which, "displaces the left S1 nerve root posteriorly in the left lateral recess". PX3, p.143. Dr. Bernstein also failed to adequately account for the EMG findings of March 13, 2019, which demonstrated electrical evidence consistent with bilateral lumbosacral radiculopathy with partial denervation changes in the bilateral L5 and S1 innervated muscles. PX6, p.139. As his causation opinions are contradicted by these objective studies, we do not find said opinions to be persuasive.

The Commission finds that Dr. Luken's opinions are more persuasive, as his recommendations took into consideration the findings in the above objective testing. Further, the Commission specifically notes that Dr. Luken's March 25, 2019 recommendation for surgical intervention took place after both Dr. Schaible and Dr. Lim's evaluations and after Petitioner had continued her conservative treatment without relief. At the time of the recommendation, Petitioner had undergone eight months of conservative treatment, including medication management, physical therapy and epidural steroid injections. After Dr. Luken's original recommendation for surgery, Petitioner underwent another five months of failed conservative treatment, before moving forward with the recommended surgery. The Commission finds Dr. Luken's recommendation for surgery to be reasonable, particularly after all other conservative options had failed and his patient was continuing to have pain in the low back accompanied by radiation into her legs.

Post-operatively, Petitioner reported satisfactory relief of her preoperative bilateral lumbar radicular symptoms to Dr. Luken. PX13, p.6. As she also reported stiffness and soreness in her lower back, Dr. Luken recommended Petitioner undergo outpatient physical therapy and a program of work hardening. *Id*. The Commission notes that the records reflect that Petitioner did not complete her course of physical therapy due to the expense (PX13, p.8) and she did not undergo

any work conditioning. *Id*. Her limited recovery is likely less due to the surgery itself and more due to her inability to continue with post-surgical physical rehabilitation. Therefore, this Commission finds her post-surgical condition of ill-being to be related to her work accident of June 25, 2018. As Petitioner was unable to continue with her post-surgical therapy, we find Petitioner reached maximum medical improvement on the date of her functional capacity evaluation on January 10, 2020.

Medical Expenses

The Commission also finds Petitioner is entitled to reasonable and related medical expenses required to cure or relieve from the effects of the accidental injury through the date of maximum medical improvement on January 10, 2020. The reasonable and related medical expenses include her surgery, post-surgical care and functional capacity evaluation. Petitioner is entitled to medical expenses for treatment rendered by providers listed in PX12, from June 25, 2018 through the date of Petitioner's functional capacity evaluation on January 10, 2020, pursuant to Section 8(a) and 8.2 of the Act.

Temporary Total Disability

As Petitioner was consistently advised to remain off work by her medical treatment providers, Petitioner is also entitled to temporary total disability from June 26, 2018 through the date of maximum medical improvement on January 10, 2020.

Maintenance Benefits

The Commission finds Petitioner did not meet her burden with regard to an entitlement to maintenance benefits. There was no evidence submitted to show that the rejection of the Petitioner's request for accommodation by Respondent was based upon the restrictions provided at the time of the January 10, 2020 functional capacity evaluation. The November 6, 2020 letter from the CTA references a rejection of an accommodation request for restrictions issued on October 28, 2020. No evidence was submitted at trial to demonstrate what restrictions were provided for Petitioner on October 25, 2020 and whether those restrictions were related to the accident of June 25, 2018.

Petitioner testified that she had contacted the Respondent regarding her restrictions, and they could not accommodate said restrictions. T.75. Petitioner specifically testified that she had called a manager about her employment status, but when she spoke with the manager, he "mentioned that it was nothing that he could do, and that he would keep an eye open for me". *Id*. However, this was again specifically related to the accommodation request in late 2020. *Id*. There was no testimony about any specific communication with any employees of CTA regarding her functional capacity evaluation restrictions and a return to work.

In addition, Petitioner's testimony regarding her job search outside of the CTA was limited. She testified to applying to jobs at "grocery stores", an insurance company and a fast-food restaurant. T.54. No information was provided to show who the potential employers were, the types of positions she applied for, or how many places or times she applied. No documentation of

her job search was offered into evidence. The Commission finds her testimony was insufficient to show a diligent job search had been conducted.

Permanent Partial Disability

Based upon the conclusions, the Commission also finds the Petitioner's occupation (ii), future earning capacity (iv) and disability factors (v) under Section 8.1(b) of the Act to be impacted.

As to factor (ii), the occupation of the injured employee, the Petitioner worked in a customer service position that was a medium demand level due to the unique business of the CTA. However, her position was not a skilled position related to the transportation industry, but rather one which emphasized contact and communication with the public. The Commission gives this factor moderate weight.

With regard to factor (iv), the employee's future earning capacity, we agree with the Arbitrator's placement of great weight on this factor in determining PPD. The Commission finds Petitioner did not prove her injury impacted her future earning capacity. There was no evidence introduced to show Petitioner contacted the CTA with her permanent restrictions per the FCE restrictions. In addition, while Petitioner testified that she looked for work after being terminated, there was no documentation of any appropriate job search in evidence and Dr. Luken's report seemed to indicate that Petitioner was not motivated to return to work.

Finally, with regard to factor (v), the evidence of disability, the Commission finds that Petitioner underwent a surgery, which relieved Petitioner's radiating pain, but did not relieve her low back discomfort. As a result, she had functional deficits as laid out in the FCE of January 10, 2020. PX2, p.11-17. Dr. Luken, Petitioner's treating physician, deferred to the FCE for Petitioner's permanent restrictions. PX13, p.8. The FCE placed restrictions of a physical demand level of light to sedentary duty upon Petitioner. *Id*. The FCE also found Petitioner's efforts during the evaluation to be valid. *Id*. The Commission places greater weight on this factor.

Based upon the above factors, the Commission finds an award of 25% loss of use of the person as a whole is appropriate.

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 28, 2023, is modified as stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner reasonable and necessary medical services as set forth in PX12 from June 25, 2018 through January 10, 2020 for causally related treatment, as provided in Section 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner temporary total disability benefits of $463.55/week for 80-5/7 weeks, commencing June 25, 2018 through January 10, 2020, as provided in Section 8(b) of the Act. Respondent shall be entitled to a credit for $16,687.626 in TTD previously paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner permanent partial disability benefits of $278.13/week for 125 weeks, as the injuries sustained caused 25% loss of use of the person as a whole, as provided in Section 8(d)2 of the Act.

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.

**December 13, 2024**

o: 10/15/2024

AHS/kjj
051

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

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

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

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 18WC019948 |
| Case Name | Sharon Craig v. Chicago Transit Authority |
| Consolidated Cases | |
| Proceeding Type | |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 9 |
| Decision Issued By | Jeffrey Huebsch, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Jason M. Whiteside |
| Respondent Attorney | Andrew Zasuwa |

DATE FILED: 12/28/2023

**THE INTEREST RATE FOR THE WEEK OF DECEMBER 27, 2023 5.08%**

/s/ Jeffrey Huebsch, Arbitrator

Signature

S. Craig v. C.T.A., 18 WC 019948

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**

**Sharon Craig** **18 WC 019948**
Employee/Petitioner
v.
**Chicago Transit Authority**
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeffrey Huebsch**, Arbitrator of the Commission, in the city of **Chicago**, on **August 23, 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 **06/25/2018**, 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, in part,*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**24,104.60**; the average weekly wage was $**463.55**.

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

Respondent shall be given a credit of $**16,687.62** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**16,687.62**.

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

**ORDER**

**Petitioner reached MMI as of June 10, 2019. Therefore, no TTD is awarded after June 10, 2019 and no medical bills incurred after June 10, 2019 are awarded.**

**Respondent shall pay Petitioner permanent partial disability benefits of $278.13/week for 25 weeks, because the injuries sustained caused Petitioner to suffer the 5% loss of use of a person as a whole, in accordance with 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.

DECEMBER 28, 2023

Signature of Arbitrator

## FINDINGS OF FACT

This case was tried with a companion case (No. 17 WC 004627), which involved the accident date of February 11, 2017 and for which Petitioner was under medical care for a back injury from February 11, 2017 through May 1, 2017.

Testimony

Petitioner testified that she currently lives in Batavia, NY and has lived there for two years. She previously lived in Chicago. (Tr. 16) She testified that she worked for Respondent for 7 years. She previously had worked for K-Mart, sold time shares for a Resort, and ran a property inspection and janitorial service that was licensed and bonded. She had attained some college education and has a high school diploma. (Tr. 17-18) Petitioner was employed by Respondent as a customer service agent, helping customers with cash machines and Ventra machines, helping with directions and assisting with supervising the platform and tracks. (Tr. 26-29)

Petitioner testified that from May of 2017 through June 25, 2018 she did not have any treatment to her low back, middle back, or neck.

The Parties stipulated that Petitioner sustained accidental injuries which arose out of and in the course of her employment by respondent on June 25, 2018. She testified that on June 25, 2018 her shift at CTA started around 10pm and lasted until 6am. She characterized this shift as the midnight or graveyard shift. Petitioner testified that she was doing paperwork in her kiosk and was sitting in a chair. She testified that she was sitting on the tip of the chair and it collapsed. She said that "…the back of the chair pushed three of my disks into my spine, crushing my spine and the nervous system to both of my legs." (Tr. 27-28)

She identified photos of the chair as a photo she took. (PX 11) She testified she was sitting toward the front of the chair as she filled out paperwork. (Tr. 29-34)

Petitioner testified that the floor she fell on was concrete. She went to Mount Sinai Hospital, where she was checked out and referred to her PCP. She later presented to OSF Primary Care (formerly Little Company of Mary) and was referred for physical therapy and told to see a specialist. Petitioner testified that she underwent epidural injections. She said that the injections did not work. (Tr. 34-37)

Petitioner testified that she was referred to Dr. Luken, a specialist. She testified that her back pain was different than the pain she had after the 2017 work accident. She described experiencing shooting pain in her legs, right more than left. Petitioner testified that she underwent 3 different surgeries in one day under anesthesia. Petitioner testified that the surgery alleviated the symptoms in her legs. (Tr. 37-45)

Petitioner testified that she had a Functional Capacity Evaluation at ATI. She testified that she could not recall whether she passed the test. She testified she had limitations of not being able to walk a long distance, not being able to sit straight and not being able to walk as far as two blocks without stopping and sitting. She testified she had ten-pound lifting restrictions. (Tr. 45-48)

Petitioner testified she attended an IME. She testified she tried to return back to the CTA and filled out paperwork. She recalled receiving a letter that stated she could not perform the essential functions of her position. Petitioner testified that she wanted to return to work but could not perform the essential job functions of her former position. (Tr. 49-53)

Petitioner testified that she looked for work outside of the CTA and applied at grocery stores and an insurance company. Petitioner testified that she was on disability and Social Security. She testified that she sees a primary care doctor in New York for general health and wellness upkeep. (Tr. 53-60)

Petitioner testified that she used to enjoy wearing heels, walking a lot and going to parks. She no longer does so. She used her own health insurance to pay for the surgery she underwent. (Tr. 61-62)

Petitioner testified that the date of the IME with Dr. Bernstein could have been June 10, 2019. She believed that the last time she saw Dr. Luken was in 2019. She testified that she had been involved in a motor vehicle accident since her treatment with Dr. Luken. The accident was on September 19, 2020. She testified that she was driving in a car and fainted, hitting a parked car, but did not sustain any injury. (Tr. 62-64)

Petitioner testified that she contacted Reed Group after receiving the letter from CTA regarding her restrictions. She testified that she did not receive any written notification from CTA that she was terminated. (Tr. 65-76)

Medical Records

Petitioner presented to the ER at Mt. Sinai Hospital on June 25, 2018. It was noted that she was seated in a work chair that collapsed. She fell to the floor sustaining lower back pain. She was diagnosed with low back pain and discharged. (PX 4)

Petitioner had treatment at OSF/Little Company of Mary, largely with Aquila Shelby, APRN. This is her PCP facility. It is noted that she denied backpain when seen on May 30, 2018 for URI and hypertension. She was taking cyclobenzaprine and Naprosyn at that time. (PX 3, 201) She received 2 ESIs. (PX 3, 114, 162) When she was seen for ER follow-up on July 25, 2018, medication, HEP and an MRI were recommended. (PX 3, 168) Shelby noted that Petitioner was seen by Dr. Keith Schaible at Advocate medical Center and was informed that she did not need surgery, should get a second opinion and continue with pain management. (PX 3, 117) There was no evidence of Dr. Schaible's specialty submitted.

Petitioner presented to Dr. Lim at Midwest Orthopedic Consultants on February 1, 2019. Severe low back pain of 10/10 was reported. A history of injury regarding a chair at work on June 25, 2018 is mentioned. It is noted that two epidural steroid injections had been done. An MRI of the lumbar spine was reviewed with an impression of disc desiccation at L4-5 and L5-S1. Dr. Lim performed a physical examination of the lumbar spine and noted no evidence of tenderness at the midline and trapezius. No paraspinal tenderness was present, there was no step off or paraspinal spasm. Range of motion was decreased. Strength testing revealed no motor deficits. Sensation was intact. Straight leg test was negative. Gait and station were normal and the patient ambulated unassisted. A course of physical therapy and pain management was recommended. (PX 5)

On February 11, 2019, Petitioner presented to Dr. Martin Luken, a neurosurgeon. It was noted that 7 and a half months prior she injured her lumbar spine at work when a chair collapsed, causing her to fall backward. It was noted that she had seen a Neurosurgeon at the University of Chicago who advised her that she was overweight and had degenerative disease of her spine, and did not need surgery. (PX 6, 142) Dynamic lumbar radiographs were recommended. Petitioner was kept off work. An EMG was recommended. (PX 6)

On March 25, 2019, Petitioner returned to Dr. Luken. Dr. Luken recommended bilateral lumbosacral foraminotomies.

On June 10, 2019 Petitioner presented to Dr. Avi Bernstein, an Orthopedic Surgeon, for an Independent Medical Examination. Dr. Bernstein noted she had a chief complaint of constant low back pain and bilateral buttock and thigh pain. He performed a physical examination and noted she was moderately overweight and in no acute distress. She was able to rise to stand without difficulty and had a "somewhat bizzare wide-based waddling gait. Dr. Bernstein reviewed an MRI of the lumbar spine from September 8, 2018 and noted minor degenerative changes from L4 to S1. There was a left-side disk bulge at L5-S1. A minimal L4-5 central disk bulge. No evidence of nerve root compression or right-sided pathology was seen. Dr. Bernstein opined that Petitioner had suffered a lumbar strain or contusion as a result of her work-related incident. He did not consider her a surgical candidate and she did not have a structural injury to her spine. He believed she was capable of working full duty as a customer service agent. He did not believe she would require further treatment. (RX 1)

On September 18, 2019, Petitioner underwent bilateral L4-5 and L5-S1 interlaminar laminotomies, partial facetectomies, and foraminotomies, with excision of right sided facet joint synovial cyst. (PX 6, 134)

Petitioner attended physical therapy at Ingalls Memorial Hospital but terminated services there in October of 2019 to find a facility closer to her home. (PX 6)

Petitioner continued physical therapy at Fyzical in Chicago, IL through November 29, 2019 (PX 9)

Dr. Bernstein authored an IME Addendum dated July 12, 2022. He reviewed additional records including an FCE dated January 10, 2020 that concluded Petitioner could function in a sedentary to light physical demand category. Dr. Bernstein opined that his previous opinions in the June 10, 2019 IME were unchanged. (RX 2)

Dr. Bernstein authored another Addendum to the IME on September 26, 2022. He noted that he was able to review the operative report from September 18, 2019, in which Dr. Luken had performed bilateral L4-5 and L5-S1 interlaminar laminotomies with partial facetectomies and foraminotomies with excision of right sided facet joint synovial cyst at L4-5. He noted she had done postoperative physical therapy. He opined that the ultimate response to surgery was unclear. (RX 3)

Dr. Bernstein reviewed the radiographic studies and noted they failed to identify nerve root compression or a synovial cyst. He did not feel that the MRI findings supported the September 18, 2019 lumbar surgery performed by Dr. Luken. He felt that the MRI scan was benign. (RX 3)

On February 16, 2023, Dr. Luken authored a narrative report addressed to Petitioner's attorney. He last saw Petitioner in December of 2019. He believed that Petitioner's injury of June 25, 2018 had significantly aggravated her bilateral compressive lumbar radiculopathy, which was more likely than not preexisting. He believed that the lumbar surgery he performed was necessary and rendered necessary due to the work accident. (Px 13, 7,8) Dr. Luken stated that Petitioner's symptoms had persisted 3 years after her date of surgery and her symptoms would be permanent. He noted that the FCE study was over 3 years old and felt he would defer comment regarding Petitioner's permanent disability to the findings of an FCE like the one done previously. (PX 13, 8)

## CONCLUSIONS OF LAW

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

Section 1(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 employment. 820 ILCS 305/1(d). To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all elements of their claim (O'Dette v. Industrial Commission, 79 Ill. 2d 249, 235 (1980)), including that there is some causal relationship between their employment and their 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)

**Regarding whether there is a causal connection between the Petitioner's current condition and the June 25, 2018 work accident, the Arbitrator finds:**

Petitioner's current condition of ill-being, to wit: lumbar strain/contusion, resolved as of June 10, 2019, as diagnosed by Dr. Bernstein, is causally related to the June 25, 2018. All treatment and lost time after June 10, 2019 is not related to the June 25, 2018 work accident and all claims for same are denied.

This finding is based on the persuasive opinion of Dr. Bernstein and the medical records.

Clearly, Dr. Lim and Dr. Schaible concurred with Dr. Bernstein's opinion that surgery was not indicated. Perhaps a third physician (neurosurgeon at University of Chicago, per Dr. Luken) also did not endorse surgery.

The Arbitrator finds the opinion of Dr. Bernstein to be more persuasive than Dr. Luken. The Arbitrator notes that Dr. Bernstein and Dr. Luken are well respected surgeons, both of whom he has found to have persuasive opinions in the past.

The MRI report for the lumbar study taken September 8, 2018 showed findings of minimal/mild chronic appearing degenerative changes in the lumbar spine. The radiologist's impression was mild lumbar spine degenerative changes at L4-5 and L5-S1.(PX 5, 16) The Arbitrator notes that while both Dr. Luken and Dr. Bernstein reviewed the MRI, Dr. Bernstein noted that it was a benign MRI with no neuro compressionand that he would not perform surgery based on the findings. (RX 3) The bottom line is that Petitioner has subjective complaints, but a benign PE (5/5 strength, negative SLR, equal DTRs) and benign MRI, such that surgery would not be indicated.

Dr. Luken's narrative is thorough and does explain the case very well; his causal opinion is not persuasive given the benign MRI and PE and the opinions of the 3 other doctors. Of note is Dr. Luken's honest consideration of secondary gain issues and his documentation of a benign PE. Given Petitioner's testimony in this case, for example, "…the back of the chair pushed three of my disks into my spine, crushing my spine and the nervous system to both of my legs." (she was discharged from the ER at Sinai with a low back strain diagnosis), "3 different surgeries in one day" (one surgery, 3 procedures), the secondary gain factor is likely present in this case and while Dr. Luken could offer the surgery in good faith, the lack of a good result is not surprising.

**Regarding whether the medical services provided to Petitioner reasonable and necessary, the Arbitrator finds:**

The Arbitrator finds all treatment to the lumbar spine through June 10, 2019 to be reasonable and necessary. The Arbitrator finds that June 10, 2019 was the MMI date per the IME opinion of Dr. Avi Bernstein.

**Regarding whether any TTD benefits are owed, the Arbitrator finds:**

No additional TTD benefits are owed, as Petitioner was at maximum medical improvement on June 10, 2019 per the IME of Dr. Bernstein.

**Regarding the nature and extent of Petitioner's injuries, the Arbitrator finds:**

Section 8.1b of the Illinois Workers' Compensation Act states that permanent partial disability shall be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of Section 8.1b of the Act; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability.

Regarding **(i),** there was no AMA rating offered by either party in this matter. This factor is given n weight in determining PPD.

The Arbitrator notes that with regards to **(ii)**, Petitioner was found to be capable of returning to work full duty by Dr. Bernstein as of June 10, 2019. The Arbitrator notes that Dr. Luken concluded in his narrative report that permanent disability would need to be based on a study like the FCE done in 2020, and that the existing FCE was nearly 3 years old. This factor, buttressed by the Arbitrator's Causation finding, above is given moderate weight in determining PPD.

With regard to **(iii)**, Petitioner was 55 at the time of the injury and is now 60. The Arbitrator places appropriate weight on this factor in determining PPD when it is coupled with the finding above on the issue of causation.

With regard to **(iv)**, the Arbitrator places great weight on this factor in determining PPD, and notes that Petitioner was found capable of returning to work full duty by Dr. Bernstein on June 10, 2019. Furthermore, while Petitioner testified that she looked for work after her CTA job, there is no record of any appropriate job search in evidence and Dr. Luken's report seems to indicate that Petitioner was not motivated to return to work.

With respect to **(v)**, the IME of Dr. Bernstein finds Petitioner to have reached MMI by June 10, 2019 and to have suffered a lumbar strain. The Arbitrator does not find the medical opinion of Dr. Luken to be persuasive. The Arbitrator notes that the MRI scan was found to show mild degenerative changes. Dr. Bernstein felt it was a benign study. The non-surgical treatment that Petitioner received was palliative and should have stopped as of the Bernstein IME. This factor is given appropriate weight in determining PPD in this case.

The Arbitrator notes that the determination of permanent partial disability benefits is not simply a calculation, but an evaluation of all of the factors as stated in the Act in which consideration is not given to any single factor as the sole determinant.

Based on the above factors and the Record in its entirety, the Arbitrator concludes that as a result of the injuries sustained, Petitioner suffered permanent partial disability to the extent of 5% loss of use of a person as a whole, in accordance with section 8(d)2 of the Act.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 21WC034732 |
| Case Name | Fred Phoenix v.<br>State of Illinois - Menard Correctional Center |
| Consolidated Cases | |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 24IWCC0599 |
| Number of Pages of Decision | 10 |
| Decision Issued By | Raychel Wesley, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Jason Coffey |
| Respondent Attorney | Aaron Wright |

DATE FILED: 12/16/2024

/s/Raychel Wesley,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) |
| WILLIAMSON | | ☐ PTD/Fatal denied |
| | ☐ Modify | ☒ None of the above |

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

FRED PHOENIX,

Petitioner,

vs. NO: 21 WC 34732

STATE OF ILLINOIS-
MENARD CORRECTIONAL CENTER,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 18, 2024, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $814.10 per week for a period of 88.55 weeks, as provided in §8(e)10 of the Act, for the reason that the injuries sustained caused a 35% loss of use of the right arm.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner compensation that has accrued from March 21, 2024 through May 3, 2024, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Pursuant to §19(f)(1), this decision is not subject to judicial review. Therefore, no appeal bond is set in this case.

**December 16, 2024**

/s/ *Raychel A. Wesley*

RAW/wde

D: 11/6/24

43

/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 21WC034732 |
| Case Name | Fred Phoenix v.<br>State of Illinois - Menard Correctional Center |
| Consolidated Cases | |
| Proceeding Type | |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 7 |
| Decision Issued By | Linda Cantrell, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Jason Coffey |
| Respondent Attorney | Aaron Wright |

DATE FILED: 6/18/2024

/s/ Linda Cantrell, Arbitrator
Signature

**THE INTEREST RATE FOR THE WEEK OF JUNE 18, 2024 5.15%**

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

June 18, 2024

/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**
**NATURE AND EXTENT ONLY**

**Fred Phoenix**
Employee/Petitioner

v.

**State of Illinois/Menard Correctional Center**
Employer/Respondent

Case # **21** WC **034732**

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 **Linda J. Cantrell**, Arbitrator of the Commission, in the city of **Herrin**, on **5/3/24**. By stipulation, the parties agree:

On the date of accident, **11/23/21**, 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 $**70,556.00**, and the average weekly wage was $**1,356.84**.

At the time of injury, Petitioner was **35** years of age, ***married*** with **2** dependent children.

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

Respondent shall be given a credit for **Any and all TTD benefits paid**, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**Any and all TTD benefits paid, pursuant to the stipulation of the parties**.

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**

Pursuant to the stipulation of the parties, Respondent shall receive credit for any and all medical bills paid through its group medical plan, under Section 8(j) of the Act.

Respondent shall pay Petitioner the sum of $**814.10**/week for **88.55** weeks, because the injuries sustained caused permanent partial disability to the extent of **35%** loss of use of the right arm, as provided in Section 8(e)10 of the Act.

Respondent shall pay Petitioner compensation that has accrued from 3/21/24 through 5/3/24, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Arbitrator Linda J. Cantrell

**June 18, 2024**

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

**ILLINOIS WORKERS' COMPENSATION COMMISSION**
**ARBITRATION DECISION**
**Nature and Extent only**

| | | |
|---|---|---|
| FRED PHOENIX, | ) | |
| | ) | |
| Employee/Petitioner, | ) | |
| | ) | |
| v. | ) | Case No.: 21-WC-034732 |
| | ) | |
| STATE OF ILLINOIS/MENARD CORRECTIONAL CENTER, | ) | |
| | ) | |
| Employer/Respondent. | ) | |

## FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Herrin on May 3, 2024. The parties stipulated that Petitioner sustained accidental injuries that arose out of and in the course of his employment with Respondent on 11/23/21 and that Petitioner's current condition of ill-being is causally connected to the injury. The parties stipulated that Respondent is entitled to a credit for any and all medical bills paid through its group medical plan, under Section 8(j) of the Act. The parties stipulated that all temporary total disability benefits have been paid and Respondent has or will pay all medical expenses incurred by Petitioner pursuant to Section 8(a) and 8.2 of the Act. The sole issue in dispute is the nature and extent of Petitioner's injuries.

## TESTIMONY

Petitioner was 35 years old, married, with two dependent children at the time of accident. Petitioner was hired by Respondent in 2010 and was a maintenance equipment operator at the time of accident. His primary job duties include driving a semi-truck and hauling supplies to and from other prison facilities to Menard Correctional Center. He operates heavy equipment when needed. Petitioner testified he has to work 12 more years before his retirement vests. On 11/23/21, Petitioner attempted to open the door to a semi-trailer to make sure the load was secure before he left the facility. He stated the door was frozen or stuck and when he pulled on it, he felt his right arm pop followed by a tingling sensation. Petitioner testified he did not think much of it at the time, and he continued working. He stated his pain worsened throughout his workday.

Petitioner is right-hand dominant with no prior injuries to his right arm. He reported the injury to his supervisor and sought medical attention. Petitioner underwent a right extensor tendon repair at the elbow by Dr. Paletta on 4/25/22. He testified that his pain did not resolve following surgery and physical therapy. Petitioner was examined by Dr. James Emanual pursuant

to Section 12 of the Act. Petitioner chose to treat with Dr. Emanual who performed a right lateral epicondylectomy on 8/9/23. Petitioner's pain persisted following the second surgery and he was referred for a nerve conduction study. Dr. Emanual performed an ulnar nerve transposition on 1/12/24 and released Petitioner at MMI in March 2024.

Petitioner testified that his right elbow pain has resolved, but he cannot engage in the activities he did prior to the injury due to residual weakness. Petitioner has a side business of power washing houses. He testified that he has decreased grip strength and he does not have near the same strength in his right arm that he does in his left. Petitioner testified that he struggles to play ball with his daughters due to the weakness in his dominant arm.

On cross-examination, Petitioner testified that he learned to operate heavy equipment through his prior employment in the coal mines. He has two daughters who play softball, and he coached their team prior to the injury. Petitioner did not coach while he was undergoing treatment, but he returned to coaching this spring. Petitioner also likes to hunt deer and turkey. He no longer has the strength to pull back the arrow on his bow. He now uses a crank crossbow. Petitioner had a shotgun deer permit last fall but was unable to kill a deer. Petitioner has not tried to fish since he was injured but he plans to do so soon. Petitioner believes he is able to perform his job duties satisfactorily since he returned to full duty work.

## MEDICAL HISTORY

On 11/24/21, Petitioner presented to Chester Clinic and reported he was trying to lift a trailer door that was stuck, and he felt a pop in his right elbow. (PX1) Petitioner complained of stabbing pain in his elbow with numbness/tingling shooting down to his fingers. X-rays of his right elbow were negative for fracture. Petitioner was instructed to ice and rest. He returned to Chester Clinic with ongoing symptoms, and he was diagnosed with lateral epicondylitis and referred for orthopedic evaluation. He was recommended to wear a brace.

Petitioner was examined by Dr. George Paletta on 12/30/21. (PX2) Dr. Paletta diagnosed acute lateral epicondylitis with probable partial tear of the common extensor tendon in the right elbow. An MRI revealed a high-grade partial tear of the common extensor tendon origin. Dr. Paletta recommended surgery.

On 4/25/22, Dr. Paletta performed an open fasciotomy, debridement, and partial lateral epicondylectomy. Petitioner underwent physical therapy at Chester Memorial Hospital through early August 2022. Dr. Paletta recommended an MRI due to Petitioner not making faster progress in therapy. The MRI was performed on 7/27/22 that revealed heterogeneous edema within the lateral epicondyle. Dr. Paletta felt the edema was more extensive than would be expected and he recommended an ultrasound-guided injection in the right elbow. In October 2022, Dr. Paletta recommended that Petitioner apply Voltaren gel twice daily and ordered a PRP injection.

On 2/21/23, Petitioner was examined by Dr. James Emanuel pursuant to Section 12 of the Act. (PX4, RX2) Dr. Emanuel took a history from Petitioner, reviewed Petitioner's medical records and diagnostic films, and performed a physical examination. He diagnosed a partial tear

of the common extensor tendon of the right elbow, lateral epicondylitis, elbow pain, and other acute post-procedural pain. Dr. Emanuel advised Petitioner that he could either forego additional treatment and be placed at MMI with permanent restrictions and wear a brace while working or undergo a revision surgery. Petitioner chose to treat with Dr. Emanuel who performed a revision right lateral epicondylectomy and revision repair of the common extensor tendon on 8/9/23. (PX4) Post-operatively, Dr. Emanuel recommended a brace and physical therapy.

On 12/11/23, Petitioner reported less pain, but the numbness and tingling in his elbow/arm persisted. Dr. Emanuel suspected cubital tunnel syndrome and recommended a nerve conduction study. Dr. Todd Silverman performed the NCS on 12/18/23 that revealed ulnar neuropathy at the elbow. On 1/12/24, Dr. Emanuel performed a submuscular transposition of the right ulnar nerve. On 2/22/24, Dr. Emanuel noted Petitioner was making very satisfactory progress and he was referred for physical therapy. Petitioner was placed on light duty work restrictions.

On 3/21/24, Petitioner reported he was doing much better and was very pleased with the result. Dr. Emanuel noted very excellent results and Petitioner had full active and passive range of motion and 5/5 strength in all groups. He released Petitioner at MMI without restrictions.

## CONCLUSIONS OF LAW

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

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

**(ii)** **Occupation**: Petitioner returned to full duty work without restrictions in his pre-accident position for Respondent. He testified that he is able to perform his job duties satisfactorily since he returned to full duty work. The Arbitrator places some weight on this factor.

**(iii)** **Age**: Petitioner was 35 years old at the time of accident. He is a younger individual and must live and work with his disability for an extended period of time. Pursuant to *Jones v. Southwest Airlines*, 16 I.W.C.C. 0137 (2016) (wherein the Commission concluded that greater weight should have been given to the fact Petitioner was younger [46 years of age] and would have to work with his disability for an extended period of time). The Arbitrator places greater weight on this factor.

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

**(v)** **Disability**: As a result of the undisputed work injury, Petitioner underwent three right elbow surgeries, including an open fasciotomy, debridement, and partial lateral epicondylectomy, a revision right lateral epicondylectomy and revision repair of the common extensor tendon, and an ulnar nerve transposition. On 3/21/24, Dr. Emanuel noted Petitioner had a very excellent result, with full active and passive range of motion and 5/5 strength in all groups. Petitioner was released at MMI without restrictions, and he returned to his pre-accident position for Respondent. Petitioner testified that he is able to perform his job duties satisfactorily.

Petitioner is right hand dominant. He testified that his right elbow pain has resolved, but he has residual weakness in his arm and decreased grip strength. He stated he does not have near the same strength in his right arm that he does in his left. His ongoing symptoms negatively affect his ability to play ball with his daughters, but he has returned to coaching softball. Petitioner is not able to pull the bow on his crossbow and he now uses a crank crossbow. 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 35% loss of use of his right arm, as provided in Section 8(e)10 of the Act.

Respondent shall pay Petitioner compensation that has accrued from 3/21/24 through 5/3/24, and shall pay the remainder of the award, if any, in weekly payments.

Arbitrator Linda J. Cantrell DATED: **June 18, 2024**

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 21WC027244 |
| Case Name | Jorge Camacho v.<br>Cook County Dept. of Corrections |
| Consolidated Cases | 22WC018473; |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 24IWCC0600 |
| Number of Pages of Decision | 15 |
| Decision Issued By | Stephen Mathis, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Al Koritsaris |
| Respondent Attorney | Brian Bendoff |

DATE FILED: 12/16/2024

/s/Stephen Mathis, Commissioner

Signature

STATE OF ILLINOIS )
) SS.
COUNTY OF COOK )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jorge Camacho,

Petitioner,

vs. NO. 21WC27244

Cook County Department of Corrections,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 21, 2024, 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.

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

**December 16, 2024**

SJM/sj
o-11.20.24
44

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

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

/s/ *Raychel A. Wesley*
Raychel A. Wesley

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 21WC027244 |
| Case Name | Jorge Camacho v.<br>Cook County Dept. of Corrections |
| Consolidated Cases | 22WC018473; |
| Proceeding Type | |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 12 |
| Decision Issued By | Joseph Amarilio, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Al Koritsaris |
| Respondent Attorney | Brian Bendoff |

DATE FILED: 3/21/2024

/s/ Joseph Amarilio, Arbitrator

Signature

**THE INTEREST RATE FOR THE WEEK OF MARCH 19, 2024 5.13%**

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**

**Jorge Camacho**
Employee/Petitioner
v.
**Cook County Dept. of Corrections**
Employer/Respondent

Case # **21** WC **027244**

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 **December 21, 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 **September 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 $***92,164.80*** the average weekly wage was $***1,772.40***

On the date of accident, Petitioner was ***35*** years of age, ***married*** with ***3*** dependent children.

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

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

Respondent shall be given a credit of $***25,052.00*** for TTD, $***0*** for TPD, $***0*** for maintenance, and $***0*** for other benefits, for a total credit of $***25,052.00.***

Respondent is entitled to a credit of $***3,441.81*** under Section 8(j) of the Act and will hold Petitioner harmless for the same.

**ORDER**

Respondent shall pay reasonable and necessary medical services of $32,370.83 for services rendered by ATI Physical Therapy directly to Petitioner pursuant to the medical fee schedule as provided in Sections 8(a) and 8.2 of the Act:

Respondent shall pay Petitioner permanent partial disability benefits of $937.11 per week [max rate] for 30 weeks, because the injuries sustained caused the 6% loss of the person as a whole, as provided in Section 8(d)2 of the Act for the left shoulder injury and Respondent shall pay Petitioner permanent partial disability benefits of $937.11 per week for 7.5 weeks, because the injuries sustained caused the 1.5% loss of the person as a whole, as provided in Section 8(d)2 of the Act for the right shoulder injury

Respondent shall pay Petitioner permanent partial disability benefits of $937.11 per week for 16.125 weeks, because the injuries sustained caused the 7.5 % loss of the right leg, as provided in Section 8(e)(12) of the Act.

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

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

/s/ *Joseph D. Amarilio*

Signature of Arbitrator Joseph D. Amarilio

**March 21, 2024**

**BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION**
**ATTACHMENT TO ARBITRATION DECISION**

| | | |
|---|---|---|
| **Jorge Camacho,** | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | |
| | ) | **Case No. 21 WC 027244** |
| **Cook County Department. of Corrections**, | ) | |
| | ) | Consolidated with 22 WC 018473 |
| | ) | |
| Respondent. | ) | |

## FINDINGS OF FACT OF FACT AND CONCLUSIONS OF LAW

### I. PROCEDURAL HISTORY

Officer Jorge Camacho ("Petitioner"), by and through his attorney, filed two (2) Applications for Adjustment of Claim for benefits under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.*) (West 2014) ( "Act." ). Petitioner alleged to have sustained two (2) separate accidents that arose out of and in the course of his employment while working for the Cook County Department of Corrections. ("Respondent'), The two claims were consolidated.

(1). Under case number 21 WC 027249, Petitioner alleged that on September 10, 2021, he sustained an accidental injury to both shoulders and to his right knee for which he received conservative treatment.

(2) Under case number 22 WC 018473, Petitioner alleged that on May 30, 2022, he sustained an accidental injury to his neck and reinjured his shoulders, left more than right. Petitioner received conservative treatment for the injured shoulders and underwent disc replacement surgery for his neck.

This matter proceeded to hearing on December 21, 2023 in the city of Chicago. The parties jointly submitted a Request For Hearing Form representing that the following four issues were in dispute: (1.) Whether Petitioner's current condition of ill-being is causally connected to this injury; (2) Whether Respondent is liable for unpaid medical bills; (3.) Whether Petitioner is entitled to TTD; and, (4.) The nature and extent of Petitioner's injury. The parties jointly requested a written decision that includes findings of fact and conclusions of law. (Arb. X 1) As the trial commenced, the parties agreed that Petitioner was entitled to the claim TTD period and that all TTD was paid.

This Arbitration Decision is related to case number 21 WC 027344,

### II. FINDINGS OF FACT

***Testimony***

On September 10, 2021, Petitioner Jorge Camacho was an employee of the Respondent, employed as a Correctional Officer. Petitioner testified that on that day he was working his regular shift

with no physical limitations. He had been working as a correctional officer for approximately 13 years as of September of 2021.

On September 10, 2021, Petitioner was injured during an altercation with an unruly inmate. He responded to an "All-Available" call that he received on his radio. When he arrived, he witnessed two of his colleagues in a physical altercation with an inmate and he immediately attempted to assist. He twisted his right knee while taking down the inmate. Further, he testified that he was able to get the inmate down on the ground and secured him with handcuffs, but in the process, injured both of his shoulders. He testified that the left shoulder injury was more painful than the right shoulder.

Petitioner sought medical treatment following the occurrence. He initially went to his primary care physician, the day after the occurrence. He saw his primary care physician a few times, before being referred to a specialist. He was referred to Steven Chudik, M.D. for further care. Dr. Chudik took him off work and he began receiving disability benefits from Respondent. Dr. Chudik sent him for an MRI of his left shoulder and right knee. He was also sent for physical therapy. He testified that his right shoulder improved significantly following therapy. He testified that his right knee and left shoulder only marginally improved after therapy. Petitioner also underwent some work conditioning but was unable to complete the program due to benefits being severed.

Petitioner remained off work until March 2, 2022. He returned to work after seeing Dr. Bryan Forsythe for an independent medical examination on February 8, 2022. He testified that his benefits stopped after he saw Dr. Forsythe. He testified that Dr. Chudik maintained an off-work recommendation at that time but he returned to work due to financial reasons. He testified that he had no choice but to return to work and do his best to support his family.

***Job Duties***

Petitioner testified that his job duties as a correction officer include the following: opening and shutting heavy metal jail doors, keeping order, restraining inmates, hand-to-hand combat with combative inmates, passing medication, supervision of inmates in the common areas, accompanying inmates to Stroger Hospital in cases of medical emergencies, and intake.

***Prior Medical Condition***

Petitioner testified that he never had injuries to his right knee, left shoulder or right shoulder prior to the September 10, 2021 work accident. No evidence was submitted that revealed any prior medical conditions relating to those body parts. [ Petitioner aggravated his shoulders in his May 30, 2022 accident.]

***Summary of Medical Records & Section 12 Examination***

The day after the occurrence, Petitioner presented to his primary care physician, Andres Marius-Nunez, M.D. at Family Medical Center. (Petitioner Exhibit 1, p. 1 hereinafter "Pet. Ex. 1, p. 1"). The record notes complaints of bilateral shoulder pain and right knee pain. *Id*. He returned for follow-up on September 13, 2021 with the same complaints and x-rays of his right knee and

bilateral shoulders were ordered. (Pet. Ex. 1, p. 2). On the same day, he presented to Rush Oak Park Medical Center and underwent x-rays of his right knee and both of his shoulders. (Pet. Ex. 2). On September 22, 2021, he returned to Dr. Marius-Nunez for follow-up. (Pet. Ex. 1, p. 3). The record indicates that he was referred to an orthopedic doctor at this time. *Id*.

On October 1, 2021, he presented to Steven Chudik, M.D., an orthopedic surgeon with Hinsdale Orthopedics for an initial consultation. (Pet. Ex. 3, p. 6-9). Petitioner complained of right knee pain, and bilateral shoulder pain, left worse than right. (Pet. Ex. 1, p. 6). On examination, a positive McMurray's test was noted with respect to the right knee. (Pet. Ex. 1, p. 7). Examination of the shoulders revealed positive Neer's and Hawkins impingement test and positive cross arm abduction test with respect to the left shoulder. (Pet. Ex. 3, p. 8). He was taken off work and MRIs of the right knee and left shoulder were ordered. *Id.*

On October 9, 2021, Petitioner underwent an MRI of the right knee, which revealed an abnormal increased signal of the medial meniscus, representing a radial tear of the posterior root along with suprapatellar joint effusion. (Pet. Ex. 3, p. 17). Petitioner also underwent an MRI of his left shoulder, which revealed partial tearing of the supraspinatus and infraspinatus rotator cuff tendons along with subdeltoid bursal fluid due to bursitis. (Pet. Ex. 3, p. 16).

On October 15, 2021, he returned to Dr. Chudik with continued complaints of right knee pain and left shoulder pain. (Pet. Ex. 3, p. 18). Dr. Chudik reviewed the MRI and diagnosed Petitioner with Left Shoulder impingement with bursal sided rotator cuff tear, as well as a posterior root tear of the medial meniscus of the right knee and recommended formal physical therapy with Petitioner kept off work. (Pet. Ex. 3, p. 19). Petitioner underwent physical therapy at ATI for his shoulders and right knee. (Pet. Ex. 4).

On November 17, 2021, Petitioner returned to Dr. Chudik after having done physical therapy with continued complaints of left shoulder pain and right knee pain and only residual right shoulder pain. (Pet. Ex. 3, p. 22). At this time, he was kept off work and was told to continue physical therapy. (Pet. Ex. 3, p. 24). Petitioner continued physical therapy at ATI physical therapy. (Pet. Ex. 4).

On January 26, 2022, Petitioner returned to Dr. Chudik for follow-up complaining of continued left shoulder pain and improved right knee and right shoulder pain. (Pet. Ex. 3, p. 30). Petitioner was kept off work at this time and work conditioning was recommended. (Pet. Ex. 3, p. 32). Petitioner began work conditioning at this time also at ATI physical therapy. (Pet. Ex. 4).

On February 8, 2022, Petitioner submitted to Brian Forsythe M.D., for a Section 12 Examination at Respondent's request. (Respondent Exhibit 5, hereinafter "Res. Ex. 5"). Dr. Forsythe notes a positive Neer and Hawkins test as it relates to the left shoulder. (Res. Ex. 5, p. 7/9). Dr. Forsythe also noted reduced right quadriceps on the right side when compared with the left and also "popping" in the right knee when toe walking. (Res. Ex. 5, p. 8/9). Dr. Forsythe notes review of the left shoulder MRI revealed subacromial/subdeltoid bursitis but not evidence of rotator cuff tear. *Id*. Dr. Forsythe also notes review of the MRI of the right knee and states he agrees with the radiologist's interpretation. *Id*. Dr. Forsythe diagnosed Petitioner with a resolved right knee strain and resolved bilateral shoulder strains. *Id*. Dr. Forsythe causally related the diagnoses to

the September 10, 2021 work injury. *Id*. Dr. Forsythe opined that Petitioner was at maximum medical improvement (hereinafter, "MMI") and was able to return to work with no restrictions as of the date of the exam. (Res. Ex. 5, p. 9/9). Dr. Forsythe diagnosed petitioner with resolved bilateral shoulder strains and a resolved right knee strain. Dr. Forsythe concluded the diagnoses were consistent with the mechanism of injury., and considered the diagnoses to be causally related to the September 10, 2021 accident. However, Dr. Forsythe also concluded that petitioner demonstrated moderate to severe symptom magnification during the physical examination and concluded that his subjective complaints were not supported by objective medical evidence.

Dr. Forsythe diagnosed Petitioner with resolved bilateral shoulder strains and a resolved right knee strain. Dr. Forsythe concluded the diagnoses were consistent with the mechanism of injury. and considered the diagnoses to be causally related to the September 10, 2021 accident. However, Dr. Forsythe also concluded that Petitioner demonstrated moderate to severe symptom magnification during the physical examination and concluded that his subjective complaints were not supported by objective medical evidence. Dr. Forsythe did not note in his records review of any symptom magnification contained in the records that would corroborate his symptom magnification findings.

***Petitioner's Current Condition***

Petitioner testified that he continued to experience pain in his left shoulder with activity as well as left arm weakness. Petitioner testified that he also continues to feel instability in the right knee with activity as well as pain and swelling at the end of the workday. Petitioner testified that his right shoulder pain has resolved for the most part and only has intermittent residual pain with increased activity.

## III. CONCLUSIONS OF LAW

The Arbitrator adopts the above Statement of Facts 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. 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 her be a credible witness. His testimony was consistent with and corroborated by the medical evidence. Petitioner was forthright when answering questions from his attorney and Respondent's attorney.

The Arbitrator did not find the opinions of Dr Forsythe to be persuasive.

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

It is well-established that an accident need not be the sole or primary cause-as long as employment is a cause-of a claimant's condition. *Sisbro, Inc. v. Industrial Comm'n,* 207 Ill.2nd 193, 205 (2003). Furthermore, an employer takes its employees as it finds them. *St. Elizabeth's Hospital v. Illinois Workers' Compensation Comm'n*, 371 Ill.App.3d 882, 888 (2007). A claimant with a preexisting condition may recover where employment aggravates or accelerates that condition. *Caterpillar Tractor Co. v. Industrial Comm'n,* 92 Ill.2d 30, 36 (1986). 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. *Mason & Dixon Lines, Inc. v. Industrial Comm'n,* 99 Ill. 2d 174, 181 (1983*); Azzarelli Construction Co. v. Industrial Comm'n,* 84 Ill. 2d 262, 266 (1981*).* 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 (1994). Prior good health followed by a change immediately following an accident allows an inference that 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 Arbitrator finds Petitioner's current condition of ill-being is causally related to his work injury of September 10, 2021. Based on the credible testimony of Petitioner as well as the medical records and opinions of Dr. Chudik, which includes the diagnostic testing, the Arbitrator finds that Petitioner has affirmatively demonstrated a causal relationship between his work injury on September 10, 2021 and his current condition of ill-being. The Arbitrator notes that even Dr. Forsythe, the Section 12 examiner retained by Respondent agrees that Petitioner suffered injuries to his right knee and bilateral shoulders; injuries which were causally related to the work accident that took place on September 10, 2021, yet disagrees with the severity of those injuries. Prior to his injury, Petitioner did not have any issues with his right shoulder, left shoulder or right knee and he was performing full duty work. The injury caused an immediate disability to Petitioner's right shoulder, left shoulder or right knee. No evidence was presented that Petitioner suffered any injury other than the work-related injury he suffered on September 10, 2021 other than the subsequent accident filed with the Commission and is companion to this case.

`The Arbitrator notes that the most convincing evidence relied upon to show that Petitioner's condition of ill-being is causally related to the September 10, 2021 work accident is the mechanism of injury and the objective pathology on imaging. Further, even the Section 12 examiner agreed that Petitioner did not suffer from any pre-existing conditions with respect to the right knee, left shoulder or right shoulder and that the mechanism of injury was consistent with the injuries.

Regarding mechanism of injury with respect to the right knee, Petitioner testified that he twisted his right knee during the altercation with the inmate. Further, the subjective history portions of the medical charts corroborate this mechanism of injury. This mechanism of injury of knee twisting is the most competent mechanism that exists to cause a tear in the meniscus. The objective pathology of the MRI of the right knee shows that Petitioner had a tear in the posterior root of the medial meniscus. Further, upon review of Dr. Chudik's physical examinations of the Petitioner's right knee, there was objective evidence of a meniscal tear on clinical examination by way of a positive McMurray's test. That test is the provocative test to determine clinically whether someone may be suffering from a meniscal injury. As such, the mechanism of injury, subjective

complaints of Petitioner, positive McMurray test on exam, and objective pathology of a meniscal tear all correlate.

Regarding the mechanism of injury with respect to the left shoulder, Petitioner testified that he hurt his shoulder while attempting to physically force the inmate's arms behind his back in order to place cuffs on him. The mechanism of injury with respect to these actions is competent to cause injury to the shoulder due to the forces at play. The objective pathology of the MRI of the left shoulder shows that Petitioner had bursitis with a bursal sided tear of the rotator cuff. Further, upon review of Dr. Chudik's physical examinations of the Petitioner's left shoulder, there was objective evidence of shoulder impingement by way of a positive Neer's and Hawkins impingement test. That test is the provocative test to determine clinically whether someone may be suffering from shoulder impingement. As such, the mechanism of injury, subjective complaints of Petitioner, positive Neer's and Hawkins test on exam, and objective pathology of left shoulder impingement all correlate.

The Arbitrator finds that Dr. Chudik is more persuasive ee than Dr. Forsythe for several reasons. First, Dr. Forsythe's opinion regarding the diagnosis for the right knee injury lacks merit. Dr. Forsythe opined that Petitioner sustained a right knee sprain. However, this contradicts his statement in his report regarding the MRI pathology with respect to the right knee. Dr. Forsythe states that he agrees with the radiologist's findings with respect to the right knee MRI. The radiologist report states that there is an increased signal in the medial meniscus posterior root which represents a radial tear of the posterior root of the medial meniscus. Further, Dr. Forsythe documents his review of the MRI report of the right knee on page 2 of 5 of his report and summarizes the findings stating, "Abnormal signal and mild irregularity of the medial meniscus, posterior root attachment with edema in the tibia at the root attachment concerning for probable small radial tear of the posterior root." As such, his opinion that the Petitioner simply suffered a right knee sprain is intellectually dishonest in lieu of his statement regarding his agreement with the radiologist as far as the right knee pathology. Dr. Chudik also diagnoses the Petitioner with a tear in the posterior root of the medial meniscus, which is consistent with the radiologist's findings.

Second, Dr. Forsythe's opinion regarding the diagnosis for the left shoulder injury also lacks merit. Dr. Forsythe opined that Petitioner sustained a left shoulder sprain. However, this diagnosis contradicts the positive findings from his physical examination of the Petitioner's left shoulder. Dr. Forsythe notes a positive Neer and Hawkins impingement test on examination, which is the provocative examination to determine whether a person is suffering from shoulder impingement syndrome. Dr. Chudik also notes a positive Hawkins impingement test during all of his physical examinations of Petitioner. Dr. Chudik diagnosed Petitioner with left shoulder impingement syndrome due to objective clinical evidence of the same. As such, Dr. Forsythe's opinion that the Petitioner simply suffered a left shoulder sprain is also intellectually dishonest. It is troubling that a physician would note a positive finding on examination and neglect to include that finding in his diagnosis opinion.

Third, on page 5 of 5 of the report, Dr. Forsythe states "There are no objective findings on physical examination or diagnostic imaging, do suggest an ongoing bilateral shoulder or right knee pathology warranting further treatment." This statement is inconsistent with his examination as well as the objective pathology on the MRIs. Dr. Forsythe noted objective positive findings with

respect to the left shoulder in his report as part of his physical exam. Dr. Forsythe also stated that he agreed with the radiologist's interpretation of the film from the right knee MRI. The radiologist's interpretation of the film of the knee MRI showed several objective positive findings.

In assessing causal connection, the Arbitrator does not find the opinions of Dr. Brian Forsythe findings that Petitioner had reached maximum medical improvement as of December 10, 2021 to be persuasive. The Arbitrator adopts the findings and opinions of Dr. Chudik as his opinions are consistent with and corroborated by the objective findings and the record. In addition to the findings and opinions of Dr. Chudik, the Arbitrator finds that Petitioner proved by a preponderance of the evidence that his current condition of ill-being to his shoulders and right knee based on t he chain of events.

**WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:**

An employer is required to pay necessary medical expenses reasonably required to cure or relieve the effects of the accidental injury. 820 ILCS 305/8(a). If there is a dispute as to recommended medical treatment, the basis of the denial will determine the evidence needed in support. Denial of treatment that is excessive or unreasonable must be supported by a utilization review.

Respondent exercised its right to obtain utilization reviews authorized by the Act, 820 ILCS 305/8.7(a); 10 in total for the period of October 28, 2021 through January 27, 2022 regarding treatment for the bilateral shoulder injuries and the right knee injury. (RX 8).

Section 8.7 of the Act states that upon receipt of written notice that the employer or the employer's agent or insurer wishes to invoke the utilization review process, the provider of medical, surgical, or hospital services shall submit to the utilization review, following accredited procedural guidelines. In fact, an employer may deny payment of or refuse to authorize payment of medical services rendered or proposed to be rendered on the grounds that the extent and scope of medical treatment is excessive and unnecessary in compliance with an accredited utilization review program under this Section.

When a payment for medical services has been denied or not authorized by an employer or when authorization for medical services is denied pursuant to utilization review, the employee has the burden of proof to show by a preponderance of the evidence that a variance from the standards of care used by the person or entity performing the utilization review pursuant to subsection (a) is reasonably required to cure or relieve the effects of his or her injury. An admissible utilization review shall be considered by the Commission, along with all other evidence and in the same manner as all other evidence and must be addressed along with all other evidence in the determination of the reasonableness and necessity of the medical bills or treatment.

The quantity of utilization reviews does not, in and of itself, make the ultimate conclusion of each utilization review persuasive. The utilization reviews contain a boiler plate of conditions of ill-being and procedures that are neither relevant nor material to the prescribed treatment. In most

instances, the utilization reviewers found Petitioner's medical treatment to be unreasonable or unnecessary in conclusory fashion without acknowledging or differentiating the objective findings that Dr. Stephen Christopher Chudik, nor the radiologist interpreting the MRI scans nor of Physician's Assistant Donald Galvin. In other instances, the utilization reviewers simply listed ODG guidelines for various conditions and procedures unrelated to the medical issues and failed to persuasively and specially explain why they denied the prescribed treatment plan for Petitioner.. The last UR of January 27, 2022 in its noncertification refers to an attachment as a basis of the denial. No attachment was provided. Overall, the Arbitrator finds the utilization reviewers' opinions to be unpersuasive. The general generalities were too general to persuasively explain with sufficient specificity the non-certification of treatment.

A reading of the medical records of indicates that Dr. Chudik and the physical therapists provided the treatment with the stated goal to avoid surgery for the shoulder impingement and to avoid surgery for the right knee meniscal tear and also to heal Petitioner well enough for to return to a physical demanding job as a correctional officer. A job in which Petitioner is required to be able to protect himself, his colleagues and inmates from violent inmates. Dr. Chudik' s treatment plan succeeded. The proof is in the pudding. Whereas, the utilization reviewers in their generalities failed to persuasively explain how these goals could be satisfied without the treatment prescribed and provided.

The Arbitrator finds Petitioner's treatment to be reasonable and necessary and finds that Respondent has not paid for said treatment of ATI Physical Therapy in the amount of $32,370.83.

The Respondent shall pay all outstanding medical bills for Petitioner's reasonable and necessary medical treatment for his right and left shoulders and his right knee, pursuant to Sections 8(a) and 8.2 of the Act. Respondent shall make this payment directly to Petitioner's attorney in accordance with Section 9080.20 of the Rules Governing Practice before the Illinois Workers' Compensation Commission. Respondent is entitled to credit in the amount of $3,441,8 for payments made by its group health insurance carrier and shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving Section 8(j) credit.

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

In the Request For Hearing form completed by the parties, Petitioner claimed to be entitled to TTD for the period of October 21, 2021 through March 2, 2022 representing 21-6/7$^{th}$ weeks. Respondent disputed this claim on the Request for Hearing form but also represented that all TTD was paid. At trial, the parties agreed that Petitioner was entitled to TTD for the period claimed and that all TTD was paid. Accordingly, the Arbitrator adopts the agreement of the parties and finds that Petitioner is to be entitled to TTD for the period of October 21, 2021 through March 2, 2022 representing 21-6/7$^{th}$ weeks and that all TTD due and owing was paid. (Tr. 6).

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

In determining PPD benefits, Section 8.1b(b) of the Act directs the Commission to consider: "(i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured

employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records." 820 ILCS 305/8.1b(b); *Con-Way Freight, Inc. v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 152576WC, ¶ 22, 67 N.E.3d 959. "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b).

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

Under Section 8.1b(b)(ii), the occupation of the injured employee, the Arbitrator has carefully considered this factor and notes that Petitioner was able to return to his position as Corrections Office. The Arbitrator notes that the physical demand levels for a Cook County Corrections Officer and Chicago Police Officer of require heavy physical demand levels on occasion for his protection and the protection of others. The Arbitrator therefore gives some weight to this factor for an increased permanency.

Under Section 8.1b(b)(iii), the age of the employee at the time of the injury, the Arbitrator has carefully considered this factor and notes that Petitioner was 35 years old at the time of the accident. As such, given that the long work life expectancy and long-life expectancy, the Arbitrator gives great weight to this factor in determining permanent partial disability.

Under Section 8.1b(b)(iv), the employee's future earning capacity, the Arbitrator notes that Petitioner testified that he would earn more income at his new job as a police officer than he earned in his position with Respondent. The Arbitrator gives no weight to this factor.

Under Section 8.1b(b)(v), evidence of disability corroborated by the treating medical records is moderate. He sustained multiple injuries as a result of the work occurrence and still has a tear in his meniscus in the right knee that was not surgically repaired as well as a small rotator cuff tear with impingement in the left shoulder that was not surgically repaired. As well as a right shoulder strain that has mostly resolved. As, such, there is evidence of some continued disability corroborated by the medical records. The Arbitrator gives moderate weight to this factor in finding that Petitioner sustained a permanent partial disability.

Based on the above factors, the record taken as a whole and Commission precedent , the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 6 % loss of use of the Person as a Whole pursuant to Section 8(d)(2) representing 30 weeks of PPD at a weekly rate of $937.11 for the left shoulder impingement, supraspinatus and infraspinatus tendinosis with small bursal sided tear and bursitis; 1.5% loss of use of the Person as a Whole representing 3.795 weeks of PPD at a weekly rate of $937.11 for the right shoulder sprain pursuant to Section 8(d)(2); and 7.5 % loss of the right leg representing 16.125 weeks of PPD at a weekly rate of $937.11 pursuant to Section 8(e)(12) for the unoperated posterior root radial tear of the right medial meniscus.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 22WC018473 |
| Case Name | Jorge Camacho v.<br>Cook County Dept. of Corrections |
| Consolidated Cases | 21WC027244; |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 24IWCC0601 |
| Number of Pages of Decision | 14 |
| Decision Issued By | Stephen Mathis, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Al Koritsaris |
| Respondent Attorney | Brian Bendoff |

DATE FILED: 12/16/2024

/s/Stephen Mathis, Commissioner

Signature

STATE OF ILLINOIS )
) SS.
COUNTY OF COOK )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jorge Camacho,

Petitioner,

vs. NO. 22WC18473

Cook County Department of Corrections,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 21, 2024, 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.

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

**December 16, 2024**

SJM/sj
o-11/20/24
44

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

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

/s/ *Raychel A. Wesley*
Raychel A. Wesley

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 22WC018473 |
| Case Name | Jorge Camacho v.<br>Cook County Dept. of Corrections |
| Consolidated Cases | 21WC027244; |
| Proceeding Type | |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 11 |
| Decision Issued By | Joseph Amarilio, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Al Koritsaris |
| Respondent Attorney | Brian Bendoff |

DATE FILED: 3/21/2024

/s/Joseph Amarilio, Arbitrator
Signature

**THE INTEREST RATE FOR THE WEEK OF MARCH 19, 2024 5.13%**

(1((99STATE 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**

**Jorge Camacho**
Employee/Petitioner
v.
**Cook County Dept. of Corrections**
Employer/Respondent

Case # **22** WC **018473**

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 **December 21, 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 **May 30, 2022**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $***65,769.60*** the average weekly wage was $***1,264.80.***

On the date of accident, Petitioner was ***35*** years of age, ***married*** with ***3*** dependent children.

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

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

Respondent shall be given a credit of $***22,645.94*** for TTD, $***0*** for TPD, $***0*** for maintenance, and $***0*** for other benefits, for a total credit of $***22,645.94***. Respondent is entitled to a credit of $***57,175.21*** 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.

**ORDER**

**MEDICAL**: Respondent shall pay directly to Petitioner reasonable and necessary medical services, pursuant to the medical fee schedule, of $14,414.76 to ATI Physical Therapy, $530.40 to Stroger Hospital, and $5,237.34 to IBJI/Hinsdale Orthopedics, as provided in Sections 8(a) and 8.2 of the Act.

**PPD: (1)** Respondent shall pay Petitioner permanent partial disability benefits of $758.88 per week for 100 weeks because the cervical injuries sustained caused the 20% loss of the person as provided in Section 8(d)2 of the Act. **(2)** Respondent shall pay Petitioner permanent partial disability benefits of $758.88 per week for 10 weeks because the left shoulder injuries sustained caused the 2% loss of the person as provided in Section 8(d)2 of the Act; and **(3)** Respondent shall pay Petitioner permanent partial disability benefits of $758.88 per week for 5 weeks, because the right shoulder injuries sustained caused the 1% loss of the person 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.

/s/ *Joseph D. Amarilio*

Signature of Arbitrator Joseph D. Amarilio

**March 21, 2024**

**BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION**
**ATTACHMENT TO ARBITRATION DECISION**

| | | |
|---|---|---|
| **Jorge Camacho,** | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | **Case No. 22WC018473** |
| | ) | |
| **Cook County Department of Corrections**, | ) | Consolidated with 21 WC 027249 |
| | ) | |
| | ) | |
| Respondent. | ) | |

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### I. PROCEDURAL HISTORY

Officer Jorge Camacho ("Petitioner"), by and through his attorney, filed two (2) Applications for Adjustment of Claim for benefits under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.*) (West 2014) ( "Act." ). The parties stipulated that Petitioner sustained two (2) separate accidents that arose out of and in the course of his employment while working for the Cook County Department of Corrections. ("Respondent'), The two claims were consolidated.

(1). Under case number 21 WC 027249, Petitioner alleged that on September 10, 2021, he sustained an accidental injury to both shoulders and to his right knee for which he received conservative treatment.

(2) Under case number 22 WC 018473, Petitioner alleged that on May 30, 2022, he sustained an accidental injury to his neck and reinjured both shoulders. Petitioner received conservative treatment for his bilateral shoulder injury, He underwent cervical disc replacement surgery for his neck injury.

This matter proceeded to hearing on December 21, 2023 in the city of Chicago. The parties jointly submitted request for hearing representing that the following three (3) issues are in dispute: (1) Whether Respondent is liable for certain unpaid medical bills; (3.) Whether Petitioner is entitled to temporary total disability benefits (TTD); and, (4.) The nature and extent of Petitioner's injury. The parties jointly requested a written decision that includes findings of fact and conclusions of law. (Arb. X 2) At the start of trial, the parties agreed that Petitioner was entitled to TTD for the period alleged and that all TTD was paid.

This Arbitration Decision is related to case number 22 WC 018473 - the May 20, 2022 accident.

## II. FINDINGS OF FACT

***Testimony of Petitioner***

On May 30, 2022, Petitioner Jorge Camacho was an employed by Respondent as a Correctional Officer. Petitioner testified that on that day he was working his regular shift. Petitioner testified that he had been working as a correctional officer for approximately 13 years.

On May 30, 2022, he was injured during an altercation with an unruly inmate at Stroger Hospital. He testified that on that day, he was tasked to accompany an inmate to Stroger Hospital for medical care. He testified that the inmate broke free from his restraints, while in the hospital bed and started a physical altercation. He testified that during the altercation while restraining the inmate, he sustained injury to his neck and re-injured his shoulders. He testified that he was seen in the emergency room at Stroger following the occurrence.

Petitioner testified that he sought medical treatment following the occurrence. He testified that he sought treatment with Dr. Steven Chudik because Dr. Chudik is the orthopedic specialist that he was treating with following his previous work injury of September 10, 2021. (*See*, companion case)

He continued to work light duty while receiving treatment. He testified that when he went to see Dr. Chudik on June 8, 2022, he complained of neck pain with numbness going down his left arm and also left shoulder pain. Dr. Chudik sent him for an MRI of his neck. He testified that he was also sent for physical therapy. Following the MRI, Dr. Chudik referred him to his colleague Dr. Darwish for continued treatment with respect to his neck. Dr. Darwish referred him to Dr. Said, a pain doctor, for injections in his neck. He only received temporary relief of his radicular symptoms following each injection, but then the symptoms returned back to the original baseline. Petitioner testified that following the injections, Dr. Darwish recommended surgery for his neck.

Petitioner testified that after the surgery recommendation, he was sent to a Section 12 examination at the request of his employer and was examined by Dr. Kern Singh at Midwest Orthopedics. Following the examination, he learned that the surgery for his neck was authorized by Respondent. He e was then taken off work pending surgery and started to receive disability benefits. Petitioner testified that he underwent neck surgery, performed by Dr. Darwish. After surgery, his radicular symptoms improved but did not completely go away. Following surgery, he underwent therapy for his neck and shoulders. Further, he testified that following therapy, he underwent work conditioning. Petitioner testified that following work conditioning he was released by Dr. Darwish and Dr. Chudik to return to work.

Petitioner claimed to be entitled to TTD for the period of December 10, 2022 through June 15, 2023 representing 26-6/7$^{th}$ weeks Petitioner received TTD for the period of December 10, 2022 through June 15, 2023 representing 26-6/7$^{th}$ weeks

He testified that following clearance to return to work, he did not return to work as a correction officer for Cook County. Petitioner had previously applied to the Chicago Police Department and was placed on a waiting list. He learned that he made it off the waiting list in close proximity to his release back to work and, therefore, accepted the offer to start the Police Academy. At the time of the hearing, he was still in the academy and had approximately another eight more weeks to go.. He testified regarding all of the physical training exercises that he participates in each day as part of the academy curriculum. He testified that he is able to complete the tasks however has difficulties with his left arm and shoulder and has to compensate by using his right arm whenever practicable. He also testified that his neck is also painful and that he continues to experience residual radicular symptoms.

***Job Duties of Correctional Officer***

Petitioner testified that his job duties as a correction officer include the following: opening and shutting heavy metal jail doors, keeping order, restraining inmates, hand-to-hand combat with combative inmates, passing medication, supervision of inmates in the common areas, accompanying inmates to Stroger hospital in cases of medical emergencies, and intake.

***Prior Medical Condition***

Petitioner testified that he never had injuries to his neck prior to the May 30, 2022 work accident. No evidence was submitted that revealed any prior medical conditions relating to his neck. Under case number 21 WC 027249, Petitioner proved that on September 10, 2021, he sustained an accidental injury to both shoulders and to his right knee for which he received conservative treatment, had reached MMI, He was released to return full duty and did so working full duty as a correctional officer.

***Summary of Medical Records***

On the day of the occurrence, Petitioner presented to the emergency room at Stroger Hospital. (Petitioner Exhibit 6, hereinafter "Pet. Ex. 6"). The ambulance and the ER records note that Petitioner complained of bilateral shoulder pain. (Pet. Ex. 6, p. 5 of 39). On June 8, 2022, Petitioner presented to Dr. Steven Chudik, M.D., for follow-up and complained of bilateral shoulder pain and neck pain. (Pet. Ex. 9, p. 10). Dr. Chudik ordered a cervical MRI and referred Petitioner to his colleague Dr. Darwish for further neck treatment, following the MRI. (Pet. Ex. 9, p. 11). Dr. Chudik also ordered physical therapy. *Id*.

On July 21, 2022, Petitioner presented to Dr. Darwish for an initial evaluation, with complaints of neck pain with numbness going down his arms into his hands. (Pet. Ex. 9, p. 16). Dr. Darwish notes review of the cervical MRI that took place on June 22, 2022 at Hinsdale Orthopedics. (Pet. Ex. 9, p. 17). Dr. Darwish noted that Petitioner's cervical MRI revealed a herniated disc at C5-6 with effacement on the lateral recesses, causing central stenosis. (Pet. Ex. 9, p. 19-20). Dr. Darwish referred Petitioner to Dr. Said for C5-6 steroid epidural injections. (Pet. Ex. 9, p. 20).

On July 25, 2022, Petitioner presented to Dr. Omar Said at Ascend Pain & Wellness for an initial consultation. (Pet. Ex. 7, p. 20-23). Dr. Said notes review of the cervical MRI and scheduled a cervical epidural steroid injection. (Pet. Ex. 7, p. 23).

On August 4, 2022, Petitioner underwent a cervical steroid epidural injection, performed by Dr. Said. (Pet. Ex. 7, p. 18-19). On August 19, 2022, Petitioner returned with follow-up with Dr. Said, who noted 80% initial improvement following the injection, which began to wear off and stated approximately 50% improvement as of the day of the follow-up visit. (Pet. Ex. 7, p. 12). Dr. Said recommended a second cervical epidural injection at that time. (Pet. Ex. 7, p. 16).

On August 25, 2022, Petitioner underwent a second cervical steroid epidural injection, performed by Dr. Said. (Pet. Ex. 7, p. 12-13). On September 8, 2022, Petitioner returned to Dr. Said for follow-up and reported the same temporary improvement of his symptoms, that he had following the initial injection. (Pet. Ex. 7, p. 8). Dr. Said ordered a third injection at that time. (Pet. Ex. 7, p. 9).

On September 29, 2022, Petitioner underwent a third epidural steroid injection, performed by Dr. Said. (Pet. Ex. 7, p. 5-6). On October 13, 2022, he returned for follow-up with Dr. Said, who referred Petitioner back to Dr. Darwish for further recommendations. (Pet. Ex. 7, p. 3).

**Dr. Kern Singh Section 12 examination**: On November 7, 2022, Dr. Kern Singh performed a Section 12 medical examination at Respondent's Request. (RX 7). Petitioner complained of 8/10 neck pain and upper extremity pain. Petitioner reported left hand numbness and tingling. Petitioner stated his symptoms were constant and increased with climbing stairs. On examination, Petitioner had full range of motion of the cervical and lumbar spine. Petitioner had full strength. All testing performed was negative. Dr. Singh did not examine nor address that Petitioner's bilateral shoulder condition of ill-being. Dr. Singh diagnosed Petitioner with a cervical muscular strain and a C5-C6 left herniated nucleus pulposus.

Dr. Singh believed Petitioner's cervical strain and C5-C6 left sided herniated nucleus pulposus were causally connected to the May 30, 2022 accident. He noted that Petitioner reported neck pain with left upper extremity dysesthesias, which correlates with C6 radiculopathy. Dr. Singh noted that the MRI of the cervical spine confirmed the herniated disc. Dr. Singh recommended Petitioner undergo a C5-C6 total disc replacement versus anterior cervical discectomy and fusion. Dr. Singh stated that following the disc replacement surgery, Petitioner would require four weeks of physical therapy three times weekly with a transition into a functional capacity evaluation and then 2-4 weeks of work conditioning. Dr. Singh opined that maximum medical improvement would be anticipated three months post-operatively. Dr. Singh opined that if Petitioner underwent the fusion surgery, he would undergo five months of physical therapy followed by a functional capacity evaluation and then 2-4 weeks of work conditioning. Dr. Singh stated that maximum medical improvement would be anticipated six months post-operatively.

**Dr. Brian Forsythe Section 12 examination**: On November 8, 2022, Dr. Brian Forsythe performed a second Section 12 medical examination at Respondent's request. (RX 6). Petitioner reported that he was working full duty but had to call off numerous times due to pain. Petitioner reported that on May 30, 2022, he was involved in an altercation with an inmate who was notoriously violent. Petitioner stated the inmate spit at him and elbowed his partner. Petitioner stated that six individuals had difficulty restraining the inmate. Petitioner reported that he was pushing and pulling the inmate at chest level for some time. Dr. Forsythe noted that claimant demonstrated severe symptom magnification during physical examination. He noted that:

Petitioner manifested active guarding throughout the examination and reported non-objective tenderness to palpation. Dr. Forsythe stated that Petitioner demonstrated a give-way effort with strength testing.

Dr. Forsythe diagnosed Petitioner with resolved bilateral shoulder strains. Dr. Forsythe noted that Petitioner's subjective complaints were not supported by objective evidence. Dr. Forsythe believed Petitioner had reached his pre-injury baseline status. Dr. Forsythe opined that Petitioner did not require further medical treatment for the injuries to the shoulders and, thus, placed Petitioner at maximum medical improvement for the shoulders. He opined Petitioner could return to full duty work.

The Arbitrator notes that Dr. Singh's examined Petitioner one day prior to Dr. Forsythe's examination and failed to note any symptom magnification. Dr. Singh opined that Petitioner's subjective complaints were consistent with the objective findings and recommended that he undergo disc replacement surgery.

Also, Arbitrator is mindful that none of the treating physicians, Dr. Chudik, Dr. Darwish nor Dr. Said noted any inconsistences or symptom magnification.

On November 10, 2022, Petitioner returned to see Dr. Darwish, with continued complaints of neck pain with numbness down his arms. (Pet. Ex. 10, p. 15). Dr. Darwish recommended a C5-6 artificial disc replacement surgery at that time, pending approval and scheduled a four (4) week re-check appointment. (Pet. Ex. 10, p. 18). On December 16, 2022, he returned for a follow-up and surgery was scheduled at this time. (Pet. Ex. 10, p. 26).

**SURGERY**: The record reflects that the C5-6 artificial disc replacement surgery took place on December 28, 2022. (Pet. Ex. 10, p. 29).

On January 13, 2023, Petitioner returned to see Dr. Darwish following the C5-6-disc replacement surgery. (Pet. Ex. 10, p. 29-32). The record notes 65-70% improvement in his symptoms since the surgery but continued to experience neck pain and residual numbness down his right arm into the right hand. (Pet. Ex. 10, p. 29). Dr. Darwish kept Petitioner off work at this time and scheduled a follow-up appointment. (Pet. Ex. 10, p. 32).

On March 29, 2023, Petitioner returned for follow-up with Dr. Darwish, complaining of continued back pain and bilateral shoulder pain. (Pet. Ex. 10, p. 47). Petitioner was kept off work at this time, was prescribed Flexeril, and physical therapy was ordered. (Pet. Ex. 10, 49-50). Petitioner began post-op physical therapy following this visit, at ATI. (Pet. Ex. 11, 12).

On May 19, 2023, Petitioner returned to Dr. Darwish for follow-up after completing physical therapy and reported 90% improvement of his symptoms. (Pet. Ex. 10, p. 56-57). Dr. Darwish kept Petitioner off work at this time and ordered two weeks of work conditioning followed by a return to work with no restrictions in three weeks. (Pet. Ex. 10, p. 59). Petitioner completed work conditioning at ATI following this visit. (Pet. Ex. 11, 12).

Petitioner's temporary total disability commenced on December 10, 2022 and ended on June 15, 2023. And, Petitioner was paid TTD in full. (Arb. X 2, Tr. P.6)

***Petitioner's Current Condition***

The medical records corroborate an aggravation of Petitioner's prior bilateral shoulder injury of September 10, 2021. Petitioner testified that he continues to experience pain in his left shoulder with activity as well as left arm weakness. Petitioner testified that he also continues to experience neck pain with residual radicular symptoms. He testified that he is able complete the physical activities required of him while at the Chicago Police Academy. He compensates by using his dominant right arm more than before his injuries.

## III. CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below. The Arbitrator adopts the above Statement of Facts 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. 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**: The Arbitrator observed Petitioner during the hearing and finds him be a credible witness. His testimony was consistent with and corroborated by the medical evidence. Petitioner was forthright when answering questions from his attorney and Respondent's attorney.

The Arbitrator is not persuaded by the findings and opinions of Dr. Forsythe. His findings are inconsistent with his own conclusions. His opinions regarding symptom magnification for example are inconsistent with the finding and opinions of Dr. Chudik, Dr. Darwish, Dr. Said and Dr. Singh. Moreover, Petitioner conduct such as working until shortly before surgery is inconsistent with symptom magnification. And the Arbitrator finds the opinions and findings of Dr. Singh to be consistent with the evidence.

**WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:**

Section 8(a) of the Act states a Respondent is responsible "…for all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred, limited, however, to that which is reasonably required to cure or relieve from the effects of the

accidental injury…" A claimant has the burden of proving that the medical services were necessary, and the expenses were reasonable. See *Gallentine v. Industrial Comm'n*, 201 Ill.App.3d 880, 888 (2nd Dist. 1990).

The Arbitrator finds Petitioner's treatment to be reasonable and necessary and finds that Respondent has not paid for said treatment. The treatment proved to be successful. It allowed Petitioner to be released to return to work full duty. Additionally, Dr. Singh recommended the surgery that Petitioner received. As such, the Arbitrator orders Respondent to pay Petitioner for the following outstanding medical services, pursuant to Sections 8(a) and 8.2 of the Act.

| | |
|---|---|
| ATI Physical Therapy | $14,414.76 |
| Ascend Pain & Wellness | $2,953.00 |
| Stroger Hospital | $530.40 |
| IBJI/Hinsdale Orthopedics | $5,237.34 |

The Respondent shall pay all outstanding medical bills for Petitioner's reasonable and necessary medical treatment for his neck and bilateral shoulders pursuant to Sections 8(a) and 8.2 of the Act. Respondent shall make this payment directly to Petitioner's attorney in accordance with Section 9080.20 of the Rules Governing Practice before the Illinois Workers' Compensation Commission. Respondent is entitled to credit in the amount of 57,175.21 for payments made by its group health insurance carrier and shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, pursuant to Section 8(j) of the Act.

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

In the Request For Hearing form completed by the parties, Petitioner claimed to be entitled to TTD for the period of December 10, 2022 through June 15, 2023 representing 26-6/7$^{th}$ weeks. Respondent disputed this claim on the Request For Hearing Form (Arb. X 2) but also represented that all TTD was paid. At trial, the parties agreed that Petitioner was entitled to TTD for the period claimed and that all TTD was paid. Accordingly, the Arbitrator adopts the agreement of the parties and finds that Petitioner is to be entitled to TTD for the period of December 10, 2022 through June 15, 2023 representing 26-6/7$^{th}$ weeks. The Arbitrator further finds that all TTD has been paid. (Tr. 6).

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

In determining PPD benefits, Section 8.1b(b) of the Act directs the Commission to consider: "(i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records." 820 ILCS 305/8.1b(b); Con-Way Freight, Inc. v. Illinois Workers' Compensation Comm'n, 2016 IL App (1st) 152576WC. "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b).

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

Under Section 8.1b(b)(ii), the occupation of the injured employee, the Arbitrator has carefully considered this factor and notes that Petitioner was released to return to his position as Corrections Officer but did not do so. He accepted an invitation to join the Chicago Police Department as a police officer. The Arbitrator notes that the physical demand levels of each position are somewhat comparable, each of which require heavy physical force on occasion for his protection and the protection of others. The Arbitrator therefore gives moderate weight to this factor to the benefit of Petitioner.

Under Section 8.1b(b)(iii), the age of the employee at the time of the injury, the Arbitrator has carefully considered this factor and notes that Petitioner was 35 years old at the time of the accident. As such, Petitioner has a long work life expectancy and life expectancy. Petitioner is expected to have many more years of work life wherein he is required to perform occasional heavy demanding activities. The Arbitrator gives great weight to this factor in finding permanent partial disability.

Under Section 8.1b(b)(iv), the employee's future earning capacity, the Arbitrator has carefully considered this factor and notes that Petitioner testified that he will earn more income at his new job as a police officer than he earned in his position with Respondent at the time of his injury. The Arbitrator gives no weight to this factor in determining level of permanent partial disability.

Under Section 8.1b(b)(v), evidence of disability corroborated by the treating medical records, the Arbitrator has carefully considered this factor and notes that Petitioner sustained a herniated disc in the cervical spine that required disc replacement surgery at the C5-6 level. Further, the records indicate that Petitioner continues to experience neck pain with some residual radicular symptoms following surgery. He also sustained bilateral shoulder strains, left worse than right, superimposed on his prior bilateral shoulder injury. As, such, there is evidence of some continued disability corroborated by the medical records. The Arbitrator gives significant weight to this factor in determining level of permanent partial disability.

Based on the above factors, the record and Commission precedent, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that he sustained 20 % loss of use of the person as a whole under Section 8(d)2 of the Act for the C5-6-disc herniation requiring a C5-6-disc replacement surgery. And, that pursuant to Section 8(d) 2 of the Act, Petitioner is entitled to an additional 2% person of as whole for the left shoulder strain and an additional 1% person of as whole for the right shoulder strain. This bilateral shoulder disability finding is in addition to the award rendered in the companion case.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 22WC021981 |
| Case Name | Kelli Kern v.<br>State of Illinois - Choate Mental Health Center |
| Consolidated Cases | |
| Proceeding Type | Petition for Review under 19(b)<br>Remand Arbitration |
| Decision Type | Commission Decision |
| Commission Decision Number | 24IWCC0602 |
| Number of Pages of Decision | 18 |
| Decision Issued By | Stephen Mathis, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Thomas C Rich |
| Respondent Attorney | Nicole Werner |

DATE FILED: 12/16/2024

/s/Stephen Mathis, Commissioner

Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kelli Kern,

Petitioner,

vs. NO. 22WC21981

State of Illinois Choate Mental Health Center,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 10, 2023, is hereby affirmed and adopted.

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

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

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

Pursuant to §19(f)(1) of the Act, this Decision and Opinion on Review of a claim against the State of Illinois is not subject to judicial review.

**December 16, 2024**

SJM/sj

o-11.6.24

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

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

/s/ *Raychel A. Wesley*
Raychel A. Wesley

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 22WC021981 |
| Case Name | Kelli Kern v. State of Illinois/Choate Mental Health Center |
| Consolidated Cases | |
| Proceeding Type | 19(b) Petition |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 15 |
| Decision Issued By | Maureen Pulia, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Thomas C Rich |
| Respondent Attorney | Nicole Werner |

DATE FILED: 10/10/2023

**THE INTEREST RATE FOR THE WEEK OF OCTOBER 3, 2023 5.34%**

/s/ Maureen Pulia, Arbitrator
Signature

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

October 10, 2023

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation

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

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

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

**KELLI KERN,**
Employee/Petitioner

v.

**STATE OF ILLINOIS/CHOATE MENTAL HEALTH CENTER,**
Employer/Respondent

Case # **22** WC **021981**

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 **Mount Vernon**, on **9/19/23**. 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, **2/8/22**, 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 $**39,982.52**; the average weekly wage was $**768.89**.

On the date of accident, Petitioner was **43** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit for TTD paid through 7/27/23, $**00.00** for TPD, $**00.00** for maintenance, and $**00.00** for other benefits, for a total credit all TTD paid through 7/27/23.

Respondent is entitled to a credit of $**00.00** under Section 8(j) of the Act.

**ORDER**

Respondent shall pay Petitioner additional temporary total disability benefits of $512.59/week for 7-5/7 weeks, commencing 7/28/23 through 9/19/23, as provided in Section 8(b) of the Act. This period of TTD is in addition to the TTD respondent already paid through 7/27/23, and is already getting credit for.

Respondent shall pay reasonable and necessary medical services related to petitioner's cervical spine from 2/8/22 through 9/19/23, as provided in Sections 8(a) and 8.2 of the Act.

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

Respondent shall pay reasonable and necessary medical services related to cervical dis arthroplasties from C3-C7 recommended by Dr. Rutz, as provided in Sections 8(a) and 8.2 of the Act.

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

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

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

**OCTOBER 10, 2023**

Signature of Arbitrator

ICArbDec19(b)

**THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:**

Petitioner, a 43 year old Mental Technician II, sustained accidental injuries that arose out of and in the course of her employment by respondent on 2/8/22. Respondent disputes that petitioner's cervical spine condition is causally related to the injury petitioner sustained on 2/8/22. The other issues in dispute are past medical expenses related to petitioner's cervical spine, TTD after 7/27/23, and prospective medical treatment for petitioner's cervical spine. Petitioner denied any injuries to her cervical spine prior to the injury on 2/8/22.

Petitioner testified that on 2/8/22 she was attacked from behind, and had her head and face slammed into the door throwing her neck back. She also fell on her knees with her left hand extended. Petitioner testified that as a result of this accident she sustained injuries to her left hand/wrist, knees, and cervical spine. Petitioner testified that her knees were still sore, and her left hand/wrist issues had been addressed. Petitioner is seeking payment of her unpaid bills for her cervical spine. She is also seeking payment of prospective medical care for her cervical spine.

Petitioner completed an Employee's Notice of Injury that described her injury as "head and face hit door. Both knees hit floor. Left hand hit on floor causing pain to hand and wrist." Under additional details of how the injury occurred petitioner wrote "Pushed by individual during a behavior causing my head and face to hit the door, both of my knees hit the floor as I fell, and my left hand/wrist bent as I fell to the floor trying to catch myself".

A Supervisor's Report of Injury was also completed. The supervisor identified the description of injury as "Kelli J Kern was pushed by an individual, her head and face hit the door. When she fell both knees hit the floor. Left wrist bent when trying to catch herself". The report also indicated that the parts of her body that were injured were "head and face (swelling on the left side of her head) Both knees and wrist".

Elizabeth Villasenor, First Notice Associate for respondent, completed an Employer's First Report of Injury. She noted that multiple body parts were injured. Her description of the injury was consistent with petitioner's.

Two additional witness reports were completed. Both witnesses arrived after the assault was over and saw petitioner on the floor trying to get up.

Following her injury, petitioner first presented for treatment at the emergency room at St. Francis Healthcare. Petitioner complained of a headache, NP, upper back pain, bilateral knee pain and left hand/wrist pain after being assaulted by a resident while working for respondent. Her chief complaint at

that time was her left hand/wrist. Petitioner underwent a CT of the brain that was within normal limits; x-rays of the left wrist that showed no acute fracture or dislocation; x-rays of the knees that showed no acute osseous abnormality; and, CT of the cervical spine that showed no acute osseous abnormality. Following and examination, petitioner was given a splint for her left hand/wrist. Petitioner was diagnosed with a sprain of the left hand/wrist, contusion of the knee, and contusion of the scalp.

On 2/14/22 petitioner presented to SIH Workcare at Herrin Hospital. Her chief complaint at that time was her left wrist and thumb. Her secondary problem was a headache located in the left frontal area. She also reported bruising to the right medial knee, and left knee. Following an examination, her diagnosis was contusion to the left and right knee, sprain of the left wrist, and contusion of part of the head. Petitioner was placed on restrictive work status. Petitioner testified that she also complained of neck and back pain.

Petitioner returned to SIH Workcare on 2/23/22. Petitioner described throbbing and sharp pain in her left wrist, made worse by movement and exertion. She also reported ongoing pain in her left and right knees at a 7/10 on a scale of 10. She reported aching pain in her head, accompanied by a headache. She rated this pain at a 7/10 on a scale of 10. Following an examination, her diagnosis remained the same, as well as her work status. Stacey Oddera, the PA was of the opinion that petitioner's diagnosis was not yet clear, and further testing may be necessary.

On 3/8/22 petitioner presented to PA David Mason at The Orthopaedic Institute of Southern Illinois. She was there primarily for her left hand/wrist and thumb issues. She reported that she still had significant discomfort. Following an examination PA Mason recommended that petitioner continue use of her thumb spica splint. He also restricted her from using her left hand. He ordered an MRI of her left hand/wrist. Petitioner testified that she reported neck and back pain.

On 3/14/22 petitioner underwent an MRI of the left hand/wrist. The impression was moderate to severe contusion of the trapezium, and central tear of the triangle fibrocartilage. It was recommended that petitioner follow up with a CT scan to further evaluate for a subtle fracture.

On 3/21/22 petitioner followed-up with PA Mason. She reported ongoing pain in her left hand/wrist, but mostly her left thumb. She also reported some numbness and tingling. She stated that her pain was not worse, just not getting better. PA Mason reviewed the MRI and examined petitioner. He assessed petitioner with a left wrist bone contusion of the trapezium. He recommended physical therapy and a Medrol Dosepak. He continued her restrictions. PA Mason was of the opinion that the changes in

the triquetrum and TFCC were incidental findings and not related to her current issues. PA Mason prescribed a course of occupational therapy.

On 3/30/22 petitioner underwent an MRI of her lumbar spine. The impression was right lateral recess foraminal annular tear/fissure and protrusion at L5-S1 resulting in epidural fat effacement but no central canal or foraminal stenosis; circumferential dis bulge at L4-L5 with mild facet arthropathy resulting in mild bilateral foraminal stenosis; and, mild facet arthropathy at L3-L4 without definite central canal or foraminal stenosis.

On 3/31/22 petitioner began a course of occupational therapy for her left wrist at Southern Illinois Healthcare.

On 4/6/22 petitioner was seen by PA Phillip Erthall for her left wrist. She reported that she was still having pain, as well as increased numbness in her little and ring fingers on the left hand. She also complained of bilateral pain. Following an examination, PA Erthall's assessment was left wrist pain, left hand numbness, and bilateral knee pain. He continued her in physical therapy and ordered an EMG/NCV of the left upper extremity. Her restrictions were continued.

On 4/25/22 petitioner underwent an NCV/EMG of the left upper extremity. The conclusion was evidence of mild sensory carpal tunnel syndrome, and slowing of the left ulnar nerve across the elbow.

On 5/11/22 petitioner was seen by PA Mason. She reported that her left thumb and wrist pain were greatly improved. Her big complaint was numbness and tingling. She also reported that she had some medial elbow pain with certain activities, and some nighttime pain. She stated that her knees had improved. Following an examination, PA Mason assessed a contusion of the left trapezium, medial epicondylitis of left elbow, and ulnar neuropathy at her left elbow. PA Mason told petitioner it was okay to discontinue the use of her wrist brace. He continued her restrictions. PA Mason gave her a cubital tunnel brace and ordered physical therapy for the left elbow.

On 6/13/22 petitioner was seen by Dr. Steven Young for her left wrist and elbow. She reported that her left elbow and wrist had worsened since her last visit. She reported that her pain radiated into the shoulder and neck. She also reported numbness that radiated into her fingertips. She complained of a "knot" over the center of her clavicle, that was very painful. Dr. Young assessed pain in left wrist and elbow, as well as left cubital tunnel syndrome, medial epicondylitis of the left elbow, and contusion of the left wrist. Dr. Young ordered a TENS unit and referred petitioner to physical therapy for her medial epicondylitis of the left elbow. Dr. Young continued petitioner's restrictions.

On 7/12/22 petitioner followed up with PA Mason. She reported ongoing pain from her neck all the way down to her left hand. She also reported numbness and tingling. PA Mason examined petitioner, reviewed x-rays of petitioner's cervical spine that demonstrated what looked like an osteophyte bridging C5-C6 and some degenerative changes at C6-C7, and assessed left sided cervical spine radiculopathy, and degenerative disc disease. PA Mason referred petitioner to Dr. Jones' group. He also ordered an MRI of the cervical spine.

On 7/22/22 petitioner called Dr. Young's office asking about the cervical spine MRI and referral. She also reported increased pain, and asked to taken off work. PA Mason told the office staff to schedule petitioner to come in to discuss options. PA Mason informed petitioner that her cervical spine issues were not part of her worker's compensation claim, per their work comp department. Petitioner was told that she may need to discuss this with her Human Resource person.

On 7/28/22 petitioner was seen by Dr. Young for follow-up of her left upper extremity pain. She reported difficulty sleeping due to pain. She also reported numbness in her left ring and small fingers, as well as pain in her left thumb. Petitioner reported that her symptoms had improved in her hand, but it was still painful. Petitioner also reported difficulty moving her head from side to side, due to her neck pain. Petitioner complained of pain in her neck while sitting in a chair for long periods of time and pain in her wrists with typing. Dr. Young examined petitioner and assessed cervicalgia, left carpal tunnel syndrome, and cubital tunnel syndrome. Dr. Young took petitioner off work. Dr. Young reiterated his order for an MRI of the cervical spine.

On 8/8/22 petitioner underwent an MRI of the cervical spine. The impression was mild posterior bulging of the C5-C6 disc with mild encroachment upon the ventral thecal sac, and mild posterior bulge of the C6-C7 disc with mild encroachment upon the ventral thecal sac.

On 8/18/22 presented to Orthopedic Specialists for a spinal consultation. She was seen by ANP Loren Vandergriff. She presented with complaints of both neck and low back pain. She provided a consistent history of her accident. She reported that she started feeling neck pain about a month after her injury. She reported pain in her bilateral posterior shoulders and numbness down the left arm to the hand, mostly in the 4$^{th}$ and 5$^{th}$ digits. She also reported that about three months ago she started noticing low back pain, radiating into both her buttocks and legs. She noted that she still had some continued pain in both of her knees, right greater than left. She described her pain as sharp, aching, and cramping, and present all the time. She reported that her symptoms were worsening. Following x-rays of the cervical, thoracic and lower spine, as a well as an examination, ANP Loren Vandergriff assessed low back pain,

lumbar radiculopathy, thoracic back pain, cervical pain, cervical radiculopathy, and other low back pain. MRIs of the thoracic and lumbar spines were ordered.

On 8/25/22 petitioner returned to Dr. Young. Petitioner's condition remained unchanged. Dr. Young examined petitioner and performed a left wrist joint injection. Dr. Young assessed a complex tear of triangular fibrocartilage of the left wrist. Petitioner reported relief after the injection. His impression was a left TFCC tear. Dr. Young released petitioner to work with a 2 pound lifting restrictions.

On 8/30/22 petitioner underwent an MRI of the thoracic spine. The impression was small right paracentral protrusion at the T8-T9 level resulting in dural displacement but no central canal or foraminal stenosis.

On 8/30/22 petitioner presented to Dr. Kevin Rutz at Orthopedic Specialists. Dr. Rutz noted that petitioner reported neck pain from the onset of her accident, but her wrist injuries were more severe than her neck, which had been more mild, and progressively worsened over time. Petitioner reported pain in her neck going to her left shoulder. Dr. Rutz reviewed the thoracic and lumbar spine MRI's from 8/30/22. He was of the opinion that the thoracic spine MRI was normal without impingement or significant degeneration, and the MRI of the lumbar spine demonstrated an annular tear at L5-S1 without nerve impingement. Dr. Rutz examined petitioner and assessed cervicalgia. He ordered a new MRI of the cervical spine due to the poor quality of the previous MRI. He restricted her from lifting over 20 pounds, and allowed her to sit and stand as needed.

An MRI of petitioner's cervical spine was performed on 9/6/22. The impression was protrusions at the C3-C4 and C6-C7 levels resulting in dural displacement, but no central canal stenosis or foraminal stenosis. Also noted was minimal circumferential disc bulge at the C5-C6 level resulting in dural displacement, but no central canal stenosis or foraminal stenosis.

Petitioner returned to Dr. Rutz on 9/6/22 after her repeat MRI of the cervical spine. Dr. Rutz was of the opinion that it demonstrated minor central annular disc disruptions at C3-C4 and from C5-C7. He examined petitioner and assessed cervicalgia and low back pain. He ordered physical therapy for her neck and low back.

On 9/12/22 petitioner began a course of physical therapy for her lumbar and cervical spine at Southern Illinois Healthcare.

On 9/29/22 petitioner followed up with PA Mason. She continued to complain of ulnar-sided wrist pain. She noted that she was unable to handle more than a couple of pounds of weight at work. She noted that she had been in multiple braces and was just not improving. PA Mason examined petitioner

and his assessment remained the same. PA Mason talked with Dr. Young about petitioner's current condition and Dr. Young recommended a left wrist arthroscopy.

On 10/25/22 petitioner followed-up with Dr. Rutz. She reported that the physical therapy led to some improvement in her low back, but only a few hours of relief at a time in her neck. Dr. Rutz did not feel petitioner's neck was trending in a good direction. He noted that her pain was worse on the left than the right. Petitioner asked if she was surgical candidate. Dr. Rutz's assessment remained the same. He sent her for a cervical discography.

On 11/22/22 petitioner returned to Dr. Rutz following her discography from C3-C7. He noted that it demonstrated concordant pain at each level. Petitioner reported that she had worked for last three months, as no light duty was available. She requested definitive care. Dr. Rutz assessed neck pain, cervicalgia, and cervical annular disc injury. Dr. Rutz recommended cervical disc arthroplasties from C3-C7.

On 12/7/22 petitioner underwent a Section 12 examination performed by Dr. Timothy Van Fleet, at the request of the respondent for her cervical spine. Dr. Van Fleet performed a record review and examined petitioner. He also reviewed the MRI of her cervical spine dated 8/8/22. Petitioner had complaints of pain in her head, neck, trapezius, and right knee, as well as pain radiating from the thoracic spine down to the lumbosacral spine, and down the left arm. She described her pain as a 7/10. Following his examination, Dr. Van Fleet was of the opinion that petitioner's examination revealed no neurological deficits, and she had normal range of motion of the cervical spine. He was of the opinion that she seemed anxious and her recollection of events was not great. He did however note that she was cooperative with the examination. His diagnoses were carpal tunnel syndrome, cubital tunnel syndrome, TFCC tear, and cervical degenerative disc disease.

Dr. Van Fleet opined that there existed a causal connection between petitioner's upper extremities complaints and the injury she sustained on 2/8/22, but that there was no causal connection between petitioner's current cervical complaints and the injury on 2/8/22. Dr. Van Fleet based this opinion on the fact that petitioner did not complain of cervical pain to any treating provider until 5 months following the accident. Dr. Van Fleet was of the opinion that all treatment to date was reasonable and necessary. He was of the opinion that no further treatment was necessary for her cervical spine. He offered no restrictions with respect to petitioner's cervical spine and lower extremities, but noted that petitioner was currently restricted for her left upper extremity. Dr. Van Fleet was of the opinion that petitioner had reached maximum medical improvement with respect to her cervical spine. Dr. Van Fleet did not view

the repeat cervical spine ordered by Dr. Rutz. He only reviewed the MRI of the cervical spine dated 8/8/22, which he noted was of poor quality.

On 12/8/22 petitioner underwent a Section 12 examination performed by Dr. William Feinstein, at the request of the respondent for her left hand/wrist. Petitioner provided a history of the accident and treatment to date. Petitioner complained of constant left wrist pain. She also complained of tenderness at the left elbow and numbness in the left ring and little finger. Following an examination and record review, Dr. Feinstein diagnosed left wrist triangular fibrocartilage complex sprain, and left cubital tunnel syndrome. Dr. Feinstein opined that there was a causal connection between her current condition of ill-being as it relates to her left upper extremity and the injury on 2/8/22. Dr. Feinstein opined that petitioner is in need of the recommended left ulnar nerve decompression through the cubital tunnel, and a left wrist arthroscopy with possible TFCC debridement. Dr. Feinstein recommended that petitioner not use her left upper extremity until after surgery.

On 2/13/23 petitioner presented to Dr. Shawn Kutnik at Archway Orthopedics and Hand Surgery. Petitioner provided a history of her accident and treatment to date. She reported her complaints as they relate to her left hand. Following an examination and x-ray of the hand, as well as a review of the MRI of the left hand, Dr. Kutnik assessed left wrist sprain and cubital tunnel syndrome with underlying carpal tunnel syndrome. Dr. Kutnik recommended a left wrist arthroscopy and debridement to remove synovitis and debride the TFCC. He also recommended a left cubital tunnel release. He restricted petitioner from lifting more than 5 pounds with her left hand.

On 3/17/23 petitioner underwent a left ulnar nerve neuroplasty in situ, and a left wrist arthroscopy with extensive debridement, performed by Dr. Kutnik. Her post-operative diagnosis was left cubital tunnel syndrome and left wrist TFCC tear. Petitioner followed-up postoperatively with Dr. Kutnik on 3/31/23, 4/14/23, 4/28/23, 5/15/23, and 6/5/23. She also underwent a course of physical therapy at Athletico.

On 4/6/23 petitioner presented to Rural Health with an acute onset of lateral right thigh for about 4-8 weeks. She complained of sharp shooting pain constantly, and getting worse. She also complained of chronic neck and back pain after her work injury. She noted that she has known disc injuries in her neck, and was awaiting surgery. Petitioner was examined and assessed with radicular pain. She was prescribed Gabapentin and referred to her spine surgeon.

On 5/2/23 petitioner followed-up with Dr. Rutz. She reported a 2-3 month history of pain in her back with radiation to the right lateral thigh. X-rays of the lumbar spine were taken that demonstrated

good maintenance of disc space height without signs of instability. Following an examination, Dr. Rutz assessed low back pain, possible radiculopathy, and trochanteric bursitis of the right hip. Dr. Rutz performed an injection into petitioner's right hip greater trochanteric bursa.

On 6/2/23 the evidence deposition of Dr. Kevin Rutz, an orthopedic surgeon, who specializes in spinal surgery, was taken on behalf of respondent. Dr. Rutz was of the opinion that the MRI of petitioner's spine performed 9/6/22 showed some annular tear disc disruptions at C3-C4, C5-C6, and C6-C7, and the MRI of the lumbar spine demonstrated an annular tear at L5-S1 without nerve impingement. After reviewing the MRIs, Dr. Rutz believed petitioner most likely had discogenic neck pain from damage to the annulus of her disc, and her lower back pain was most likely from the tear at L5-S1. Dr. Rutz was of the opinion that petitioner's mechanism of injury is the type of trauma that can cause cervical symptoms and pathology he viewed on the MRIs and the discogram. Dr. Rutz could not opine if petitioner's hand symptoms were coming from the neck. He was of the opinion that petitioner's testimony to him that her neck pain started somewhat mild at first and then progressively worsened, and that she then mentioned it to her physicians, is consistent with petitioner seeing Dr. Young four months and a week after the injury. Dr. Rutz did not find this unusual. With respect to petitioner's low back, Dr. Rutz recommended weight loss and physical therapy. Dr. Rutz opined that the cervical treatment he provided petitioner, and the surgery he recommended are causally related to her injury.

On cross examination, Dr. Rutz testified that petitioner told him that she had neck pain from the onset, or within a month following the injury, but her wrist injuries were more severe. Dr. Rutz was of the opinion that hand surgeons don't usually examine for cervical spine issues. Dr. Rutz agreed that when someone has nerve injuries in the arm and elbow area, that can be confused with radicular symptoms as well. He also agreed that when a hand surgeon is checking for neuropathies in the arm, they generally don't take into consideration if those neuropathies are coming from the cervical spine. Dr. Rutz did not agree that if a person has a traumatic incident that is severe enough to necessitate a 4-level disc replacement surgery, they would normally experience pain directly after the event, because it takes time for inflammation to build up. Dr. Rutz said if petitioner's symptoms remain the same, he would not need to see her again before surgery.

Petitioner last followed up with Dr. Kutnik on 6/5/23. Following an examination, Dr. Kutnik was of the opinion that petitioner had made good progress overall. He released her to full duty work without restrictions for her left hand. He also placed her at maximum medical improvement.

On 8/23/23 the evidence deposition of Dr. Timothy Van Fleet, an orthopedic surgeon was taken on behalf of respondent. Based on the MRI of the cervical spine on 8/8/22, Dr. Van Fleet was of the opinion

that the MRI showed some degenerative studies through the C5-C6 level with osteophytes, and, minimal posterior canal compromise at C5-C6, and to a lesser extent at C6-C7. He interpreted it as relatively unremarkable. Dr. Van Fleet was of the opinion that petitioner had complaints of headaches and underwent a CT of the cervical spine on the day of injury, and on 3/8/22 complained of some neck pain. Dr. Van Fleet opined that petitioner's current condition of ill-being as it relates to her cervical spine is not causally related to the injury she sustained on 2/8/22 because according to his notes petitioner did not have any complaints of pain for 5 months following the injury. He did not agree with Dr. Rutz's surgical recommendation. He also stated that he does not do 4 level disc replacements, because it is not an indicated procedure, not the standard of care, and not approved by the FDA. Dr. Van Fleet opined that petitioner needed no more treatment for her cervical spine and had reached maximum medical improvement for her cervical spine.

On cross examination Dr. Van Fleet testified that he has done procedures using an implant that is not technically approved by the FDA for that use. Before doing an arthroplasty Dr. Van Fleet was of the opinion that you need proper patient selection, and good solid medical indications that are studied and have been shown to have improvements for conditions that are known to improve within any kind of cervical operation. He did not believe a 4 level fusion was one of them. Although Dr. Van Fleet was of the opinion in November of 2019 that Dr. Rutz was a fine upstanding individual, he testified that his opinion had changed. He was of the opinion that Dr. Rutz had lost his way. Dr. Van Fleet testified that he did not agree with Dr. Rutz's opinions regarding petitioner's cervical spine because she wasn't complaining of neck pain within a month of the injury. Dr. Van Fleet was of the opinion that there are no peer reviewed studies that evaluate patients treating with axial pain with 4-level disc replacements showing the level of significance as far as success rates are concerned. He was further of the opinion that it would not be done because a 4-level fusion is below the standard of care.

Petitioner testified that she tried to explain many times to Dr. Youngs's PAs about her neck complaints but was just told to do PT, which did not help. She testified that Dr. Young took her complaints seriously.

Petitioner testified that she was off for a period of 5 days and then returned to light duty work, until she was taken off work by Dr. Rutz on 7/27/22.

Petitioner testified that Dr. Van Fleet asked her to move her neck, but never touched it. He only asked her questions about her hand and elbow, and did strength tests for her hand and elbow. Petitioner testified that she was in the room with Dr. Van Fleet for 7 minutes and he never went over the MRI of her cervical spine with her.

Petitioner testified that she has chronic pain that affects almost every aspect of her life. She stated that she loves to work and wants to get back to doing the things she normally does.

Petitioner testified that she had pain in her neck right after the accident, but the intensity of it where she could not stand it, came about three weeks out.

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

Petitioner claims her current condition of ill-being as it relates to her cervical spine is causally related to the injury she sustained on 2/8/22. Respondent disputes this claim.

Respondent bases its dispute on the opinions of Dr. Van Fleet that petitioner did not complain of any neck pain directly after the work injury, or within one month of her injury; that petitioner did not provide any neck complaints to her treating doctors until 5 months after the injury on 2/8/22; and, that the Form 45 and Notice of Injury forms do not specifically identify any alleged neck injury.

Immediately following the injury on 2/8/22 the petitioner presented to the emergency room. Her complaints were listed as headache, NP, upper back pain, bilateral knee pain and left hand/wrist pain. Given that a CT scan of her brain and cervical spine were performed, the arbitrator reasonably infers that the "NP' in emergency room records stands for "neck pain". The arbitrator sees no reason why a CT of the cervical spine would be performed if petitioner had no complaints with respect to her neck.

The respondent also references the reports that were completed on 2/8/22. Both the Employee's Notice of Injury, as well as the Supervisor's Report of Injury indicate that petitioner was pushed from behind by a resident, her head and face hit the door, and she fell to the ground onto her knees and left wrist/hand. Although these reports do not specifically identify her neck as a body part injured, both contain injuries to petitioner's head and face. In fact, the Supervisor's Report even notes that petitioner had swelling to the left side of her head, which the arbitrator reasonably infers was the result of some type of direct impact to that side of her head. The arbitrator also finds it significant that petitioner's cervical spine symptoms were also left sided. The arbitrator notes that even if petitioner did not make mention of her neck complaints in the first few months following the injury, Dr. Rutz was of the opinion that if a person has a traumatic incident that is severe enough to necessitate a 4-level disc replacement surgery, they may not experience pain directly after the event, because it takes time for inflammation to build up.

Given that petitioner's main complaint immediately following the injury was to her left wrist/hand, the arbitrator finds it reasonable then that the treatment immediately following the injury was focused primarily on her left hand/wrist and thumb issues.

All treatment following the injury on 2/8/22, other than the emergency room visit was primarily focused on petitioner's left hand/wrist until she saw Dr. Young on 6/13/22. It was noted at that visit that petitioner had pain radiating into her shoulder and neck, and numbness radiating into her fingertips. From this day forward, petitioner's cervical complaints were consistently documented in the medical records. When she presented to ANP Vandergriff on 8/18/22, she reported neck pain about a month after the injury that included pain into her shoulders and numbness down her left arm to her hand, with the 4th and 5th digits the worst. When she presented to Dr. Rutz she reported neck pain from the onset of her injury, that was initially mild and worsened over time, while she was focusing on her left hand/wrist problems.

Dr. Van Fleet opined that there was no causal connection between the petitioner's neck complaints and the injury on 2/8/22 because she did not complain of cervical pain to any treating provider until 5 months after the injury. The arbitrator finds this opinion is not supported by the credible record or his own testimony during his deposition. During his deposition Dr. Van Fleet testified that petitioner reported neck complaints on 3/8/22, which would have been 1 month after the injury.

The arbitrator finds the credible record shows that petitioner's head and face were pushed into a door of 2/8/22; that petitioner's complaints of "NP' on the date of accident were more likely than not referrable to her "neck pain" complaints, especially given the fact that they performed a CT of her cervical spine; that both the Employee's Notice of Injury, as well as the Supervisor's Report of Injury indicate that petitioner was pushed from behind by a resident and her head and face hit the door; that the Supervisor's Report even notes that petitioner had swelling to the left side of her head; the petitioner's cervical spine issues are primarily left sided; that following the injury petitioner continued with head complaints; that petitioner testified she continued to report neck pain to her providers after she went to the emergency room; that petitioner had no known neck problems prior to 2/8/22; that Dr. Van Fleet in his deposition testified that petitioner reported neck pain on 3/8/22; and, that petitioner had pain radiating into her shoulder and neck, and numbness radiating into her fingertips, when she presented to Dr. Young four months after the injury on 6/13/22.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner has proven by a preponderance of the credible evidence that her current condition of ill-being as it relates to her cervical spine is causally related to the injury she sustained on 2/8/22.

**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?**

Having found the petitioner's current condition of ill-being as it relates to her cervical spine is causally related to the injury she sustained on 2/8/22 the arbitrator finds the medical services that were provided to petitioner for her cervical spine from 2/8/22 through 9/19/23 were reasonable and necessary to cure or relieve petitioner from the effects of her injury on 2/8/22.

Respondent shall pay reasonable and necessary medical services related to petitioner's cervical spine from 2/8/22 through 9/19/23, as provided in Sections 8(a) and 8.2 of the Act.

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

**K. IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE?**

Having found petitioner's current condition of ill-being as it relates to her cervical spine causally related to the injury on 2/8/22, and having found Dr. Rutz's opinions more persuasive than those of Dr. Van Fleet and better supported by the credible evidence, the arbitrator finds the petitioner is entitled to the prospective medical care recommended by Dr. Rutz, that being the cervical disc arthroplasties from C3-C7.

Respondent shall pay reasonable and necessary medical services related to cervical dis arthroplasties from C3-C7 recommended by Dr. Rutz, as provided in Sections 8(a) and 8.2 of the Act.

**L. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?**

Petitioner alleges she is entitled to temporary total disability benefits from 7/28/23 through 9/19/23, a period of 7-5/7 weeks. Respondent disputes this claim based on the opinion of Dr. Van Fleet that petitioner's cervical spine condition is not causally related to the injury on 2/8/22.

Having found the petitioner's current condition of ill-being as it relates to her cervical spine is causally related to the injury on 2/8/22, the arbitrator finds the petitioner is entitled to temporary total disability benefits from 7/28/23 through 9/19/23, a period of 7-5/7 weeks.

Respondent shall pay petitioner temporary total disability benefits of $512.59/week for 7-5/7 weeks, commencing 7/28/23 through 9/19/23, as provided in Section 8(b) of the Act.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 21WC009929 |
| Case Name | Ryan Sullivan v.<br>O'Reilly Auto Parts |
| Consolidated Cases | |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 24IWCC0603 |
| Number of Pages of Decision | 15 |
| Decision Issued By | Stephen Mathis, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Luis J. Magaña |
| Respondent Attorney | Kristin Lechowicz,<br>Rich Lenkov |

DATE FILED: 12/16/2024

/s/Stephen Mathis, Commissioner

Signature

STATE OF ILLINOIS )
) SS.
COUNTY OF LASALLE )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ryan Sullivan,

Petitioner,

vs. NO. 21WC009929

O'Reilly Auto Parts,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by both parties herein and notice given, the Commission, after considering the issues of medical expenses, causal connection, prospective medical care, temporary partial disability, temporary disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 21, 2023, is hereby affirmed and adopted.

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

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

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

**December 16, 2024**

SJM/sj
o-11.6.24
44

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

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

/s/ *Raychel A. Wesley*
Raychel A. Wesley

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 21WC009929 |
| Case Name | Ryan Sullivan v. O'Reilly Auto Parts |
| Consolidated Cases | |
| Proceeding Type | |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 12 |
| Decision Issued By | Jessica Hegarty, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Luis J. Magaña |
| Respondent Attorney | Rich Lenkov |

DATE FILED: 8/21/2023

**THE INTEREST RATE FOR THE WEEK OF AUGUST 15, 2023 5.29%**

/s/ Jessica Hegarty, Arbitrator

Signature

STATE OF ILLINOIS )
)SS.
COUNTY OF LASALLE )

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

**ILLINOIS WORKERS' COMPENSATION COMMISSION**
**ARBITRATION DECISION**

**Ryan Sullivan**
Employee/Petitioner

v.

**O'Reilly Auto Parts**
Employer/Respondent

Case # **21** WC **009929**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jessica A. Hegarty**, Arbitrator of the Commission, in the city of **Ottawa**, on **5-19-23**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

**DISPUTED ISSUES**

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

**FINDINGS**

On **2-13-21**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**23,432.07**; the average weekly wage was $**450.61**.

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

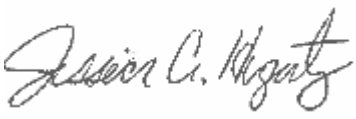
Petitioner ***has not*** received all reasonable and necessary medical services.

**ORDER**

- *Respondent is liable for payment of reasonable and necessary medical bills contained in Petitioner's Exhibit 1.*
- *Respondent is liable for payment of TTD benefits from September 14, 2021, through September 27, 2021.*
- *Respondent is liable for payment of TPD benefits in the amount of $1,187.79.*
- *Respondent is liable for the prospective right shoulder surgery along with any related pre- and post-operative treatment, as recommended by Dr. Aribindi.*

**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 21, 2023**

ICArbDec p. 2

## ADDENDUM TO THE DECISION OF THE ARBITRATOR

## FINDINGS OF FACT

This matter proceeded to hearing on May 19, 2023, in Ottawa, Illinois. (Arbitrator's Exhibit "Arb." 1) The disputed issues are causal connection, unpaid medical bills, temporary total disability ("TTD") benefits, temporary partial disability benefits ("TPD") and prospective medical treatment. (Id.)

On February 13, 2021, Petitioner had been employed full-time, full-duty, by Respondent for approximately 3 years. (Transcript of the hearing, "T." pp. 7-8) Petitioner's duties included opening and closing the store, keeping track of the safe, helping customers find parts for their vehicles, performing battery checks, and installing various parts on customer vehicles including batteries, light bulbs, headlights, and windshield wiper blades.

Petitioner testified that he informed Respondent when he was hired that he suffered from several mental disabilities including Klinefelter Syndrome, Gigantism, and Tourette Syndrome.

Respondent does not dispute that on February 13, 2021, Petitioner sustained accidental injuries that arose out of and in the course of his employment while installing windshield wiper blades on a customer's vehicle parked in Respondent's outdoor lot. (Arb. 1; T. p. 12) Petitioner testified that at the time of his accident, the weather conditions outside were "blizzard-like." As Petitioner walked to one side of the customer's vehicle to complete the installation, he slipped and fell to the ground, landing on his outstretched right arm. (T. p. 12) Upon impact, Petitioner heard a pop in his right shoulder. (Id., p. 13) Although he felt a warm, sharp sensation in his right shoulder, he finished his work duties for the day. He iced his shoulder over the weekend and took Ibuprofen. (Id.)

On February 15, 2021, Petitioner presented to the emergency room at Morris Hospital where he complained of right shoulder pain, with intermittent numbness and tingling in his right fingers, after slipping on ice/snow at work, landing on his outstretched right arm and feeling a pop in his shoulder, a few days prior. (Petitioner's Exhibit, "PX" 2, pp. 56, 58) Upon his discharge from the ER, Petitioner was provided a sling for his right arm, instructed to follow up with an orthopedic doctor, and restricted from working until February 20, 2021. (Id.)

On February 16, 2021, Petitioner returned to the ER at Morris Hospital with complaints of bilateral ankle and right rib pain following the accident at issue. (Id., p. 29)

On February 22, 2021, Petitioner presented to Rezin Orthopedics and Sports Medicine where Dr. Raymond Meyer noted his complaints of severe right shoulder pain and limited range of motion following a slip and fall accident at work. (PX 3, p. 19) Dr. Meyer noted a diagnosis of right shoulder pain/strain/contusion, ordered a right shoulder MRI, a venous doppler for Petitioner's swollen leg, and took Petitioner off of work. (Id., p. 20)

Petitioner testified that he had a history of deep vein thrombosis ("DVT") in his legs, unrelated to this case. (T. p. 19)

On March 15, 2021, MRI of Petitioner's right shoulder showed partial-width (less than 50%) articular supraspinatus tears with extension into the anterior and interstitial fibers of the infraspinatus along with partial-width, articular surface tears of the superior slips in the subscapularis. (PX 4, p. 32) The radiologist's report also noted fluid surrounding the bicep's long head. (Id.)

On March 18, 2021, Petitioner followed up with Dr. Meyer who reviewed the recent MRI, noting partial-thickness tears in the supraspinatus, infraspinatus, and subscapularis. The doctor diagnosed right shoulder impingement, a partial rotator cuff tear, and possible adhesive capsulitis. (Id., p. 16). Dr. Meyer prescribed a course of physical therapy and placed Petitioner on light-duty work restrictions, no lifting over 5 lbs., and no overhead lifting. (Id.)

On March 26, 2021, Petitioner presented to Dr. David Burt at Midwest Sports Medicine, for a second opinion regarding his right shoulder. (PX4, p. 20) Petitioner complained of worsening right shoulder pain that radiated to his right arm, aggravated by reaching and lifting, following a fall at work in which Petitioner had jammed his right shoulder. On exam, tenderness to palpation of the right acromion and biceps tendon was noted along with positive findings on O'Brien's, Speed's, Hawken's, SLAP, and Neer's tests. (Id.) Upon review of the recent MRI, the doctor noted partial rotator cuff tearing, possible tearing of the proximal biceps, and a likely SLAP tear. (Id.) Dr. Burt recommended physical therapy for Petitioner's right shoulder/arm, placed Petitioner on light-duty work restrictions, and ordered Petitioner to return in one month (Id.)

On June 4, 2021, Dr. Burt noted Petitioner's report of little improvement in his right shoulder pain and function. (Id., p. 15) On exam, reduced range of motion was noted along with positive O'Brien's and Speed's tests. Dr. Burt's assessment/plan recommended a one-time steroid injection for Petitioner's ongoing pain, partial rotator cuff tear, and SLAP/biceps lesion. (Id., p. 17) A Kenalog injection was administered to the subacromial space in Petitioner's right shoulder that day. Dr. Burt continued Petitioner's light-duty work restrictions noting Petitioner would follow up in one month. (Id.)

Petitioner testified that Respondent accommodated his light duty restrictions, albeit at a reduced hourly wage, from March 2021 through July 3, 2021, at which time Petitioner stopped work due to a non-work-related, right leg, DVT issue. Petitioner testified he underwent surgery in July 2021 followed by hospitalization for 8 days (T. pp. 21-22, 33).

On July 15, 2021, Dr. Burt noted that Petitioner's shoulder was feeling better with physical therapy and the injection administered last month. (Id., p. 11) The doctor noted Petitioner had been hospitalized approximately one month prior for bilateral DVT issues. Petitioner reportedly underwent surgery to treat an abscess in his right posterior thigh/buttock and was being treated with oral antibiotics and wound care. Petitioner had also begun neurological treatment pertaining to his lumbar back and right lower extremity symptoms and was reportedly taking medication for diabetes. Dr. Burt concluded that Petitioner was at high risk for any surgery at the moment. (Id.) Dr. Burt restricted Petitioner from work and recommended an 8-week course of physical therapy for his right shoulder. (Id., p. 42)

On September 14, 2021, Petitioner followed up with Dr. Burt reporting no improvement in his right shoulder since the last visit. (Id., p. 7) Dr. Burt noted Petitioner exhibited "hypersensitivity" in his right neck/shoulder/arm. Petitioner reportedly found tissue massage during therapy excruciatingly painful. (Id.) The doctor concluded that Petitioner was not a surgical candidate due to his weight/smoking, and multiple medical issues. Noting there was nothing further he could offer Petitioner from a surgical standpoint, Dr. Burt discharged Petitioner from treatment. Petitioner was referred to a pain management doctor for suspected complex regional pain syndrome ("CRPS") and restricted from work (Id. pp. 7, 26, 44)

On September 24, 2021, Petitioner presented at Integrated Pain Management where Tian Xia, D.O., noted a history of a February 13, 2021, accident in which Petitioner was changing a wiper blade for a customer when he slipped and fell, landing on the right side of his body, and hearing a pop in his right

shoulder. Petitioner reportedly felt pain in his right shoulder after the accident and later felt pain in his ribs and bilateral ankles. (PX 5, p. 50) Petitioner reportedly continued work with restrictions until June 24, 2021, when he felt back pain and numbness in his right leg and underwent surgery to his right inner thigh abscess. He was later diagnosed with found DVT in both legs. (Id.) Petitioner was reportedly released by wound care although he currently was being treated by a hematologist, Dr. Hamdan, and an endocrinologist, for his newly diagnosed diabetes mellitus. On exam of Petitioner's right shoulder, Dr. Xia noted, restricted movement, reduced strength, and positive Neer's and Hawkins's tests. (Id.) Dr. Xia did not see signs of CRPS and thought Petitioner was likely a candidate for shoulder surgery. Petitioner was referred to an orthopedic surgeon, Dr. Aribindi, regarding his right shoulder. (Id.) It does not appear that Dr. Xia noted any work restrictions that day. Petitioner testified that at his initial appointment with Dr. Xia, the doctor noted restrictions of "light duty, between light duty and no work depending on the amount of pain" that he felt. (T p. 28)

On September 27, 2021, Petitioner presented for initial consult to Dr. Ram Aribindi at Southland Orthopedics at which time Petitioner reported a history of persistent right shoulder pain and weakness following a February 13, 2021, slip and fall accident in which Petitioner fell forward onto his outstretched right upper extremity and heard a pop in his right shoulder. (PX 6) Petitioner reported difficulty lifting his right arm overhead, pain reaching behind his back, and pain lying on his right side. (Id.) Petitioner noted the right shoulder injection in April 2021 and physical therapy provided no significant improvement in his symptoms. (Id.) Dr. Aribindi reviewed the right shoulder MRI, noting a partial thickness rotator cuff tear. The doctor further noted that a 7-month course of conservative treatment had failed to alleviate Petitioner's persistent symptoms. The doctor recommended that Petitioner undergo arthroscopic repair of his partially torn right rotator cuff. (Id.) Although Petitioner testified that Dr. Aribindi kept him off of work at his initial appointment, Dr. Aribindi's records document light duty restrictions of no lifting/carrying more than 5 lbs. with his right upper extremity. (T. p. 29; PX 6)

On October 1, 2021, Petitioner followed up with Dr. Xia with complaints of persistent right shoulder, right knee, and low back pain that radiated down both legs. (PX 5, p. 48) On exam of the right shoulder, Dr. Xia noted positive Neer's and Hawkin's signs. (Id.) although Dr. Aribindi had restricted Petitioner to light duty work, Dr. Xia noted that Petitioner "should be off work until his Hematologist clears him" for his DVT issues. (Id., p. 18)

Petitioner regularly followed up with Dr. Aribindi between October 2021 and December 2022, during which time, Petitioner's light-duty restrictions and surgical recommendation were continued. (PX 6)

In response to a November 2, 2022, denial letter from Respondent's insurance carrier, Dr. Aribindi noted the following:

> *The requested approval for surgery is for treatment of the right shoulder impingement and partial-thickness rotator cuff tear and not for diagnostic purposes. As noted on exam, he has pain as well as weakness on resistance to forward elevation and abduction. He has positive Hawkin's impingement sign. His symptoms and exam findings are consistent with findings on MRI, namely partial thickness rotator cuff tear. The diagnosis is fairly clear based on the exam and MRI. The rationale for surgery is that Mr. Sullivan has had persistent pain about the right shoulder which has not improved with time, steroid injection, as well as physical therapy for rehab of the right shoulder. (Id.)*

Petitioner testified that his right shoulder condition has not changed since his last visit with Dr. Aribindi in December of 2022 (T. p. 26).

Petitioner testified he regularly follows up with his pain management physician, Dr. Xia. (Id., p. 29)

Regarding his current condition, Petitioner testified his right shoulder pain persists and he has difficulty with any kind of rotation in that joint. Further, he has difficulty pouring a cup of coffee, grabbing a jug of milk out of the fridge, carrying groceries, trying to wash his back with a scrub brush, bending over to tie his shoes, and holding anything over five pounds. (Id., 33) Petitioner wishes to proceed with Dr. Aribindi' proposed shoulder surgery. (Id., 28) Petitioner testified his right ankle and ribs were fine as of the hearing date. (Id., 26-27)

Regarding the period of time from March 18 through July 3rd, 2021, Petitioner testified he was paid by Respondent while working on restricted duty albeit at a decreased rate from his average weekly wage. (Id., 28)

**Dr. Lawrence Li – IME Reports and Records Review**

On April 22, 2021, Petitioner presented for an independent medical evaluation ("IME"), pursuant to Respondent's request, with Dr. Lawrence Li who noted an accident history consistent with Petitioner's testimony. (RX 1) Dr. Li noted Petitioner underwent a right shoulder MRI that showed a partial thickness tear of the rotator cuff. Petitioner complained of right shoulder pain from the trapezius down his lateral arm along with pain accompanied by lifting and leaning over. On exam, the doctor noted discomfort with provocative testing including Neer and Hawkins's impingement tests. Negative biceps load and O'Brien's test were noted. Dr. Li found Petitioner's right shoulder symptoms consistent with the "objective" MRI findings he reviewed. He diagnosed partial-thickness tears of the supraspinatus and subscapular tendons and recommended steroid injections into the subacromial space followed by 4-6 weeks of therapy. (Id.) If Petitioner's symptoms persisted, the doctor thought arthroscopic rotator cuff repair surgery would be indicated. (Id.) Dr. Li opined that a causal relationship existed between the work accident and Petitioner's right shoulder, right rib, and right ankle conditions. Dr. Li opined that Petitioner was capable of working but should be restricted from any over-chest lifting with his right arm. (Id.)

On September 23, 2021, Petitioner presented to Dr. Li for a second IME pursuant to Respondent's request. (RX 2) Petitioner reported pain "everywhere in the shoulder" worse with lifting and carrying. (Id.) Dr. Li noted a diagnosis of a right shoulder partial thickness tear of the supraspinatus and subscapularis tendon. (Id.) Dr. Li maintained his prior causal connection opinion however, he did not recommend further treatment concluding Petitioner had exhibited non-physiological pain patterns on exam. The doctor further opined that Petitioner was at maximum medical improvement ("MMI") and required no further restrictions. (Id.)

On November 1, 2022, Dr. Li authored a report regarding additional records he purportedly reviewed including Dr. Aribindi' s notes from September 27, 2021, through April 11, 2022, and the March 15, 2021, right shoulder MRI report. (RX 3) Dr. Li noted Petitioner has partial thickness tears in his rotator cuff tendon that is less than 50%. He further noted the MRI report noted the imaging was suboptimal due to motion during the examination. (Id.) The doctor reiterated his opinion that Petitioner exhibited non-physiological pain patterns on his prior exam, adding that Petitioner demonstrated purposeful giving away and "cogwheeling" along with symptom magnification. Dr. Li concluded that Petitioner's current complaints were due to symptom magnification and malingering, inconsistent with any shoulder pathology. (Id.) According to Dr. Li, "All of these red flags argue against this with any surgical procedure". (Id.)

**Dr. Aribindi's Testimony**

Dr. Ram Aribindi's evidence deposition was taken on May 20, 2022. (PX 8) Dr. Aribindi has been board certified in orthopedic surgery, since 2000, and practices at Southland Orthopedics. (Id., 4) Dr. Aribindi brought a file to the deposition containing chart notes pertaining to his treatment of Petitioner between his initial consult on September 27, 2021, and Petitioner's last visit on April 11, 2022. (Id., 6) Dr. Aribindi' s exam findings are documented contemporaneously, stored electronically, locked, and time stamped. (Id., 7)

Regarding his initial consult with Petitioner on September 27, 2021, Dr. Aribindi noted Petitioner's complaints of persistent right shoulder and right knee pain following a slip and fall on ice while at work on February 13, 2021. (Id., p. 8) Petitioner denied a history of right shoulder injury prior to the accident. (Id.) Petitioner reportedly had undergone physical therapy and a steroid injection with no significant improvement in his symptoms. (Id., 8-9) Petitioner complained of difficulty elevating his right arm in the overhead position, pain when reaching behind his back, and pain at night and when lying on his right side. He denied left shoulder pain and exhibited good motion and strength in his left shoulder joint. (Id., 9) On exam, Dr. Aribindi noted forward elevation of about 150 degrees with some pain of the right shoulder along with pain on resistance of forward elevation and abduction. Petitioner exhibited a positive Hawkin's impingement sign and pain with abduction and internal rotation of the shoulder. (Id.,10) The doctor reviewed the right shoulder MRI noting a partial thickness rotator cuff tear. (Id.) Based on Petitioner's history and seven-month course of conservative treatment that failed to alleviate Petitioner's symptoms, Dr. Aribindi recommended right shoulder arthroscopic surgery. (Id., p. 11) Petitioner was to refrain from overhead activities, stop smoking, lose weight, and obtain pre-surgical medical clearance. (Id.)

Dr. Aribindi testified he saw Petitioner again on October 18, 2021, and February 28, 2022, at which time Petitioner's right shoulder condition had not changed much. (Id., 12) In his February 28, 2022, chart note, Dr. Aribindi noted disagreement with Dr. Li's IME findings alleging Petitioner's symptoms were non-physiological. (Id., 13) Dr. Aribindi noted that Petitioner's right shoulder complaints were consistent over his past three visits and correlated with the doctor's exam and MRI findings. (Id., 13) Dr. Aribindi saw Petitioner again in March and April of 2022, at which time, Petitioner had persistent right shoulder complaints, and clinical findings consistent with his prior chart notes. (Id., 14)

Dr. Aribindi testified he diagnosed Petitioner with right shoulder pain, tendinitis, impingement, and a partial thickness rotator cuff tear. (Id., 15) Based on Petitioner's history, exam results, and MRI, Dr. Aribindi opined that Petitioner's partial thickness rotator cuff tear was causing Petitioner's right shoulder pain. (Id.) Dr. Aribindi opined that Petitioner's right shoulder injury was caused by his fall with an outstretched arm on February 13, 2021. (Id., 15) The doctor further testified that Petitioner's medical treatment had been reasonable and necessary. (Id., 16-17)

On cross-exam, Dr. Aribindi testified that he specializes in orthopedic surgery related to the hip, knee, and shoulder. (Id., 19) In the 52-week period prior to his deposition, the doctor performed 75-100 shoulder surgeries which is down from the 100-150 shoulder surgeries he performed pre-pandemic. (Id., 20) The doctor sees 40 patients per day, 3 days per week and 1/3 of those patients have shoulder issues. (Id.) Dr. Aribindi testified he did not review Petitioner's records from other medical providers although he did review the MRI and "the IME report" and summarized the pertinent portions of those records in his chart notes. (Id., 24) The doctor's standard practice is to review the actual MRI films because sometimes errors are made in the reports. (Id., 25)

Regarding his treatment of Petitioner, Dr. Aribindi examined Petitioner on 5 occasions. (Id., p. 27) He usually spends 30 minutes with his patients and the exam portion takes 5-10 minutes. (Id.) Regarding Petitioner's forward elevation, the doctor initially noted Petitioner had 150 degrees and on subsequent visits the doctor noted 10 degrees of improvement which plateaued since February 28, 2021. (Id., 29) The doctor recommended Petitioner stop smoking and encouraged him to lose weight. As of April 2022, Petitioner was down 8 lbs. to 390 lbs. (Id., p. 31) Regarding Petitioner's DVT issues in his bilateral legs, Dr. Aribindi testified that he would likely order anti-coagulant medication for Petitioner following the proposed surgery as Petitioner was at higher risk for post-surgery DVT issues. In addition, the doctor would likely use sequence compression devices during surgery to decrease the likelihood of DVT-related complications. (Id., p. 32) Petitioner's last visit was May 20, 2022, and Dr. Aribindi doubts that Petitioner's shoulder condition has improved since that time. (Id., p. 34)

On re-direct, Dr. Aribindi testified that he makes reasonable inferences regarding a patient's condition noting, "If their condition in September is what you saw in April and every month you're seeing them on a monthly basis and they're not progressing, I mean, it's – I don't think it's reasonable for you to expect they get better the day after you saw them, miraculously they got better, I don't think that's reasonable to assume." (Id., p. 35). The doctor further testified that cigarette smoking does not cause rotator cuff tears but it is a cause for concern in the post-surgical healing process." (Id., pp. 35-36) The fact that Petitioner suffers from gigantism does not have any effect on his rotator cuff tear.

**Dr. Lawrence Li Testimony**

Dr. Lawrence Li's evidence deposition was taken on March 6, 2023. (RX 4) Dr. Li has been board certified in orthopedic surgery since 1995 and has been licensed to practice medicine in Illinois since 1996. (Id., p. 6)

Dr. Li testified that Petitioner presented for an IME on April 22, 2021. (Id., p. 8) Petitioner reported a history of a work-related slip-and-fall accident consistent with his testimony. (Id.) On exam, Dr. Li noted decreased active range of motion by about 40 percent. Petitioner had full, passive range of motion, but "he just couldn't lift it up by himself", according to Dr. Li. (Id., p. 10) Petitioner had discomfort with provocative testing, including Neer and Hawkin's impingement signs, along with slight weakness with strength testing. Dr. Li diagnosed a right shoulder partial thickness rotator cuff tear, right rib contusion, right knee internal derangement, and right ankle contusion. (Id., p. 13) The medical treatment had been reasonable and necessary. In terms of prospective treatment, Dr. Li thought a steroid injection in the right shoulder and 4-6 weeks of physical therapy were necessary. (Id.)

Regarding Petitioner's second IME, on September 23, 2021, Dr. Li testified that Petitioner had much improved active range of motion in the right upper extremity along with slight weakness on strength testing. (Id.) The doctor did not find that testing reliable as he felt Petitioner was "cogwheeling" with intentional giving away. (Id., p.14) According to Dr. Li, Petitioner's exam findings were non-physiologic and "appeared to be more severe but without basis". (Id.) Petitioner complained of pain "everywhere in his shoulder, and he hurts equally in every part of his shoulder, and that all parts of his shoulder were worse with lifting and carrying". (Id., p. 15) The doctor further noted that "everywhere I touched in his right shoulder it hurt, which again doesn't make sense." (Id.) Dr. Li thought Petitioner's complaints were due to symptom magnification and malingering. Accordingly, Dr. Li did not recommend that Petitioner undergo surgery to repair his rotator cuff tear as recommended by Dr. Aribindi. (Id.)

On cross-exam, Dr. Li agreed that Petitioner has a partial rotator cuff tear, a condition that does not heal itself. (Id., pp. 18, 21) Dr. Li found no records or evidence of any right shoulder condition prior to Petitioner's February 13, 2021, accident. (Id.) Dr. Li agreed the mechanism of injury is consistent with a diagnosis of a partial rotator cuff tear and that Petitioner's shoulder condition was related to the accident at issue. (Id., p. 19)

Dr. Li confirmed that at Petitioner's initial IME, Petitioner exhibited positive Neer and Hawkin's signs, findings consistent with a rotator cuff tear which was diagnosed on Petitioner's MRI. (Id.) The doctor agreed that there were no inconsistencies noted in any of Dr. Aribindi's examinations of Petitioner. Dr. Li conceded he did not rely on Dr. Aribindi's records as a basis for his third report, although his third report was a records review. When asked whether he ignored Dr. Aribindi's records in formulating his opinions in contained in his third report, Dr. Li agreed, stating, "Yes. My opinion is not based on those records. That would be fair to say." (Id., p. 23) Dr. Li has no evidence of any intervening accidents between Petitioner's first and second IME. (Id.) Lastly, Dr. Li agreed that the arthroscopic procedure proposed by Dr. Aribindi is a reasonable recommendation to treat Petitioner's partially torn rotator cuff, as diagnosed on MRI. (Id.)

## CONCLUSIONS OF LAW

### Causal Connection

Based on a preponderance of the credible evidence contained in the record, the Arbitrator finds that Petitioner has established a causal connection between the current condition in his right shoulder and his February 13, 2021, accident. In support, the Arbitrator notes that Petitioner's testimony regarding the general good health in his right upper extremity, prior to his accident, is uncontested. Petitioner worked his full-duty job for Respondent, unrestricted, for 3 years before February 13, 2021. Two days after his accident, Petitioner was restricted from work, ordered to consult with an orthopedic specialist, and furnished a sling for his right arm. It is undisputed that approximately one month following the accident, objective evidence on MRI showed a partially torn rotator cuff. Petitioner's treating medical records document his consistent right shoulder complaints and course of conservative treatment, including physical therapy and injections, that failed to alleviate his symptoms. The Arbitrator places significant weight on the testimony of Dr. Aribindi whose opinions are well substantiated by the evidence contained in the record including Petitioner's history, clinical exam findings, and diagnostic evidence. Furthermore, Dr. Li, Respondent's Section 12 examiner, agreed that Petitioner's partially torn right rotator cuff was caused by his February 13, 2021, slip-and-fall accident.

The Arbitrator finds the preponderance of evidence contained in the record, including the treating records from Morris Hospital, Dr. Meyer, Dr. Burt, Dr. Xia, Dr. Aribindi, and Dr. Li's first Section 12 exam, are inconsistent with Dr. Li's findings/opinions related to symptom magnification, "cogwheeling", non-physiologic behavior on exam, and malingering.

The Arbitrator notes the issue of causal connection is essentially uncontested as Dr. Li never disavowed his initial opinions on causation in this case.

Based on the greater weight of the evidence, the Arbitrator finds the current condition of Petitioner's right shoulder is causally related to his February 13, 2021, work accident.

### Prospective Medical Treatment

Regarding the prospective surgery proposed by Dr. Aribindi, the Arbitrator finds the preponderance of credible evidence in the record supports a finding in Petitioner's favor. Petitioner has established a causal connection between the current condition in his right shoulder and his accident. Respondent's IME, Dr. Li testified that Petitioner's rotator cuff tear will not heal itself and that the surgery proposed by Dr. Aribindi is reasonable. Dr. Aribindi credibly testified that Petitioner's seven-month course of conservative treatment failed to alleviate his right shoulder pain and disability and that Petitioner required arthroscopic surgery to repair his partially torn rotator cuff. Based on a preponderance of the credible evidence contained in the record, the Arbitrator finds that Petitioner's right shoulder condition and his need for right shoulder surgery, as prescribed by Dr. Aribindi, is reasonable, necessary, and related to Petitioner's February 13, 2021, work accident.

**Medical Bills**

The Petitioner has established a causal connection between his right shoulder condition and the accident at issue. The Arbitrator has reviewed the disputed medical bills contained in Petitioner's Exhibit 1 which correspond to treatment he received for his right shoulder following his accident. Dr. Aribindi credibly testified that Petitioner's treatment following the accident has been reasonable and necessary. The Arbitrator finds that the preponderance of credible evidence has established that the disputed medical treatment contained in Petitioner's Exhibit 1 is reasonable and necessary. Accordingly, Respondent is liable for the medical bills contained in Petitioner's Exhibit 1.

**TTD and TPD**

Petitioner claims entitlement to TTD benefits from September 14, 2021, through the date of the hearing. (Arb. 1) The Arbitrator finds that he has not marshaled sufficient evidence in support.

Respondent accommodated Petitioner's light duty, right shoulder restrictions, from March 2021, until July 3, 2021, at which time Petitioner was taken off work for unrelated emergency surgery and hospitalization for 8 days for his unrelated DVT issues. It is unclear whether Petitioner currently remains off work for his unrelated health issues. Petitioner did not offer testimony in this regard.

Dr. Xia's records from December 3, 2021, through February 10, 2023, indicate that Petitioner had not been released or "cleared" by his hematologist for his unrelated, off-work restrictions. (PX 5) The records from Dr. Aribindi show that Petitioner was released to light duty restrictions on September 27, 2021, which were continued up until December 12, 2022, which is the last treatment record from Dr. Aribindi in evidence.

Petitioner's testimony regarding the work restrictions ordered by Dr. Xia and Dr. Aribindi regarding his right shoulder is inconsistent with the treatment records in evidence.
this hearing?

Based on the preponderance of credible evidence contained in the record, the Arbitrator finds that Petitioner has not sustained his burden regarding his claimed entitlement to TTD benefits from September 14, 2021, through the date of the hearing.

Petitioner has established that Respondent is liable for TTD benefits from September 14, 2021, the date he was released from treatment by Dr, Meyer, through September 27, 2021, the date Petitioner presented for initial consult with Dr. Aribindi.

Regarding Petitioner's claim to temporary partial disability ("TPD") benefits. The wage statements in evidence indicate that Petitioner's pay from March 18, 2021, until July 3, 2021, was $1,187.79 less than his average weekly wage at the time of his accident. (PX 10) The Arbitrator finds that Respondent is liable and shall pay Petitioner $1,187.79.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 23WC008779 |
| Case Name | John Mead v.<br>Continental Tire The Americas, LLC., |
| Consolidated Cases | |
| Proceeding Type | Petition for Review under 19(b)<br>Remand Arbitration |
| Decision Type | Commission Decision |
| Commission Decision Number | 24IWCC0604 |
| Number of Pages of Decision | 19 |
| Decision Issued By | Stephen Mathis, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Jon Rosenstengel |
| Respondent Attorney | Andrew Keefe |

DATE FILED: 12/16/2024

/s/Stephen Mathis, Commissioner

Signature

STATE OF ILLINOIS )
) SS.
COUNTY OF JEFFERSON )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

John Mead,

Petitioner,

vs. NO. 23WC008779

Continental Tire The Americas,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 12, 2023, is hereby affirmed and adopted.

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

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

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

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

**December 16, 2024**

SJM/sj
o-11.6.24
44

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

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

/s/ *Raychel A. Wesley*
Raychel A. Wesley

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 23WC008779 |
| Case Name | John Mead, v. Continental Tire The Americas, LLC., |
| Consolidated Cases | |
| Proceeding Type | 19(b) Petition |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 16 |
| Decision Issued By | Maureen Pulia, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Jon Rosenstengel |
| Respondent Attorney | Andrew Keefe |

DATE FILED: 10/12/2023

**THE INTEREST RATE FOR THE WEEK OF OCTOBER 11, 2023 5.32%**

/s/Maureen Pulia, 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)**

**JOHN MEAD,**
Employee/Petitioner

v.

**CONTINENTAL TIRE THE AMERICAS, LLC.,**
Employer/Respondent

Case # **23** WC **8779**

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 **Mount Vernon, IL**, on **9/19/23**. 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, **11/2/22**, 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 $**32,086.88**; the average weekly wage was $**996.49**.

On the date of accident, Petitioner was **59** 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 $**664.32** for TTD, $**00.00** for TPD, $**00.00** for maintenance, and $**00.00** for other benefits, for a total credit of $**00.00**.

Respondent is entitled to a credit of $**00.00** under Section 8(j) of the Act.

**ORDER**

Respondent shall pay reasonable and necessary medical services related to petitioner's cervical spine from 11/2/22 through 9/19/23, as provided in Sections 8(a) and 8.2 of the Act.

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

Respondent shall pay reasonable and necessary medical services related to the anterior cervical discectomy and fusion at C4-C5 and C5-C6, as well as disc replacements at C3-C4 and C6-C7 recommended by Dr. Peloza, as provided in Sections 8(a) and 8.2 of the Act.

Respondent is not entitled to an overpayment of TTD from 5/22/23-5/28/23 in the amount of $664.32.

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

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

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

**OCTOBER 12, 2023**

Signature of Arbitrator

ICArbDec19(b)

**THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:**

Petitioner, a 59 year Processing Crew Worker in the Rework Center, alleges he sustained an accidental injury to his cervical spine due to repetitive work activities that arose out of and in the course of his employment by respondent and manifested itself on 11/2/22. Petitioner has been employed by respondent since October of 1992, primarily in stock prep. Petitioner worked 40 hours a week.

Petitioner testified that he worked as a stock prep on two different occasions for a total of 10 years. His duties as a stock prep are performed before the material goes to the tire builder. He testified that he ran a large machine that made belts for the ply. He testified that this job was somewhat physically demanding and included a lot of pulling and some lifting. Petitioner also worked on the tread line as a millman. He stated that in this job he brought large skids of rubber to the extruder on a forklift. There the rubber was broke down and went on to a large mill where it was cut and prepared to go in a final extruder.

Petitioner testified that from 2015-2019 he worked as a truck wire cutter.

For two years prior to the alleged injury on 11/2/22 (since July of 2019), petitioner worked in the Rework Center as a Processing Crew Member (PCM). In the beginning he would rework semi tire tread. This job required him to stand in front of a large conveyor. Petitioner would load large pallets of rubber treads onto the conveyor. Petitioner testified that this job was more physically demanding than his stock prep job. He testified that the rubber treads weighed up to 65-70 pounds. Petitioner performed this job his entire shift. Petitioner would also move sidewall. He stated that the sidewalls were made of soft rubber that would often stick together. Petitioner would spray chemical on them in order to try and get them apart, and also use hooks to pull them apart so that he could lay them on the conveyor. The weight of the sidewalls varied. They weighed up to 65-70 pounds, and as little as 20 pounds. The stickiness of the sidewalls made it harder to separate them. Petitioner testified that there was also a manipulator that was used mostly on the tread, but he rarely used it because it did not work. Petitioner denied any problems with his neck prior to working the PCM job in the Rework Center.

Petitioner testified that when he started working as a PCM, he dealt more with tread than sidewall. He testified that some days he could do all tread or sidewall, and other days maybe ½ tread and ½ sidewall. One day a week he drove the forklift, which was used to bring pallets of tread or sidewall to the conveyor. The skids were often loaded with material up to chest level. Petitioner testified that when he worked with the sidewalls they stuck together more often and it would take longer to pull them apart and

get them on the conveyor. He testified that the speed of production was based on the weight of the tread or sidewall.

Petitioner testified that if working tread, he would load about 58 treads an hour. If he ran into no problems, he could load treads every 3-4 seconds. He noted with sidewalls it could be twice that amount in an hour, if the sidewalls were small. He testified that the sidewalls could be sticky and then he would need to pry the sidewalls apart. Sometimes 2 people were needed to pull them apart. Other times it was easier, and sometimes he would use a knife to separate the sidewalls. Petitioner testified that the skids weighed a ton, and one would be processed every 30 minutes. He processed 14 pallets of tread in 7 hours. He reported that there was no down time between pallets.

Petitioner testified that he first started noticing problems in his neck while working in the Rework Center as a PCM. These problems included sharp pain in his neck for months when pulling sidewalls apart, before he reported it. He testified that the delay in reporting his problems with his neck were because he thought the pain would go away, but it did not.

Petitioner testified that he was off work for about three months in the summer of 2022 due to an unrelated knee surgery. He testified that he came back to work in late summer and worked continuously through November of 2022. It was during this time that he noticed his neck problems and eventually reported them to his supervisor. Petitioner testified that during the course of a day he would get sharp pains, and then noticed that he was losing strength in his right arm/shoulder, and would have to shift his weight in order to pick things up.

Petitioner testified that he reported developing a stiff and sore right shoulder and neck pain in November of 2022. As a result, he completed an incident report.

On 12/9/22 petitioner underwent an MRI of the right shoulder that showed evidence of tendinopathy with high grade partial tear of the supraspinatus tendon; effusion of the subacromial subdeltoid bursa; small amounts of fluid along the long head of the biceps.

Petitioner presented to PA-C Evan Hakman on 12/21/22 for his complaints of right shoulder pain. Petitioner reported that he had a very strenuous job for respondent, and in early November 2022 was pulling or jerking something off a pallet and felt some pain in his right shoulder, that had not resolved. He complained of decreased strength and weakness. He noted that most of his pain was located in the medial aspect of the scapula, and between his shoulder blades. Petitioner reported that he was put on prednisone in early November 2022, and that helped his neck pain, but not his shoulder. Following an examination, x-rays, and a review of the MRI, Hakman assessed right shoulder pain, tendinopathy with

high grade partial tear of the supraspinatus tendon, biceps tendinitis, neck pain, and right sided cervical radiculopathy. Hackman told petitioner that his symptoms could be coming from his neck. He recommended petitioner address the neck prior to the shoulder. Hackman ordered an MRI of the cervical spine. He also gave petitioner restrictions to avoid any heavy lifting with the right upper extremity. Petitioner refused a cortisone injection into the right shoulder.

On 1/30/23 petitioner underwent an MRI of the cervical spine. The impression was facet disease in the cervical spine, most severe at C5-C6. There was moderate bilateral foraminal stenosis at C3-C4; severe right and moderate left foraminal stenosis at C4-C5; and, severe bilateral foraminal stenosis and mild spinal canal stenosis at C5-C6 with a small disc bulge, and mild left foraminal stenosis.

On 2/22/23 petitioner presented to Dr. John Peloza at Midwest Orthopedic and Spine Specialists. Petitioner complained of neck and right arm pain, numbness, and weakness most notable when he reported it on 11/2/22. Petitioner reported that he worked for respondent for 30 years, and for most of his career he was a machine operator which did not require a lot of heavy lifting. He reported that two years ago he changed to be more on the line where he has to do a lot of pulling, pushing, and lifting. Over this period petitioner noticed pain in his neck and shoulder that had been increasing. He reported that it came to a crescendo when he had severe pain in his neck and weakness in his right arm on 11/2/22. Petitioner said he had been put on light duty. Petitioner provided Dr. Peloza with a description of all his complaints.

Following an examination of his cervical spine, and an orthopedic exam of the upper extremities, a neurologic exam of his upper extremities and lower extremities, as well as a review of the MRI of the cervical spine, Dr. Peloza's impression was that petitioner had significant pathologic changes, particularly at C5-C6, with cord compression, root compression, and spinal cord signal change; significant root compression with signal change in the cord at C4-C5; midline herniation at C6-C7 with cord flattening and signal change; and degenerative changes at C3-C4, particularly at the facets and the foramen on the right side. Dr. Peloza was of the opinion that his impressions correlate with petitioner's weakness, sensory changes, atrophy of his deltoid, biceps, and forearm musculature, as well as significant weakness in his right arm. Dr. Peloza was of the opinion that petitioner's current condition of ill-being is secondary to his work, particularly the last two years of repetitive work that culminated with the injury on 11/2/22. Dr. Peloza did not think any further conservative treatment was warranted, and he recommended an anterior cervical discectomy and fusion at C4-C5 and C5-C6, as well as disc replacements at C3-C4 and C6-C7. He continued petitioner on light duty.

On 3/24/23 petitioner underwent a Section 12 examination performed by Dr. Peter Mirkin, an orthopedic surgeon, at the request of the respondent. Petitioner reported a history of working for

respondent for 30 years. He denied any traumatic event, but did report that over a period of time he developed symptoms in his neck and atrophy in his biceps, particularly his right. He reported that in October/November of 2022 he was at home helping his wife cook and noticed significant weakness in his right arm. Following a record review, and physical examination, Dr. Mirkin's impression was that petitioner had severe degenerative disease and instability of his spine at C4-C5 and C5-C6. He was of the opinion petitioner should consider a C4-C5 and C5-C6 anterior and posterior decompression, instrumentation and fusion. He did feel an anterior approach on its own would help. He also did not feel petitioner needed any surgery at C3-C4 and C6-C7. Dr. Mirkin was of the opinion that petitioner's condition was degenerative, and petitioner gave him no evidence that there was any indication that his work activities caused or exacerbated his condition. He was of the opinion petitioner could work light duty due to his degenerative condition. He could not predict if petitioner would be able to return to work after the surgery, but was of the opinion that petitioner needed the surgery he recommended at C4-C5 and C5-C6. He was of the opinion that petitioner had severe instability as seen on his x-rays.

On 4/4/23 petitioner followed-up with Dr. Peloza. He noted that his condition was worsening, especially as it related to the weakness in his right arm and the clumsiness in his hands. Following an examination, x-rays and review of the cervical MRI, Dr. Peloza's impression was that petitioner had cervical myelopathy, as well as cervical stenosis and a Grade 2 spondylolisthesis at C5-C6. He was of the opinion that petitioner clearly needs surgery for the cervical stenosis, the cervical myelopathy, and the instability in his neck. Dr. Peloza was of the opinion that at a minimum petitioner needed the fusion at C4-C5 and C5-C6.

On 4/19/23 Dr. Peloza drafted a letter to Ms. Sarah Black indicating that he disagreed with Dr. Mirkin's opinion that petitioner needs an anterior and posterior approach. He was of the opinion that petitioner did not have a major traumatic injury where he has perched facets or a fracture. Therefore, under traction at the time of the surgery, petitioner should get an anatomic reduction of his spondylolisthesis particularly at C4-C5 and C5-C6. He noted that he could put in a fusion cage and plates at theses level, and that should stabilize it without a posterior approach. He further noted that should there be any trouble with healing or instability, he could always do a posterior approach secondarily. Dr. Peloza noted that even though Dr. Mirkin saw no pathology at C3-C4 and C6-C7, there are significant disc injuries at both levels, particularly a central contained herniation at C6-C7, that is causing some flattening of the spinal cord. Due to these changes at C6-C7, Dr. Peloza was of the opinion that he would do a disc replacement to maintain as much motion in the cervical spine as possible. He noted that at C3-C4 there was a midline annular tear with significant foraminal stenosis on the right.

Because of these changes, Dr. Peloza noted that he would do a disc replacement at this level, rather than extend the 2 level fusion to a 3 level fusion. Dr. Peloza opined that these conditions from C3-C7 are the cause of his present condition and secondary to his work injury, as he has not had any treatment to his neck in all the years he worked for respondent. Dr. Peloza was of the opinion that the injury caused an exacerbation of his underlying condition and probably the new injuries at C6-C7, and secondarily to C3-C4.

On 6/21/23 petitioner returned to Dr. Peloza. He reported that his pain was worse, and he was taking 4 oxycodone a day. He noted that the ache in his neck involved his entire neck into the intrascapular region out to his shoulders. Petitioner also reported trouble with fine motor control in his hands. Following an examination and review of the diagnostic imaging, Dr. Peloza's impression was that petitioner had worsened in terms of his pain, but did not change much neurologically. He noted that the atrophy in his right arm, and hands was severe, and the positive Hoofman's sign suggested myelopathy. Petitioner also had weakness in his right arm. Dr. Peloza was of the opinion that he needed to decompress and stabilize petitioner at C4-C5 and C5-C6 with a fusion, and that he could also take care of the inflamed facets anteriorly, without a posterior approach being needed. Dr. Peloza was of the opinion that he also wanted to address C3-C4 and C6-C7 with disc replacements at the same time.

On 6/23/23 petitioner underwent a CT and MRI of the cervical spine that revealed degenerative Grade 1 anterolisthesis at C4-C5 and C5-C6 with circumferential disc bulges at both levels; right foraminal protrusion at C4-C5, and cranially extruded/herniated disc material in the midline and both foramina at C5-C6; moderate C5-C6 and mild C4-C5 central cranial stenosis; severe, right greater than left, foraminal stenoses at both levels; central protrusion resulting in dural displacement but no definite central canal or foraminal stenosis; and, C3-C4 circumferential disc bulge with a right foraminal protrusion and facet arthropathy resulting in moderate to severe, right greater than left, foraminal stenosis without central canal stenosis.

On 7/17/23 the evidence deposition of Dr. Peter Mirkin, an orthopedic surgeon, was taken on behalf of respondent. Dr. Mirkin testified that he was unaware that petitioner was off work from May 2022 through September of 2022 due to an unrelated knee replacement. Dr. Mirkin testified that petitioner told him his symptoms developed over time, and he particularly noticed weakness when he was helping his wife cook something at home. Dr. Mirkin testified that petitioner told him he takes care of cows and does activities outside of work. Dr. Mirkin opined, based on the evidence provided him, his discussions with petitioner, and his review of the written job description, that there is no causal connection between petitioner's activities for respondent and his degenerative phenomenon. He was of the opinion that

petitioner did not sustain an injury, but rather it was just a condition he had. He was of the opinion that petitioner's condition was not traumatic, but rather degenerative. He opined that the surgery he recommended is not causally related to any specific activity. Dr. Mirkin was of the opinion that petitioner had some mild degenerative disease at all levels other than C4-C5 and C5-C6. He saw no significant herniated disc or high intensity zone. He saw a mild disc bulge at C6-C7, and mild foraminal stenosis at C3-C4 without any central stenosis. He was of the opinion that petitioner was more likely to be able to return to heavy work with a 2 level procedure versus a 4-level procedure. He did not believe that if you insert disc replacements, that you gain more stability than you would have with a degenerated level. He was of the opinion that disc replacements are contraindicated in facet arthropathy, which petitioner has.

On cross examination, Dr. Mirkin was of the opinion that based on petitioner's work job description his job was considered medium to heavy, and that petitioner was occasionally exposed to heat and dust; constantly exposed to noise and moving equipment; standing the entire shift; and, required to perform frequent stooping, bending, twisting, walking long distances, climbing stairs, as well as lifting 50 or more pounds on an occasional to frequent basis. Petitioner was required to have full range of motion in his fingers, hands and wrists, and the ability to use both arms/hands to perform the job. He was also required to push and pull in the medium to heavy category. Dr. Mirkin did not believe petitioner had an annular tear at C3-C4, and was of the opinion that the radiologist also did not mention it. Dr. Mirkin was of the opinion that there was only a little noncompressive bulge at C6-C7, not a disc herniation. Dr. Mirkin was of the opinion that trying the surgery at C4-C5 and C5-C6 all from the front had a high risk of falling apart because of the degenerative changes in his cervical spine, that were the incompetent facets at C4-C5 and C5-C6. Dr. Mirkin did not believe that the degeneration was caused or aggravated by the conditions of petitioner's work duties that petitioner described to him that were not in petitioner's job description.

On 7/27/23 the evidence deposition of Dr. John Peloza, an orthopedic spine surgeon, was taken on behalf of petitioner. Dr. Peloza opined that petitioner's cervical spine condition was caused or aggravated by the 30 year work history with respondent petitioner provided. Dr. Peloza was of the opinion that Dr. Mirkin's suggestion of an anterior/posterior approach for stabilization is not necessarily wrong, but he was of the opinion that he could address the spondylolisthesis with traction anteriorly, and because a posterior exposure presents a significant morbidity in terms of damaging the muscles in the back of the neck and the outcome is worse because if you don't have normal muscles to hold your neck up, patients have a lot more pain and they get this condition call kyphosis where they bend forward.

Dr. Peloza was of the opinion that petitioner had wear and tear on his neck over the years, but it was totally asymptomatic until he was doing the heavy lifting for respondent, and that is what brought it on. Dr. Peloza testified that he still had petitioner on light duty with no lifting over ten pounds, and no pushing, pulling, or overhead work. He was of the opinion that petitioner's prognosis after the surgery he recommended would be good, and he could return to work at least at the light duty level. He stated that he would probably restrict petitioner's heavy lifting so he does not reinjure himself. He was of the opinion that operating a machine would be better than heavy lifting.

On cross examination, Dr. Peloza testified that his understanding as it relates to petitioner's work activities was that he had to push, pull, and lift heavy things, but did not know how much weight he moved. However, he did not think it mattered with respect to his causation opinions, because as it relates to causation it does not matter at what level petitioner was pushing, pulling and lifting heavy things. He testified that he never saw a demands analysis or a written job description.

Dr. Peloza testified that petitioner told him he likes to work on his horse and cattle ranch. He believed it involved a lot of physical work. He was of the opinion that it is possible that the types of activities on a ranch could certainly cause the symptoms petitioner reported. Dr. Peloza testified that he did not know what petitioner does on his ranch. He testified that he did not know petitioner was off work from 5/22/22 through 9/22/22 for an unrelated knee replacement, but that it did not change his opinion, because petitioner had pain for 2 years prior to his accident date. Having reviewed the MRI of January 2023, and the x-rays, Dr. Peloza was of the opinion that petitioner's spondylolisthesis probably existed for more than two years. He was also of the opinion that something changed in petitioner in late fall of 2022 that caused him to go from some neck soreness to all of sudden screaming pain down his right arm with weakness and atrophy after 6 months.

On 8/29/23 petitioner followed-up with Dr. Peloza. He was not improving. Dr. Peloza wanted to try and minimize petitioner's use of hydrocodone, and for him to use tramadol for breaks with pain. He noted that despite his ongoing complaints, petitioner did not have any myelopathic complaints. It was more radicular with severe pain and weakness. Following his examination, Dr. Peloza reiterated his recommendation for a fusion at C4-C5 and C5-C6, and disc replacements at C3-C4 and C6-C7 through an anterior approach. He believed this surgery has the best chance of giving petitioner the best result.

Petitioner testified that he wanted to undergo the surgery recommended by Dr. Peloza. He testified that he received temporary total disability benefits through the Section 12 examination performed by Dr. Mirkin. Petitioner also testified that he got a week of temporary total disability benefits when the plant was shut down for a week.

Petitioner testified that he has farm, and works on the farm. He denied any problems with his neck while working on the farm. He testified that the farm is almost totally automated. Petitioner has 15-20 beef cattle. Petitioner raises the babies and sells the steers off for beef once fattened. He stated that he never touches the feed or bales because he has machines for this. He testified that his responsibility was to keep grass in front of the cattle, provide water, and keep the fences secure. Petitioner testified that his job at work is more physical than at the farm. Petitioner stated that he drives a tractor on the farm. He has not road horses for about a year, after being told by the doctor not to ride them.

Petitioner testified that at one point before he sought treatment, he was helping his wife get a roast ready for cooking in a crock pot. He stated that as he lifted the crock pot to put it in the refrigerator on the top shelf, he noted that he could not lift it with his right arm. He testified that lifting the pot did not cause him an injury.

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

Petitioner is alleging injuries to his cervical spine due to repetitive work activities that arose out of and in the course of his employment by respondent and manifested itself on 11/2/22.

As a general rule, repetitive trauma cases are compensable as accidental injuries under the Illinois Worker's Compensation Act. In Peoria County Belwood Nursing Home v. Industrial Commission (1987) 115 111.2d 524, 106 Ill.Dec 235, 505 N.E.2d 1026, the Supreme Court held that "the purpose behind the Workers' Compensation Act is best serviced by allowing compensation in a case … where an injury has been shown to be caused by the performance of the claimant's job and has developed gradually over a period of time, without requiring complete dysfunction.." However, it is imperative that the claimant place into evidence specific and detailed information concerning the petitioner's work activities, including the frequency, duration, manner of performing, etc. It is also equally important that the medical experts have a detailed and accurate understanding of the petitioner's work activities.

In Illinois, recovery under the Workers' Compensation Act is allowed, even though the injury is not traceable to a specific traumatic event, where the performance of the employee's work involves constant or repetitive activity that *gradually* causes deterioration of or injury to a body part, assuming it can be medically established that the origin of the injury was the repetitive stressful activity. In any particular case, there could be more than one date on which the injury "manifested itself". These dates could be based on one or more of the following, depending on the facts of the case:

1. The date the petitioner first seeks medical attention for the condition;

2. The date the petitioner is first informed by a physician that the condition is work related;
3. The date the petitioner is first unable to work as a result of the condition;
4. The date when the symptoms became more acute at work;
5. The date that the petitioner first noticed the symptoms of the condition.

Petitioner has worked for respondent for 30 years. Over this period, petitioner worked 10 years in stock prep, which is a somewhat physically demanding job. He also worked as a millman, and a truck wire cutter from 2015-2019. Beginning in July of 2019 petitioner began working as a PCM. In this job petitioner began by reworking semi tire tread where he would load tire treads and sidewalls onto a conveyor. The tire treads weighed as much as 65-70 pounds. The sidewalls weighed up to 65-70 pounds, and as little as 20 pounds. The sidewalls were very sticky and often had to be pulled apart, sometimes requiring two people to separate them. Petitioner also used a knife to try and separate them. Petitioner testified that production was based on the weight of the tread or sidewall, but in reality he processed a pallet of treads or sidewalls, stacked to his chest, every 30 minutes. In a 7 hour work shift he completed 14 pallets of treads or sidewalls.

Petitioner was off work from May 2022 through early September of 2022 due to an unrelated knee issue. Petitioner testified that when he returned to work in September 2022 as a PCM he started noticing neck problems, and eventually reported them to his supervisor. He testified that during the course of his day he would get sharp pains, and then he began noticing that he was losing strength in his right arm/shoulder, and he would need to shift his weight in order to pick things up. This continued and in November of 2022 he started developing stiffness and a sore right shoulder with neck pain.

Petitioner alleges that on 11/2/22 while pulling/jerking an item off the pallet he felt some pain in his right shoulder that did not resolve. The arbitrator finds this manifestation date as the date on which his symptoms became more acute at work.

However, it is imperative that the claimant place into evidence specific and detailed information concerning the his work activities, including the frequency, duration, manner of performing, etc. It is also equally important that the medical experts have a detailed and accurate understanding of the petitioner's work activities.

In the case at bar, the petitioner has clearly put into evidence specific and detailed information concerning his work activities, including the frequency, duration, and manner of performing as detailed herein.

With respect to the requirement that the medical experts have a detailed and accurate understanding of the petitioner's work activities, the arbitrator finds both Dr. Peloza and Dr. Mirkin had information regarding petitioner's job for respondent. Petitioner reported to Dr. Peloza that he worked for respondent of 30 years, and for the last 2 years he worked on the line and had to do a lot of pulling, pushing and lifting. He reported that over this period her had pain in his neck and shoulder that had been increasing, and the it came to a crescendo when he had severe pain in his neck and weakness in his right on 11/2/22. Dr. Mirkin had the same information, as well as petitioner's job description.

Based on the above as well as the credible evidence, the arbitrator finds the petitioner has proven by a preponderance of the credible evidence that he sustained an accidental injury to his cervical spine, that arose out of and in the course of his employment by respondent, that manifested itself on 11/2/22.

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

Both Dr. Peloza and Dr. Mirkin provided causal connection opinions with respect to petitioner's claim that petitioner's current condition of ill-being as it relates to his cervical spine in causally related to his injury on 11/2/22.

Dr. Peloza, based on the description of injury provided by petitioner, opined that petitioner's current condition of ill-being is secondary to his 30 year work history with respondent, particularly the last two years of repetitive work of pushing, pulling and lifting, that ended with a crescendo with the activities on 11/2/22.

Dr. Mirkin testified that petitioner told him his symptoms developed over time, and he particularly noticed weakness when he was helping his wife cook something at home. Petitioner testified that what he told Dr. Mirkin was that he noticed the weakness in his right arm when he went to lift her crock pot with a roast in it, into the refrigerator, in October 2022. The arbitrator finds it significant that this incident occurred prior to the date when petitioner's symptoms became more acute at work on 11/2/22, and after the time petitioner's symptoms started to gradually develop. In addition to petitioner's history, Dr. Mirkin also had an opportunity to review petitioner's job description that shows petitioner was required to perform frequent stooping, bending, twisting, walking long distances, and climbing stairs, as well as lifting 50 or more pounds on an occasional to frequent basis. The arbitrator finds petitioner's job description alone supports a finding that petitioner's job as a PCM required him to perform repetitive activities with heavy weights. Petitioner told Dr. Mirkin that he also takes care of cows and does activities outside of work, but Dr. Mirkin did not know what this work entailed.

Based on the information Dr. Mirkin had, he opined that petitioner's condition was merely degenerative in nature, and petitioner gave him no evidence that there was any indication that his work activities caused or exacerbated his condition, or that his condition was traumatic. The arbitrator finds this statement unsupported by the credible record, especially given the repetitive activities identified in petitioner's job description. The arbitrator finds it significant that Dr. Mirkin did not address the possibility that petitioner's injuries were due to the repetitive activity related to his job as a PCM for respondent, especially since he had the opportunity to review petitioner's job description. Dr. Mirkin admitted that petitioner's job as a PCM was considered medium to heavy, and required petitioner to stoop, bend, twist, walk, and climb stairs frequently, as well as lift 50 or more pounds occasionally to frequently, but failed to address the repetitive nature of petitioner's work as a PCM as a possible cause of his injury.

Based on petitioner's unrebutted testimony that he has worked for respondent for 30 years; that his 2 most recent years as a PCM he had to load tread and sidewalls, weighing up to 70 pounds each, off 14 pallets a day, that were stacked to his chest level; that after returning to work in September 2022 as a PCM (after 4 months off due to an unrelated knee condition) he started noticing neck problems; that during the course of his day he would get sharp pain, and began to notice he was losing strength in his right arm/shoulder; that due to the loss of strength in his right arm he would shift his weight in order to pick things up; that in November of 2022 he also started developing stiffness and a sore right shoulder with neck pain; and, then on 11/2/22 while pulling/jerking an item off the pallet he felt some pain in his right shoulder that did not resolve, the arbitrator finds the petitioner has proven by a preponderance of the credible evidence that his current condition of ill-being as it relates to his neck is causally related to the injury on 11/2/22.

Although Dr. Mirkin relates petitioner's injury in part to his work on the farm, the arbitrator notes that Dr. Mirkin did not know what work petitioner did on the farm. The arbitrator finds it significant that petitioner's farm is almost totally automated, and petitioner's activities on the farm include driving a tractor, keeping grass in front of his cattle, providing them water, and keeping the fences secure, which petitioner testified involves less physical activity than his work for respondent. Based on this evidence, the arbitrator does not find the work petitioner did on his farm as the cause of his current cervical spine problems.

**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?**

Having found the petitioner's current condition of ill-being as it relates to his cervical spine is causally related to the injury he sustained on 11/2/22, the arbitrator finds the medical services provided to petitioner from 11/2/22 through 9/19/23, were reasonable and necessary to cure or relieve petitioner from the effects of his injury on 11/2/22.

Respondent shall pay reasonable and necessary medical services related to petitioner's cervical spine from 11/2/22 through 9/19/23, as provided in Sections 8(a) and 8.2 of the Act.

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

**K. IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE?**

Having found Dr. Peloza's opinions on causation more persuasive than Dr. Mirkin's, the arbitrator also finds the opinions of Dr. Peloza, as they relate to prospective medical care, more persuasive than those of Dr. Mirkin.

Dr. Peloza opined that petitioner's conditions from C3-C7 are the cause of his present condition and secondary to his work injury, as he has not had any treatment to his neck in all the years he worked for respondent. Dr. Peloza was of the opinion that the injury caused an exacerbation of his underlying condition and the new injuries at C6-C7, and secondarily to C3-C4. As a result, he recommended an anterior cervical discectomy and fusion at C4-C5 and C5-C6, as well as disc replacements at C3-C4 and C6-C7. Dr. Peloza was of the opinion that petitioner had significant disc injuries at C3-C4 and C6-C7, particularly a central contained herniation at C6-C7, that is causing some flattening of the spinal cord. Due to these changes, Dr. Peloza indicated that he would do a disc replacement to maintain as much motion in the cervical spine as possible. He was also of the opinion that due to the midline annular tear at C3-C4 with significant foraminal stenosis on the right, he would also do a disc replacement, rather than extend the 2 level fusion to a 3 level fusion. The arbitrator finds these findings consistent with the diagnostic tests.

Alternatively, Dr. Mirkin was of the opinion that petitioner should consider only a C4-C5 and C5-C6 anterior and posterior decompression, instrumentation and fusion. He was of the opinion that petitioner only had a mild bulge at C6-C7, and mild foraminal stenosis at C3-C4, without any central stenosis. He did not feel an anterior approach on its own would work. He also did not feel petitioner

needed any surgery at C3-C4 and C6-C7. The arbitrator finds Dr. Mirkin's opinions do not fully reflect the totality of the findings on the diagnostic tests, and therefore are not as persuasive as those of Dr. Peloza.

Based on the above, as well as the credible evidence, the arbitrator finds the opinions of Dr. Peloza more persuasive than Dr. Mirkin as they relate to prospective surgery for petitioner. Therefore, the arbitrator finds the petitioner is entitled to prospective medical care as recommended by Dr. Peloza in the form of an anterior cervical discectomy and fusion at C4-C5 and C5-C6, as well as disc replacements at C3-C4 and C6-C7.

Respondent shall pay reasonable and necessary medical services related to the anterior cervical discectomy and fusion at C4-C5 and C5-C6, as well as disc replacements at C3-C4 and C6-C7 recommended by Dr. Peloza, as provided in Sections 8(a) and 8.2 of the Act.

**L. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?**

Petitioner is claiming temporary total disability (TTD) benefits for the period 5/22/23-5/28/23, a period of 1 week. Respondent claims it paid temporary total disability for this period, and is requesting an overpayment of TTD in the amount of $664.32 for payment of TTD during this period, claiming it is not liable for TTD for this period.

The petitioner is currently working light duty and the respondent is accommodating the light duty restriction. There was one week however, where the respondent paid the petitioner TTD from 5/22/2023 through 5/28/2023. The arbitrator finds that this is a week that the respondent did not accommodate the petitioner's restrictions and therefore the TTD that was paid by the respondent for that period was appropriate and owing given that the arbitrator has found the petitioner's current condition of ill-being as it relates to his cervical spine is causally related to the injury he sustained on 11/2/22.

Based on the above, as well as the credible evidence the arbitrator finds the respondent is not entitled to an overpayment of TTD from 5/22/23-5/28/23 in the amount of $664.32.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 23WC019821 |
| Case Name | Jenni Valencia v.<br>Home City Ice |
| Consolidated Cases | |
| Proceeding Type | Petition for Review under 19(b)<br>Remand Arbitration |
| Decision Type | Commission Decision |
| Commission Decision Number | 24IWCC0605 |
| Number of Pages of Decision | 24 |
| Decision Issued By | Marc Parker, Commissioner |

| | |
|---|---|
| Petitioner Attorney | James McHargue |
| Respondent Attorney | Miles Cahill |

DATE FILED: 12/16/2024

/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

Jenni Valencia,

Petitioner,

vs. No. 23 WC 019821

Home City Ice,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition 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, medical expenses, benefit rates, temporary disability, prospective medical care, and penalties and attorney's fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below, and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission,* 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

**FINDINGS OF FACT:**

On July 11, 2023, Petitioner, a 44-year-old warehouse worker, slipped on ice from a broken 20-lb. bag of ice she had been moving on a dolly. She fell onto her back and twisted her left foot. Petitioner gave notice to her supervisor, who provided ice for her foot but did not send her to a doctor either that day, or on any of the following days when she showed her supervisor that her foot was swollen. Despite her back pain and the swelling and numbness in her left foot, Petitioner

worked for six days after her accident until July 19, 2023, when she sought medical care with Dr. Mohiuddin, who took her off work.

Dr. Mohiuddin diagnosed Petitioner with low back pain with radiation and ankle pain. He provided medication and ordered physical therapy for her back. Petitioner's September 7, 2023 lumbar MRI revealed an abnormal signal at L4-5 which may have represented a small annular tear, and early degenerative disc disease. On October 4, 2023, Dr. Mohiuddin administered an epidural steroid injection at L4-5 which, he subsequently reported, resolved Petitioner's radicular complaints but not her low back facet and axial pain. On November 28, 2023, Dr. Mohiuddin recommended Petitioner continue physical therapy and undergo a medial branch block injection. Petitioner testified she wishes to under that injection, which to date has never been authorized.

On August 16, 2023, Petitioner underwent an MRI of her left ankle; it showed tenosynovitis, bursitis, a microtrabecular fracture, and partial ligament tears. On August 21, 2023, Petitioner saw Dr. Peterson for her left ankle. X-rays taken that day showed an ankle sprain, instability, and derangement. Dr. Peterson took Petitioner off work for her ankle injury, and ordered physical therapy. On October 2, 2023, Dr. Peterson administered an intraarticular steroid injection to Petitioner's left ankle. None of the conservative ankle treatment, including therapy, bracing, medications, and an injection, provided relief. Dr. Peterson subsequently recommended a left ankle debridement and an open Brostrom/Gould lateral ligament repair. Petitioner testified she wishes to undergo that surgery, which also has never been authorized.

After numerous requests for benefits had been made to Respondent, on October 19, 2023 Petitioner's counsel filed a Petition for an Immediate Hearing and a Petition for Penalties against Respondent. Petitioner has made multiple additional demands for benefits from Respondent since then, but as of the date of arbitration, none have been paid to Petitioner.

The Arbitrator issued a Decision on March 24, 2024 and found, inter alia, that Petitioner proved accident and causal connection of her low back and left ankle conditions. The Arbitrator calculated Petitioner's average weekly wage (AWW) to be $1,320.00, and awarded Petitioner 25-2/7 weeks of TTD for the period between July 19, 2023 and January 12, 2024.[1] The Arbitrator denied Petitioner's request for penalties.

Regarding the issues of benefit rates, penalties, and attorney's fees, the Commission views the evidence differently than the Arbitrator.

[1] We affirm that period of TTD, but find that it represents a period of 25-3/7 weeks, not 25-2/7 weeks.

**CONCLUSIONS OF LAW:**

*Benefit Rates*

The Arbitrator found Petitioner's AWW to be $1,320.00 based upon her pay details which were admitted into evidence, and her testimony of earning $20.00/hour for a 40-hour work week and having to work mandatory overtime hours. The Arbitrator included, in her AWW calculation, 26 hours of mandatory overtime hours worked on weekends, at Petitioner's straight time rate of pay (66 total weekly hours x $20.00/hour = $1,320.00).

The Commission finds Petitioner's testimony – that she earned $20.00 per hour, and had to work at least 26 mandatory overtime hours in addition to her usual 40-hour week – uncontradicted. However, we note that at arbitration, Petitioner amended the Request for Hearing form to claim an AWW of only $1,000.00. Respondent did not object to that amendment, and the Arbitrator allowed it. The Appellate Court has held that the language of Section 7030.40 of the Act[2] indicates that the Request for Hearing form is binding on the parties as to the claims made therein. *Walker v. Indus. Comm'n,* 345 Ill. App. 3d 1084 (4th Dist., 2004). We find that the $1,000.00 AWW claimed by Petitioner on the Request for Hearing form was her stipulation to that average weekly wage. Accordingly, we find Petitioner's AWW in this case to be $1,000.00.

*Penalties and Attorney's Fees*

The Arbitrator denied Petitioner's request for section 19(k) and 19(l) penalties, and section 16 attorney's fees, finding that Respondent's failure to pay benefits in this case was not vexatious, intentional, frivolous, in bad faith, or without good and just cause. We disagree, and award penalties and fees.

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

> If the employee has made written demand for payment of benefits under Section 8(a) [820 ILCS 305/8] or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay. In the case of demand for payment of medical benefits under Section 8(a), the time for the employer to respond shall not commence until the expiration of the allotted 30 days specified under Section 8.2(d) [820 ILCS 305/8.2]. In case the employer or his or her insurance carrier shall *without good and just cause* fail, neglect, refuse, or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission *shall* allow to the employee additional compensation

[2] That Section has since been recodified as Section 9030.40, and still states that, "The completed Request for Hearing form, signed by the parties (or counsel), shall be filed with the Arbitrator as the stipulation of the parties and a settlement of the questions in dispute in the case."

> in the sum of $30.00 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed $10,000.00. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay. 820 ILCS 305/19(l) *(Emphases added).*

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

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

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

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

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

Sections 19(k) and 16 require more than an "unreasonable delay" in payment of an award. *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 514-15 (1998). It is not enough for the claimant to show that the employer simply failed, neglected, or refused to make payment or unreasonably delayed payment without good and just cause. *Id*. at 515. Instead, section 19(k) penalties and section 16 fees are, "intended to address situations where there is not only a delay, but the delay is deliberate or the result of bad faith or improper purpose." *Id*.

Petitioner testified that after Dr. Mohiuddin authorized her off work on July 19, 2023, she brought her off-work authorization to her employer the following day. TTD was not paid and she was not offered any accommodated work thereafter. Petitioner's attorney then filed a penalty petition for non-payment of benefits on October 19, 2023 specifically requesting 19(l) penalties to begin on October 19, 2023. He again demanded payment of TTD benefits on November 27, 2023. The Respondent failed to provide a written response as required under Section 19(l).

The Commission finds Respondent's arguments for not paying benefits to be unpersuasive. Respondent argues that Petitioner was not credible because of inconsistencies in her testimony and medical records. However, we agree with the Arbitrator that Petitioner was a credible witness, and we find any inconsistencies in her testimony and medical histories to be materially insignificant. From Petitioner's first visit to Dr. Mohiuddin, she reported that her pain began when she slipped and fell at work on July 11, 2023. Her testimony of falling onto her back was consistent with the medical records. Her complaints of pain were corroborated by objective evidence: her lumbar MRI revealed nerve root compression at L4-5, and her left ankle MRI showed ligament tears and a microtrabecular fracture at the talus.

Respondent's argument that Petitioner's lumbar spine condition after her accident was causally related to her prior degenerative condition, lacks merit. Respondent offered no evidence to show that on or before July 11, 2023, Petitioner was under treatment for her back or left foot; or that despite her prior unrelated work restriction, she was unable to perform her usual job duties. Nor do we find the absence of any mention of Petitioner's prior work restriction in her post-accident treating records to be a persuasive reason for withholding benefits, as Respondent implies. The evidence in this case amply supports a conclusion that Petitioner's low back and left ankle injuries were caused by her work accident.

Respondent's claim that it did not owe Petitioner TTD benefits because she had a CDL driver's license is also without merit, for several reasons: Driving a truck was not part of Petitioner's usual job duties at Respondent. Respondent never offered Petitioner a truck driving position after her accident. But most importantly, Petitioner has been authorized *completely* off work by Drs. Mohiuddin and Peterson since July 19, 2023.

For these reasons, the Commission finds Respondent's failure to pay Petitioner's TTD and medical expenses after October 19, 2023 to have been unreasonable, justifying penalties under section 19(l). We therefore find Respondent liable to pay to Petitioner $30.00/day for the 86 day

period between October 19, 2023 and January 12, 2024, or $2,580.00, pursuant to section 19(l) of the Act.

The Commission also finds that Respondent's failure to pay benefits to Petitioner was unreasonable, vexatious, and in bad faith, therefore also warranting penalties under section 19(k). Petitioner made multiple requests for benefits, and Respondent even gave written assurance that benefits would be paid. None were ever paid, and no reasons why were given to Petitioner. Most troubling to us is that Respondent offered no reports, testimony, or opinions from any medical experts to support its claim that Petitioner's medical treatment, and her time off work, were not causally related to her July 11, 2023 accident. The Commission finds Respondent's failure to pay benefits was deliberate and in bad faith. It's failure to pay Petitioner was not based upon any real controversy, and was only for purposes of delay.

We therefore find Respondent liable to pay to Petitioner a penalty of $8,476.23 (50% of the TTD being awarded), plus 50% of the medical expenses being awarded herein after adjustment by the fee schedule, pursuant to section 19(k) of the Act. In awarding section 19(k) penalties, the Commission has also considered that Respondent made no payments to Petitioner under section 8(j) of the Act.

Finally, for the reasons stated above, we find Respondent liable to pay to Petitioner attorney's fees in the amount of $3,390.49 (20% of the TTD being awarded), plus 20% of the medical expenses being awarded herein after adjustment by the fee schedule, pursuant to section 16 of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 25, 2024, is 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 $1,000.00, pursuant to Petitioner's stipulation on the Request for Hearing form.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner temporary total disability benefits of $666.67 per week for the 25-3/7 week period commencing July 19, 2023 through January 12, 2024, as provided in section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner's reasonable and necessary medical services, pursuant to the medical fee schedule, of: Midwest Specialty Pharmacy, $3,331.08; Illinois Orthopedic Network, $17,246.60; South Suburban Physical Therapy, $18,437.15; Suburban Orthopaedics LLC, $5,408.00; and H-Wave Electronic Waveform Lab, Inc., $4,181.88, as provided in section 8(a) and section 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner additional compensation of $2,580.00, or $30.00/day for the 86 days between October 19, 2023 and January 12, 2024, as provided in section 19(l) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner additional compensation of $8,476.23 (50% of the TTD owed), and 50% of the awarded medical expenses after adjustment by the fee schedule, as provided in section 19(k) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner additional compensation of $3,390.49 (20% of the TTD owed), and 50% of the awarded medical expenses after adjustment by the fee schedule, as attorney's fees, as provided in section 16 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent authorize and pay for the bilateral L4-S1 lumbar medial branch injection, and associated care as recommended by Dr. Mohiuddin; and the left ankle arthroscopy with extensive debridement, open Brostrom/Gould lateral ligament repair, and associated care as recommended by Dr. Peterson.

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

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

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

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

**December 16, 2024**

MP/mcp
o-10/24/24
068

/s/ *Marc Parker*
Marc Parker

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

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

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 23WC019821 |
| Case Name | Jenni Valencia v.<br>Home City Ice |
| Consolidated Cases | |
| Proceeding Type | 19(b) Petition |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 15 |
| Decision Issued By | |

| | |
|---|---|
| Petitioner Attorney | James McHargue |
| Respondent Attorney | Miles Cahill |

DATE FILED: 3/25/2024

/s/Efi James, Arbitrator
Signature

**THE INTEREST RATE FOR THE WEEK OF MARCH 19, 2024 5.13%**

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)**

**Jenni Valencia**
Employee/Petitioner

v.

**Home City Ice**
Employer/Respondent

Case # **23** WC **019821**

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 **Efi James**, Arbitrator of the Commission, in the city of **Chicago**, on **January 12, 2024.** 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, **July 11, 2023,** 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 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 2 weeks preceding the injury, Petitioner earned $**2,640.00**; the average weekly wage was $**1,320.00.**

On the date of accident, Petitioner was **44** years of age, **single** with **1** dependent children.

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

Respondent shall be given a credit of $**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:**

**Temporary Total Disability**
Respondent shall pay Petitioner temporary total disability benefits of $880.00 for 25 and 2/7 weeks, commencing July 19, 2023 through January 12, 2024 at a rate of $880.00 as provided in Section 8(b) of the Act.

**Medical Benefits**
Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of Midwest Specialty Pharmacy, $3,331.08; Illinois Orthopedic Network, $17,246.60; South Suburban Physical Therapy, $18,437.15; Suburban Orthopaedics LLC, $5,408.00; H-Wave, Electronic Waveform Lab, Inc., $4,181.88.

**Prospective Medical**
The Arbitrator orders Respondent to authorize the bilateral L4-S1 lumbar medial branch injection and associated care as recommended by Dr. Mohiuddin.

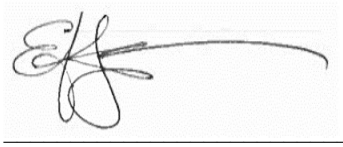
The Arbitrator orders Respondent to authorize the left ankle arthroscopy with extensive debridement, open Brostrom/Gould lateral ligament repair and associated care as recommended by Dr. Peterson.

**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 25, 2024**

STATE OF ILLINOIS )
) SS
COUNTY OF COOK )

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

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|---|---|---|
| Jenni Valencia, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | |
| | ) | Case No. 23 WC 019821 |
| Home City Ice, | ) | |
| | ) | |
| | ) | |
| Respondent. | ) | |

## FINDINGS OF FACT

This matter proceeded to hearing on January 12, 2024, in Chicago, Illinois before Arbitrator Efi James on Petitioner's Petition for Immediate Hearing under Sections 19(b) and 8(a). The issues in dispute were accident, causation, wages, medical and medical bills, prospective medical, total temporary disability benefits and penalties. Arbitrator's Exhibit 1. (AX 1)

### *Job Duties*

Petitioner testified that she was employed by Respondent, Home City Ice, from June of 2023 through July 18, 2023. (Tr. 7) Petitioner testified that she worked as a dispatcher for Respondent, assisting with purchasing of ice and packing ice. (Tr. 8)

### *Wages*

Petitioner testified that her typical shift was fourteen hours, from 5:00 AM to 6:00 or 7:00 PM, seven days a week at $20.00 per hour. (Tr. 10) Petitioner was shown Petitioner's Exhibit No. 7 and Petitioner's Exhibit No. 8, which were bank deposits from Respondent to Petitioner's bank account. (Tr. 10-12) Petitioner testified that all her hours of overtime on weekends were mandatory. (Tr. 13) Petitioner testified that she worked fourteen hours on Saturdays and twelve hours on Sundays. (Tr. 14-15)

### *Accident*

Petitioner testified that on July 11, 2023, she was working for Respondent when she went inside the cooler to get fourteen ice bags. (Tr. 15) Petitioner testified that her coworker, Jose, assisted her with this task and they moved the ice bags with a dolly. Petitioner testified that as she was pushing the dolly, the ice bags broke, causing ice to spill onto the floor. (Tr. 15) Petitioner testified that she slipped on the ice and fell backwards on concrete landing on her back. (Tr. 16) Petitioner testified that as she was falling, she also twisted her left foot. Petitioner testified that after the work accident, Jose and his son helped Petitioner up, sat her on a pallet and gave her ice for her left foot. (Tr. 17)

Petitioner testified that she continued working the following week until she sought medical treatment on July 19, 2023. (Tr. 19) Petitioner testified that during the week after her accident, she had difficulty standing, had back pain, and her left foot was swollen and numb. (Tr. 19-20)

***Summary of Medical Records***

On July 19, 2023, Petitioner was seen by Dr. Mohiuddin at Illinois Orthopedic Network with low back pain, radiating pain down the left lower extremity with associated numbness/tingling, and left ankle pain. (PX 1) Upon examination, Dr. Mohiuddin noted positive straight leg raise on the left. Dr. Mohiuddin recommended physical therapy, MRIs, and placed Petitioner off work. (PX 1) Petitioner followed up on August 22, 2023 with continuing low back pain, pain down the left lower extremity and similar physical examination findings. (PX 1) Dr. Mohiuddin recommended an MRI of Petitioner's lumbar spine, which she underwent on September 6, 2023. The MRI showed degenerative disc disease at L4-L5 causing bilateral foraminal narrowing resulting in compression of the nerve roots and a small annular tear at L4-L5. (PX 1)

Petitioner completed a course of physical therapy at South Suburban Physical Therapy for her back from July 20, 2023 through January 2, 2024. (PX 3)

After the MRI, Petitioner presented to Dr. Mohiuddin on September 26, 2023 with low back pain with radicular complaints down her bilateral lower extremities with associated numbness/tingling. (PX 1) Dr. Mohiuddin recommended that Petitioner undergo a bilateral L4-L5 epidural injection and to continue physical therapy. On October 4, 2023, Petitioner underwent the epidural injection. Petitioner followed up with Dr. Mohiuddin on October 24, 2023 with significant radicular pain relief from the injection, but still had low back pain and achy pain into her thighs. (PX 1) Dr. Mohiuddin recommended bilateral L4-S1 medial branch blocks and then radiofrequency ablation if indicated. (PX 1)

Petitioner last followed up with Dr. Mohiuddin on November 28, 2023 with 5/10 low back pain with some radiating pain, numbness, and tingling down the left leg. (PX 1) Petitioner was awaiting the medial branch injection. Throughout Petitioner's treatment with Dr. Mohiuddin, he placed her off work. (PX 1)

Dr. Mohiuddin also recommended an MRI of Petitioner's left ankle. (PX 1) On August 16, 2023, Petitioner underwent a left ankle MRI, which showed periarticular subcutaneous edema (suggesting posttraumatic); left ATFL partial tear; posterior talotibular ligament partial tear; microtrabecular fracture of the left talus; tenosynovitis of multiple ligaments; partial tear of the anterior capsular ligament; primary osteoarthritis; and retrocalcaneal bursitis. (PX 1)

Petitioner was referred to an ankle specialist, Dr. Peterson, on August 21, 2023 at Suburban Orthopaedics. (PX 1) Petitioner had 7/10 pain in the left ankle with numbness/tingling in the toes. (PX 1) On physical examination of the left ankle, Dr. Peterson noted tenderness to multiple areas, lateral ankle swelling, positive lateral ankle instability with anterior drawer and talar tilt testing positive, pain with the peroneal tendons, limited ankle dorsiflexion, and crepitation to the ankle joint with clicking and popping. Dr. Peterson diagnosed Petitioner with ankle instability and recommended she continue physical therapy. (PX 1)

Petitioner completed a course of physical therapy at South Suburban Physical Therapy for her left ankle from August 28, 2023 through November 28, 2023. (PX 2)

Petitioner followed up with Dr. Peterson on September 11, 2023 with similar subjective complaints and physical examination findings. (PX 1) On October 2, 2023, Petitioner presented to Dr. Peterson with continued

left foot pain, localized in the heel and radiating up the ankle with numbness and tingling in the toes. Dr. Peterson noted a similar physical examination, recommended DME equipment, and administered a steroid injection to Petitioner's left ankle. (PX 1) Petitioner followed up with Dr. Peterson on October 26, 2023 with relief for about four days after the injection, but still with swelling, numbness, pins and needles, and 6-7/10 pain. Dr. Peterson noted similar physical examination findings in addition to an antalgic gait and positive anterior drawer crepitus with range of motion. (PX 1) X-rays taken of the left ankle confirmed left ankle instability. At this visit, Dr. Anderson recommended a left ankle arthroscopy with extensive debridement and open Brostrom/Gould lateral ligament repair. (PX 1)

Petitioner followed up with Dr. Peterson on November 30, 2023 and December 28, 2023 with similar subjective complaints and physical examination findings. (PX 1) During those visits, Petitioner was still awaiting approval of the surgery recommended by Dr. Peterson. Throughout Petitioner's treatment with Dr. Peterson, he had placed her off work. (PX 1)

***Testimony of Petitioner***

Petitioner testified that the steroid injection for her left ankle helped for about three days because it took down the swelling. (Tr. 21) Petitioner testified that she wishes to proceed with the left ankle surgery recommended by Dr. Peterson. (Tr. 22) Petitioner testified that she has difficulty standing and cooking due to the pain in her left ankle. (Tr. 22-23) Petitioner testified that she did not have any issues with her left ankle prior to the work accident. (Tr. 23)

Petitioner testified that after the work accident, she felt pain in her low back and down her left leg, over her thighs. (Tr. 24) Petitioner testified that the injection helped alleviate the radicular pain in her legs. (Tr. 26) Petitioner testified that she wishes to proceed with the medial branch block as recommended by Dr. Mohiuddin. (Tr. 26) Petitioner testified that as of the date of the trial, her low back pain was worse than her radiating leg pain. (Tr. 26-27) Petitioner testified that her back condition has affected her ability to drive and sleep. (Tr. 27-28) Petitioner testified that she did not have any issues with her back prior to the work accident. (Tr. 28)

Petitioner testified that her current treating physicians have her completely off work. (Tr. 49) Petitioner testified that she has not worked since the accident and has not received any benefits from the worker's compensation insurance company. (Tr. 28-29) Petitioner testified that she had a prior work accident involving her left shoulder in 2019 while working at Lawson Products. (Tr. 29) Petitioner testified that the 2019 accident did not involve her left ankle or back. Petitioner testified that after the 2019 accident, she was placed on permanent restrictions and subsequently worked for New City Home, Celtic, and Easy Movers. (Tr. 32-37) Petitioner testified that she worked for these companies as a driver and was not required to lift. (Tr. 34-36)

Petitioner testified that she has a CDL license which expires on December 26, 2025. (Tr. 37-38) Petitioner testified that she was not prohibited from driving by her treating physicians. (Tr. 39) Petitioner testified that she was not taking medications that would restrict her from driving. (Tr. 57-59. Petitioner testified that she told her physical therapists regarding her permanent restrictions on the left shoulder. (Tr. 44)

## 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).

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. *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 instant case, the Arbitrator observed Petitioner during the hearing and finds her to be a credible witness. Petitioner was calm, well-mannered, composed, and spoke clearly in her answers through the interpreter. 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 the accident arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds as follows:***

The Arbitrator finds that the accident did arise out of and in the course of Petitioner's employment by Respondent.

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 including that there is some causal relationship between his employment and his injury. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 63 (1989) It is well established that the Act is a humane law of remedial nature and is to be liberally construed to effect the purpose of the Act - that the burdens of caring for the casualties of industry should be borne by industry and not by the individuals whose misfortunes arise out of the industry, nor by the public. *Shell Oil v. Industrial Comm'n,* 2 Ill.2nd 590, 603 (1954)

Petitioner testified that on July 11, 2023, she was pushing a dolly with ice bags on it at Respondent when the ice bags broke causing Petitioner to slip backwards landing on her back and twisting her left foot. Immediately following the accident, Petitioner testified that her coworkers had to assist her to get up. Petitioner continued to work the following week but as her low back and left ankle pain continued to worsen, she sought medical treatment.

The Arbitrator notes that Petitioner's testimony regarding the accident is consistent with the medical records' histories from Illinois Orthopedic Network, South Suburban Physical Therapy, and Suburban Orthopaedics. Further, the Arbitrator notes that Respondent offered no witness from Respondent to rebut Petitioner's account

of her accident. Therefore, the Arbitrator finds that the accident did arise out of and in the course of Petitioner's employment by Respondent.

***Issue F, whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds as follows:***

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

"Whether a causal connection exists is a question of fact for the Commission, and a reviewing court will overturn the Commission's decision only if it is against the manifest weight of the evidence... The test is whether the evidence is sufficient to support the Commission's finding, not whether this court or any other tribunal might reach an opposite conclusion. For the Commission's decision to be against the manifest weight of the evidence, the record must disclose that an opposite conclusion clearly was the proper result." Vogel v. Industrial Commission, at 786 (2nd Dist. 2005)(citing Navistar International Transportation Corp. v. Industrial Comm'n, 331 Ill.App.3d 405, 415 (2002)

Petitioner testified that when she slipped at work, she fell backwards onto her back. This history is consistent with the medical records and supports that Petitioner had an injury to her back as a result of the work accident. From July 19, 2023 through September 26, 2023, the medical records indicate that Petitioner had consistent complaints of low back pain and lower extremity radiating pain with positive straight leg raises. On September 6, 2023, Petitioner underwent an MRI of her lumbar spine which showed pathology at L4-L5 causing bilateral compression over the nerve roots and an annular tear at L4-L5.

Petitioner's subjective complaints of radicular pain into her lower extremities and positive straight leg raises correlated with Petitioner's MRI findings of compression of her nerve roots at L4-L5. Dr. Mohiuddin specifically noted that Petitioner's reported pain was in a "dermatomal distribution such as L4" and he recommended an L4-L5 epidural steroid injection to treat Petitioner's radicular pain, which Petitioner underwent on October 4, 2023.

As Petitioner testified to and the medical records corroborate, Petitioner's radicular complaints improved following the injection. This supports Petitioner's subjective complaints and pathology at L4-L5 as Petitioner had a positive response from the epidural injection.

Throughout Petitioner's treatment with Dr. Mohiuddin, Petitioner complained of low back pain, which is consistent with Petitioner's testimony. After the injection, Petitioner's axial low back pain was her primary concern. To treat Petitioner's facet pain, Dr. Mohiuddin recommended a medial branch injection.

The Arbitrator notes that Petitioner's low back pain and radicular complaints were consistent in the medical records and in her testimony following the work accident. Dr. Mohiuddin opined that Petitioner had low back pain with radiating symptoms following the work accident. Petitioner testified that she had no back or radicular symptoms prior to the work accident. There was no evidence or testimony submitted into evidence to point to the contrary. Further, Respondent offered no IME report or evidence to rebut Dr. Mohiuddin's opinions in the medical records.

Therefore, the Arbitrator finds that Petitioner's current condition of ill-being related to her low back is causally related to the injury.

As to her left ankle, Petitioner testified that she twisted her left ankle when she fell on July 11, 2023. At Petitioner's initial visit with Dr. Mohiuddin on July 19, 2023, Petitioner complained of left ankle pain and swelling of her left ankle was noted at her initial visit, supporting that Petitioner had an injury to her left foot/ankle as a result of her fall at work.

Petitioner underwent the MRI of the left ankle on August 16, 2023, which showed an ATFL tear among other pathology. Petitioner was referred to Dr. Peterson on August 21, 2023, who she treated with until December 28, 2023. Throughout Petitioner's treatment with Dr. Peterson, she had consistent complaints of left foot/ankle pain that would radiate upwards. Petitioner's testimony of where she experiences left foot/ankle pain is consistent with the medical records. Additionally, throughout Petitioner's treatment with Dr. Peterson, he noted positive physical examination findings such as lateral ankle swelling, positive lateral ankle instability, anterior drawer and talar testing positive, and anterior drawer crepitus with range of motion.

Dr. Peterson recommended conservative treatment including physical therapy, DME equipment, and administered a cortisone injection. However, after Petitioner exhausted conservative treatment, Dr. Peterson recommended surgery for the left ankle. Dr. Peterson opined that Petitioner's left ankle symptoms began after her fall at work which is consistent with Petitioner's testimony. Further, the MRI on August 16, 2023 showed "posttraumatic" pathology supporting the fact that Petitioner's left ankle condition occurred as a result of her acute trauma work accident.

Petitioner testified that she had no left ankle issues prior to the work accident. There were no medical records or testimony submitted into evidence that indicate Petitioner had any prior left ankle issues. Respondent offered no IME report or evidence to rebut Dr. Peterson's opinions within the medical records.

The Arbitrator notes that Petitioner had a prior work accident in 2019 that was solely related to her left shoulder and has no bearing on her current claim related to the left ankle and low back. Further, Petitioner treated at the same facility, Illinois Orthopedic Network, for both her 2019 injury and the current injuries, indicating that her current treating physicians were aware of her 2019 treatment and restrictions.

Therefore, the Arbitrator finds that Petitioner's current condition of ill-being related to her left ankle is causally related to the injury.

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

Section 10 of the Act provides that the weekly benefits to which an injured employee is entitled for PPD under section 8 of the Act shall be computed on the basis of his or her average weekly wage. 820 ILCS 305/10 (West 2012). The statute defines "average weekly wage" as the actual earnings of the employee, excluding bonuses. The claimant has the burden of establishing his average weekly wage. *Edward Don Co. v. Industrial Comm'n*, 344 Ill. App. 3d 643, 655 (2003).

When an employee has worked for the employer for 52 weeks prior to the accidental injury, the average weekly wage is calculated by determining the regular earnings and dividing by the "number of weeks and parts thereof." 820 ILCS 305/10. If an employee does not work the full 52 weeks, then the Courts have used a "parts thereof" analysis when calculating average weekly wage. *Peoria Roofing & Sheet Metal Co. v. Industrial Commission*, 181 Ill.App.3d 616, 537 N.E.2d 381, 130 Ill.Dec. 314 (3d Dist. 1989).

Petitioner testified that while working for Respondent, she made $20 per hour and worked seven days per week. Petitioner introduced two exhibits, a direct deposit form and an explanation of the deposit, to substantiate Petitioner's average weekly wage. (PX 7, PX 8) Petitioner's Exhibit 7 showed a deposit from Respondent to Petitioner's bank account, dated July 10, 2023, of $2,862.43 after taxes. (PX 7) Petitioner's Exhibit 8 showed the gross wages of $3,598.50, dated July 10, 2023, from Respondent to Petitioner. (PX 8) These exhibits show Petitioner's biweekly payment from the pay period of July 10, 2023.

Petitioner's Exhibit 8 shows Petitioner worked 8 regular hours at $20 per hour ($1600.00 bi-weekly) which corroborates Petitioner's testimony that she was paid $20 per hour. This equates to $800.00 per week for Petitioner's regular work hours ($1600 divided by 2). Petitioner testified that she also worked mandatory overtime as part of her work for Respondent which is used in the calculation of average weekly wage.

In *Edward Hines Lumbar Co v. Industrial Comm'n,* 215 Ill.App.3d 659 (1990), the Court found that an employee who is required to work hours above their regular workweek, the hours constituted as "overtime" can be considered as part of the calculations for average weekly wage at the regular rate.

Here, Petitioner credibly testified that her weekend hours on Saturday and Sunday were mandatory overtime. Petitioner's exhibit 8 corroborates that Petitioner worked 66.62 overtime hours at $30 per hour ($1,998.50 total). (PX 8) Petitioner worked 14 hours on Saturday and 12 hours on Sunday, for a total of 26 overtime hours per week. These mandatory overtime hours are calculated at the regular rate of $20 per hour for purposes of average weekly wage. 26 hours at the regular rate of $20 per hour equals $520.00 per week.

The regular rate per week of $800.00 plus $520.00 mandatory overtime equals an average weekly wage of $1,320.00. The Arbitrator notes that Petitioner's testimony was consistent with Petitioner's exhibits substantiating Petitioner's average weekly wage. The Arbitrator notes that Respondent offered no exhibits, testimony or evidence to support their argument of Petitioner's average weekly wage. Therefore, the Arbitrator finds that Petitioner's average weekly wage at the time of the accident was $1,320.00.

***Issue J, whether the medical services that were provided to Petitioner were reasonable and necessary and whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds as follows:***

Section 8(a) of the Act states a Respondent is responsible …"for all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred, limited, however, to that which is reasonably required to cure or relieve from the effects of the accidental injury…" A claimant has the burden of proving that the medical services were necessary, and the expenses were reasonable. See *Gallentine v. Industrial Comm'n*, 201 Ill.App.3d 880, 888 (2nd Dist. 1990).

The Arbitrator finds that the medical services provided to Petitioner were reasonable and necessary for the July 11, 2023 work accident. This is supported by Petitioner's medical records from Dr. Mohiuddin and Dr. Peterson. As Petitioner's treating physicians that saw Petitioner on several occasions, they were the most equipped physicians to diagnose Petitioner and recommend treatment based on Petitioner's subjective complaints and their

own objective findings. The Arbitrator notes that Respondent offered no evidence to rebut Petitioner's treatment as being reasonable and necessary.

Overall, the Arbitrator finds Petitioner's treatment to be reasonable and necessary and finds that Respondent has not paid for said treatment. As such, the Arbitrator orders Respondent to pay Petitioner and Petitioner's counsel directly for the following outstanding medical services, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act:

- Midwest Specialty Pharmacy: $3,331.08
- Illinois Orthopedic Network: $17,246.60
- South Suburban Physical Therapy: $18,437.15
- Suburban Orthopaedics LLC: $5,408.00
- H-Wave, Electronic Waveform Lab, Inc.: $4,181.88

The parties stipulated that Respondent is entitled to a credit under Section 8(j) of the Act of $0. (AX 1)

***Issue K, whether Petitioner is entitled to any prospective medical care, the Arbitrator finds as follows:***

Section 8(a) of the Act entitles a claimant to compensation for all necessary first aid, medical and surgical services and all necessary medical, surgical and hospital services "thereafter incurred" that are reasonably required to cure or relieve the effects of injury. 820 ILCS 305/8(a) (West 2004). Prescribed services not yet performed or paid for are considered to have been "incurred" within the meaning of the statute. *Certified Testing v. Industrial Comm'n*, 367 Ill. App. 3d 938, 948, 856 N.E.2d 602, 305 Ill. Dec. 797 (2006).

The Arbitrator finds that Petitioner is entitled to the bilateral L4-S1 lumbar medial branch injection as recommended by Dr. Mohiuddin. Petitioner attempted all treatment available to her for her back including medication, physical therapy, and an injection. Dr. Mohiuddin noted that following the lumbar epidural injection, Petitioner's primary complaints were facet pain, which is consistent with Petitioner's testimony. Due to the persistence in Petitioner's axial low back pain and the confirmed pathology on the MRI, Dr. Mohiuddin recommended the lumbar medial branch injection.

The Arbitrator notes that Respondent offered no IME report or opinions to rebut Dr. Mohiuddin's opinions regarding the recommendation of the lumbar medial branch injection.

Respondent shall approve and pay for bilateral L4-S1 lumbar medial branch injection and necessary post-operative care as prescribed by Dr. Mohiuddin as provided in Section 8(a) and 8.2 of the Act.

The Arbitrator also finds that Petitioner is entitled to the left ankle arthroscopy with extensive debridement, open Brostrom/Gould lateral ligament repair as recommended by Dr. Peterson. Petitioner attempted all treatment available to her including medication, physical therapy, DME equipment, and injections. Due to the persistence in Petitioner's left foot/ankle symptoms, the ATFL tear on the MRI, and left ankle instability confirmed on the stress radiographs, Dr. Peterson recommended the left ankle surgery.

Dr. Peterson opined:

[i]n my opinion, [Petitioner] has failed conservative treatment over the past 3 months from her work-related injury. She has had an extensive amount of physical therapy, bracing/immobilization, corticosteroid injection/medications, all without relief. The next logical step with the positive stress radiographs today and the previous findings in the MRI of an ATFL tear for surgical intervention. I am recommending a left ankle arthroscopy with extensive debridement, open Brostrom/Gould lateral

ligament repair. In my opinion this is medically necessary and required for a full and complete recovery. (PX 1, p. 57)

The Arbitrator notes that Respondent offered no IME report or opinions to rebut Dr. Peterson's recommendations regarding surgical intervention.

Respondent shall approve and pay for the left ankle arthroscopy with extensive debridement, open Brostrom/Gould lateral ligament repair and necessary post-operative care as prescribed by Dr. Peterson as provided in Section 8(a) and 8.2 of the Act.

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

A claimant is temporarily totally disabled from the time an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of his injury will permit. *Westin Hotel v. Indus. Comm'n*, 372 Ill.App.3d 527, 542 (1st Dist. 2007).

In determining whether a claimant remains entitled to receiving TTD benefits, the primary consideration is whether the claimant's condition has stabilized and whether she is capable of a return to the workforce. *Interstate Scaffolding, Inc. v. Illinois Workers' Comp. Comm'n*, 236 Ill.2d 132, 148 (2010). Once an injured employee's physical condition stabilizes, she is no longer eligible for TTD benefits. *Archer Daniels Midland Co. v. Indus. Comm'n*, 138 Ill.2d 107, 118 (1990).

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. *Holocker v. Illinois Workers' Compensation Comm'n,* 2017 IL App (3d) 16036WC, P35 (3rd Dist., 2017). The fundamental purpose of the Act is to provide injured workers with financial protection until they can return to the work force. Id. When determining whether an employee is entitled to TTD benefits, the test is whether the employee remains temporarily totally disable as a result of a work-related injury and whether the employee is capable of returning to the work force. Id. The touchstone for determining whether claimant is entitled to TTD is whether the claimant's conditions had stabilized to the extent that they are able to reenter the workforce. *Id*. at P40.

Throughout Petitioner's treatment with Dr. Mohiuddin and Dr. Peterson starting on July 19, 2023, Petitioner was placed off work due to her back and left foot/ankle conditions. Petitioner credibly testified that she has not worked since she was placed off work on July 19, 2023. Thus, Petitioner is entitled to TTD benefits from July 19, 2023 through January 12, 2024.

Petitioner was asked about her CDL license and her ability to drive. However, both Dr. Mohiuddin and Dr. Peterson had placed Petitioner off work, negating any argument that Petitioner could have driven for Respondent.

Respondent aslo offered no witnesses or evidence that Respondent would have offered a light duty position had Petitioner been placed on light duty. Further, Petitioner's job duties for Respondent did not include driving a truck, as Petitioner specifically testified that Respondent did not offer her a position as a truck driver.

Additionally, Respondent offered no IME reports or evidence to rebut Dr. Mohiuddin and Dr. Peterson's opinions to place Petitioner off work throughout her treatment.

Based on the above, the Arbitrator finds Respondent liable for 25 and 2/7 weeks of TTD benefits (July 19, 2023 through January 12, 2024) at a weekly rate of $880.00, which corresponds to $22,251.43 to be paid directly to Petitioner and Petitioner's counsel.

Respondent has paid of TTD benefits in the amount of $0.

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

The imposition of Section 19(l) penalties requires the Petitioner to make a written demand or payment of benefits under Section 8(a) or Section 8(b). It also requires the Respondent to fail, neglect, refuse, or unreasonably delay the payment of benefits without good and just cause. See *820 ILCS 305/19(l).* The Court has found that the act of submitting medical bills into evidence at hearing is not the same as tendering them to the employer for payment. See *Theis v. Illinois Workers' Comp. Comm'n*, 2017 IL App (1st) 161237WC.

Regarding the imposition of Section 19(k) penalties and Section 16 attorney fees, the Courts have confirmed that the imposition of these penalties is where there is not only a delay, but the delay is deliberate or the result of bad faith or improper purpose. These penalties are appropriate when the delay was vexatious, intentional, or merely frivolous. These penalties and fees require a higher standard of proof. See *McMahon v. Industrial Commission*, 183 Ill.2d 499, 515(1998). When the Respondent acts in reliance upon reasonable medical opinion or where there are conflicting medical opinions, penalties are not ordinarily awarded. *USF Holland, Inc. v. Industrial Comm'n*, 357 Ill.App.3d 798, 805 (2005).

Sections 19(k) and 16, in pertinent part, both refer to instances where the position taken "does not present a real controversy" and is "frivolous." Section 16 refers to this language found in section 19(k) as well. See 820 ILCS 305/16, 19(k) (West 2012). These penalties and fees address deliberate conduct or actions undertaken in bad faith.

Petitioner submitted the filed 19(b) with penalties along with attached exhibits into evidence. (PX 6) On October 10, 2023, Respondent's counsel clearly indicated that Respondent would provide Petitioner an "advance" as no benefit payments have been made. (PX 6) As of the date of the trial, Petitioner had received no worker's compensation benefits.

Petitioner's 19(b) with penalties was filed on October 19, 2023. (PX 6) On January 9, 2024, Petitioner's counsel sent email correspondence indicating that Petitioner would be seeking penalties at trial on January 12, 2024. (PX 6)

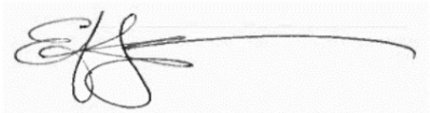
It is agreed that Petitioner sustained an accidental injury arising on the course of her employment on July 10, 2023. Issues existed between the parties as it relates to the nature of Petitioner's limitations, which predated the accident of July 10, 2023 as well as the issues associated with Petitioner's medical care. The Arbitrator finds that the Respondent's arguments associated with Petitioner's disability, medical treatment and the fact that she was performing her regular work duties 8 days after her injury were not arguments that are frivolous in nature or made in bad faith. Based upon that finding, the Arbitrator finds that Petitioner's claim for penalties and attorney's fees are denied.

## CONCLUSION

In light of the above facts and considerations, the Arbitrator finds that Petitioner's work accident on July 11, 2023 did arise out of and in the course of Petitioner's employment by Respondent. The Arbitrator further finds that Petitioner's current condition of ill-being related to her low back and left ankle is causally related to the

injury. The Arbitrator finds that Petitioner's average weekly wage at the time of the accident was $1,320.00 and that Respondent is liable for 25 and 2/7 weeks of TTD benefits (July 19, 2023 through January 12, 2024) at a weekly rate of $880.00, which corresponds to $22,251.43 to be paid directly to Petitioner and Petitioner's counsel. The Arbitrator finds Petitioner's treatment to be reasonable and necessary and finds that Respondent has not paid for said treatment. As such, the Arbitrator orders Respondent to pay Petitioner and Petitioner's counsel directly for the following outstanding medical services, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act: Midwest Specialty Pharmacy: $3,331.08; Illinois Orthopedic Network: $17,246.60; South Suburban Physical Therapy: $18,437.15; Suburban Orthopaedics LLC: $5,408.00 and H-Wave, Electronic Waveform Lab, Inc.: $4,181.88. Additionally, Respondent shall approve and pay for bilateral L4-S1 lumbar medial branch injection and necessary post-operative care as prescribed by Dr. Mohiuddin as provided in Section 8(a) and 8.2 of the Act. Respondent shall also approve and pay for the left ankle arthroscopy with extensive debridement, open Brostrom/Gould lateral ligament repair and necessary post-operative care as prescribed by Dr. Peterson as provided in Section 8(a) and 8.2 of the Act. Finally, the Arbitrator finds that the Respondent's arguments associated with the denial of benefits were not frivolous in nature or made in bad faith and therefore Petitioner's claim for penalties and attorney's fees are denied.

It is so ordered:



March 25, 2024

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 23WC000260 |
| Case Name | Denell Wright v.<br>Chicago Transit Authority |
| Consolidated Cases | |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 24IWCC0606 |
| Number of Pages of Decision | 12 |
| Decision Issued By | Deborah Simpson, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Jordan Browen |
| Respondent Attorney | James Jackson |

DATE FILED: 12/16/2024

/s/Deborah Simpson,Commissioner

Signature

STATE OF ILLINOIS )
) SS.
COUNTY OF COOK )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Denell Wright,
Petitioner,

vs. NO: 23 WC 260

Chicago Transit Authority,
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 medical expenses, permanent disability, temporary disability and penalties and fees and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 6, 2024, is hereby affirmed and adopted.

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

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

There is no bond for the removal of this cause to the Circuit Court by Respondent pursuant to §19(f)(2) of the Act. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

**December 16, 2024**
o: 11/20/24
DLS/rm
046

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

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

/s/*Raychel A. Wesley*
Raychel A. Wesley

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 23WC000260 |
| Case Name | Denell Wright v.<br>Chicago Transit Authority |
| Consolidated Cases | |
| Proceeding Type | |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 10 |
| Decision Issued By | Efi James, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Jordan Browen |
| Respondent Attorney | |

DATE FILED: 2/6/2024

/s/Efi James, Arbitrator
Signature

**THE INTEREST RATE FOR THE WEEK OF FEBRUARY 6, 2024 5.045%**

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**

Denell Wright
Employee/Petitioner

Case # 23 WC 000260

v.

Consolidated cases: N/A

Chicago Transit Authority
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Efi James, Arbitrator of the Commission, in the city of Chicago, IL, on December 6, 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 December 31, 2022, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $11,089.70; the average weekly wage was $989.27.

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

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

Respondent ***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**

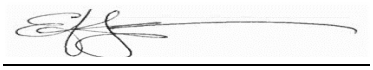
*Respondent shall pay directly to Petitioner all medical bills as outlined in Section J of Arbitrator's Conclusions of Law and pursuant to Sections 8(a) and 8.2 of the Act.*

*Respondent shall pay directly to Petitioner $9,044.52, representing 13 5/7 weeks of TTD at the rate of $659.51 per week for the period beginning January 1, 2023 to April 6, 2023.*

*Respondent shall pay directly to Petitioner $4,450.20, representing 1 1/2% loss of use of Petitioner's person as a whole, or 7.5 weeks of PPD at the rate of $593.56 per week as outlined in Section L of Arbitrator's Conclusions of Law.*

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

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



Signature of Arbitrator



**February 6, 2024**

**STATE OF ILLINOIS** )
) SS
**COUNTY OF COOK** )

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

| | | |
|---|---|---|
| **DENELL WRIGHT**, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| **v**. | ) | |
| | ) | **Case No. 23WC000260** |
| **CHICAGO TRANSIT AUTHORITY**, | ) | |
| | ) | |
| | ) | |
| Respondent. | ) | |

## FINDINGS OF FACT

This matter proceeded to hearing on December 6th, 2023, in Chicago, Illinois before Arbitrator Efi James on Petitioner's Request for Hearing. The issues in dispute were accident, causal connection, medical expenses, TTD and nature and extent of the injuries. Arbitrator's Exhibit 1. (AX 1)

### ***Petitioner's Testimony***

Petitioner testified that on December 31, 2022, he was employed with the Chicago Transit Authority ("CTA") as a full-time bus operator. (Tr. 11) Petitioner further testified that he has been employed in this position since September 2022. (Tr. 11)

### ***Accident***

Petitioner testified that he began his shift on December 30, 2022, and that his shift continued past midnight into December 31, 2022. (Tr. 12) Petitioner testified that in the early morning hours of December 31, 2022, while operating the bus, he was hit "the rear-end driver's side of the bus." by a vehicle. (Tr. 13) Petitioner testified that immediately after the accident, he experienced a headache and "something pulling" in the lower part of his back. (Tr. 13) Petitioner testified that police arrived at the scene and his manager asked if he was okay and if he could finish his shift to which he responded he could and declined emergency services. (Tr. 14) Petitioner testified that he was able to finish his shift although his headache had worsened. (Tr. 14-15) Once he completed his shift, Petitioner testified that he filled out an accident report and at that point told his manager that he thought he needed to go to the hospital. (Tr. 14) Petitioner testified that his wife drove him to University of Chicago Medical Center the same day. (Tr. 15)

***Summary of Medical Records and Testimony***

On the date of the accident, Petitioner was seen at the University of Chicago Medical Center. (PX 1) In the ER, Petitioner complained of headache and neck pain after having been involved in a motor vehicle accident. (PX 1, pg. 66) Petitioner reported going home after the accident and waking up with "double vision and neck pain". (PX 1, pg. 66) A CT scan of his head and cervical spine were ordered. (PX 1, pg. 69-71) The CT scan of Petitioner's head was normal and the C T scan of his neck revealed degenerative changes. (PX 1, pg. 69-71) Upon release from the ER, Petitioner was told to follow up with a primary care physician and released to return to work on January 5, 2023. (PX 1, pg. 89) Petitioner testified that he followed up with Dr. Chunduri at Illinois Orthopedic Network on January 3, 2023. (Tr. 15)

On January 3, 2023, Petitioner presented to Illinois Orthopedic Network for an initial evaluation following up from the Emergency Room. (PX 3) Dr. Chunduri noted the motor vehicle accident from December 31, 2022 and Petitioner's complaints of headaches, neck pain, and diffuse back pain. (PX 3, pg. 3) Dr. Chunduri diagnosed Petitioner with a concussion, cervicalgia, and mid to low back pain. Petitioner followed up with Dr. Chunduri on January 31, 2023. Petitioner was still complaining of headaches, as well as neck pain, mid back pain, and low back pain. He recommended a treatment plan consisting of physical therapy 3 times a week for the next 4 weeks and medication for pain. Dr. Chunduri also prescribed follow up MRIs to both the thoracic spine and cervical spine and took Petitioner off work. (PX 3, pg. 8)

Petitioner underwent MRIs on February 10, 2023 of the thoracic and cervical spine. (PX 3, pg. 12-17) The MRI of the thoracic spine was within normal limits and the MRI of the cervical spine revealed a C$-C5 4 mm left sided disk protrusion with mild left foraminal narrowing. Petitioner was diagnosed with lumbar strain. (PX 3, pg. 18)

Petitioner began therapy at Injury Centers of Illinois on January 6, 2023. He underwent a total of 40 sessions through April 7, 2023. (PX 2, pg. 12) Petitioner was discharged to return to work full duty on April 6, 2023. (PX 3, pg. 24) Petitioner reported that his pain was mild, and he was ready to go back to work. (PX 3, pg. 24) Petitioner testified that he returned to work for the CTA and was still working for the CTA on the date of the hearing. (Tr. 20)

***Current Condition***

Petitioner testified that when he drives, the seat goes up and down, causing "pain, like, sharp pains in my back." (Tr. 22) Petitioner specifically testified that the remaining symptoms he experiences in his neck and back only occur when he is at work, driving the bus. (Tr. 22-23)

***Video Evidence***

During the trial, the Arbitrator along with the parties present in court, viewed a video depicting the accident in question from multiple camera angles. (RX 1) Petitioner identified himself in the video and further testified that the video accurately and fairly depicts the accident of December 31, 2022. (Tr. 26-27) Petitioner was further asked to view different camera angles at the time of the impact between the other motorist and the bus. (Tr. 27) Petitioner testified, after re-watching Respondent's video clip, that at the point of impact, the hydraulic seat hit the part of the bus behind the driver's seat. (Tr. 30)

## CONCLUSIONS OF LAW

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

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

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

In the case at hand, the Arbitrator observed Petitioner during the hearing and finds him be a very credible witness. Petitioner came across as a hard-working individual. The Arbitrator finds Petitioner's testimony to be straight forward, truthful, and consistent with the records as a whole. 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, the Arbitrator finds as follows:***

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)*. An employee's injury is compensable under the Act only if it arises out of and in the course of the claimant's employment. 820 ILCS 305/2 (West 2012). Both elements must be present at the time of the claimant's injury in order to justify compensation. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483 (1989). Arising out of the employment refers to the origin or cause of the claimant's injury. *Cox v. Illinois Workers' Compensation Comm'n*, 406 Ill. App.3d 541, 544 (2010). For an injury to arise out of the employment, its origin must be in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58 (1989). An injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties. *Id.*

Whether the claimant sustained an accidental injury that arose out of and in the course of his employment is a question of fact. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674 (2009). In resolving disputed issues of fact, it is the Commission's province to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine what weight to give testimony, and resolve conflicts in the evidence, particularly medical opinion evidence. *Id.* at 675; *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041 (1999); *Swartz v. Industrial Comm'n*, 359 Ill. App. 3d 1083, 1086 (2005).

Petitioner's unrebutted testimony was that he was operating a CTA bus on the date of accident and the bus was hit by another motorist. He felt an immediate onset of symptoms, including a headache and pull in his low back. Petitioner's is corroborated by the history of the mechanism of injury as well as the documented physical complaints recorded in the records of his treating physicians at University of Chicago, Illinois Orthopedic Network, and Injury Centers of IL.

Respondent offered no evidence to dispute Petitioner's testimony and in fact, introduced video from the bus that corroborates Petitioner's testimony that an accident did, in fact, occur. The video shows that the bus was hit by another motorist while Petitioner was in the driver's seat.

The Arbitrator therefore finds that Petitioner met his burden to establish that his injuries both arose out of and occurred in the course of Petitioner's employment.

***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. It is not necessary to prove that the employment was the sole causative factor or even that it was the principal causative factor, but only that it was a causative factor. *Tolbert v. Ill. Workers' Comp. Comm'n*, 2014 IL App (4th) 130523WC, 11 N.E.3d 453. "A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." *International Harvester v. Industrial Com.*, 93 Ill. 2d 59, 63 442 N.E.2d 908 (1982).

"Whether a causal connection exists is a question of fact for the Commission, and a reviewing court will overturn the Commission's decision only if it is against the manifest weight of the evidence... The test is whether the evidence is sufficient to support the Commission's finding, not whether this court or any other tribunal might reach an opposite conclusion. For the Commission's decision to be against the manifest weight of the evidence, the record must disclose that an opposite conclusion clearly was the proper result." *Vogel v. Industrial Commission*, at 786 (2nd Dist. 2005).

The Arbitrator notes that Petitioner was working his full-time job without restrictions prior to this work accident and there was no evidence of any prior injuries sustained by Petitioner that effected his ability to perform his job duties. His unrebutted testimony with respect to the mechanism of injury was corroborated by the consistent and contemporaneous description of the accident memorialized in the medical records, as well as the video from the bus that was introduced by Respondent showing that an accident did, in fact, occur. The opinions of Petitioner's treating physicians are unrebutted in the record.
Based upon the evidence presented at trial and the chain of events, the Arbitrator finds that Petitioner met his burden of proof by a preponderance of the evidence that his current condition of ill-being is causally related to his work accident.

***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:***

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 Comm'n* 409 Ill. App. 3d 258, 267 (1st Dist., 2011). Based upon the Arbitrator's finding with respect to casual connection, reasonable and necessary treatment through January 31st, 2020 would be casually related.

Petitioner's treatment to date has consisted of an Emergency Room visit, doctor visits, physical therapy and diagnostic testing. All these treatment measures are reasonable and necessary in treating Petitioner's various conditions.

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

| | | |
|---|---|---|
| 1. | University of Chicago | $18,788.00 |
| 2. | University of Chicago Physicians Group | $1,312.00 |
| 3. | Injury Centers of IL | $22,680.61 |
| 4. | ION | $2,379.94 |
| 5. | Medlegal Associates Corp (Molecular Imaging) | $7,500.00 |
| 6. | Midwest Specialty Pharmacy LLC | $4,920.65 |
| | **Total** | **$57,581.20** |

The Arbitrator finds that the emergency services rendered to Petitioner by the University of Chicago and University of Chicago Physicians Group to be both reasonable and necessary and that Respondent has not paid all appropriate charges for this treatment.

Similarly, the Arbitrator further finds that the follow-up medical treatment ordered and rendered by Illinois Orthopedic Network, Injury Centers of Illinois, Molecular Imaging, and Midwest Specialty Pharmacy to be both reasonable and necessary and that Respondent has not paid all appropriate charges for these reasonable and necessary medical services.

Having already decided the issue of accident and causation in favor of Petitioner based on both the opinion of his treating physicians and under the chain of events analysis, as well as the absence of any medical opinions or other evidence to the contrary from Respondent, the Arbitrator finds that all the medical treatment rendered has been reasonable and necessary.

Accordingly, having found in Petitioner's favor with respect to the issue of accident and causal connection, and for the reasons outlined above, the Arbitrator finds Respondent liable for all outstanding and related medical charges, and orders them to be paid pursuant to the fee schedule.

If any bills are found to have been paid by Petitioner's group health insurance, Respondent shall hold Petitioner harmless from any attempt to recover said payments.

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

A claimant is temporarily totally disabled from the time an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of his injury will permit. *Westin Hotel v. Indus. Comm'n*, 372 Ill.App.3d 527 (1st Dist. 2007).

In determining whether a claimant remains entitled to receiving TTD benefits, the primary consideration is whether the claimant's condition has stabilized and whether she is capable of a return to the workforce. *Interstate Scaffolding, Inc. v. Illinois Workers' Comp. Comm'n*, 236 Ill.2d 132, (2010). Once an injured employee's physical condition stabilizes, she is no longer eligible for TTD benefits. *Archer Daniels Midland Co. v. Indus. Comm'n*, 138 Ill.2d 107 (1990).

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. *Holocker v. Illinois Workers' Compensation Comm'n,* 2017 IL App (3d) 16036WC, (3rd Dist., 2017). The fundamental purpose of the Act is to provide injured workers with financial protection until they can return to the work force. *Id.* When determining whether an employee is entitled to TTD benefits, the test is whether the employee remains temporarily totally disabled as a result of a work-related injury and whether the employee is capable of returning to the work force. *Id*. The touchstone for determining whether claimant is entitled to TTD is whether the claimant's conditions had stabilized to the extent that they are able to reenter the workforce. *Id*. at p. 40.

Having found Petitioner's condition of ill-being arose out of in in the course and scope of his employment and that his condition of ill-being is causally related to his December 31, 2022 accident date, any periods of temporary total disability incurred would be the responsibility of Respondent. Evidence admitted at trial, including Petitioner's testimony shows that Petitioner was off work from the date of the accident, January 1, 2023 through his last doctors visit on April 6, 2023 due to the work injury.

Petitioner's condition had not stabilized from January 1, 2023 through April 6, 2023, as he was actively treating with medications, diagnostics, and physical therapy to address his work injury.

Based on the above, the Arbitrator finds that Petitioner is entitled to TTD benefits from January 1, 2023 through his last doctors visit on April 6, 2023 at the weekly rate of $659.51 for 13 and 5/7 weeks.

***Issue L, what is the nature and extent of Petitioner's injuries, the Arbitrator finds:***

Section 8(d)(2) of the Act provides, in relevant part, that the employee may be compensated after sustaining serious and permanent injuries "if such injuries partially incapacitate him from pursuing the duties of his usual and customary line of employment but do not result in an impairment of earning capacity" at a rate of the percentage of 500 weeks that the partial disability bears to total disability. 820 ILCS 305/8(d)(2) (West 2004). The extent or permanency of a claimant's disability is a question of fact to be determined by the Commission, and its decision will not be set aside unless it is contrary to the manifest weight of the evidence. *Roper Contracting v. Industrial*

*Comm'n*, 349 Ill. App. 3d 500, 506-07, 812 N.E.2d 65, 285 Ill. Dec. 476 (2004). *Hubl v. Illinois Workers' Compensation Comm'n*, 2013 IL App (1st) 123051WC-U, ¶ 15

Pursuant to §8.1b(b) of the Act, the Arbitrator addresses the issue of Petitioner's permanent partial disability as follows:

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

Under Section 8.1b(b)(ii), the occupation of the injured employee, the Arbitrator notes that Petitioner's occupation at the time of the accident was full-time bus operator. Petitioner testified that he returned to work for the CTA and was still working for the CTA on the date of the hearing. Petitioner testified that when he drives, the seat goes up and down, causing "pain, like, sharp pains in my back." (Tr. 22) Petitioner testified that the remaining symptoms he experiences in his neck and back only occur when he is at work, driving the bus. (Tr. 22-23) The Arbitrator gives some weight to this factor.

Under Section 8.1b(b)(iii), the age of the employee at the time of the injury, the Arbitrator notes Petitioner was 45 years old at the time of his accident. As such, Petitioner has a few more working years ahead of him. Additionally, the Arbitrator finds that, due to Petitioner's age, the residuals of his work injury are likely to have a greater impact on him. The Arbitrator gives some weight to this factor in determining PPD.

Under Section 8.1b(b)(iv), the employee's future earning capacity, the Arbitrator notes there was no evidence of a decrease in earnings or future earning capacity. The Arbitrator assigns no weight to this factor in determining PPD.

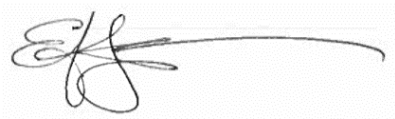
Under Section 8.1b(b)(v), evidence of disability corroborated by the treating medical records, the Arbitrator notes that the video of the incident showed virtually no movement of Petitioner's body other than Petitioner's reaction of moving his arms in what appears to be in frustration. The evidence of disability corroborated by the treating medical records is a resolved neck, thoracic, and low back pain. Dr. Chunduri discharged Petitioner on April 6, 2023, to full duty work with resolved strains. The Arbitrator gives great weight to this factor to the benefit of Petitioner. The Arbitrator gives great weight to this factor in determining PPD.

After considering the above five factors and the entirety of the evidence, the Arbitrator finds based upon the weight of credible evidence in this record, that as a result of the injuries sustained, Petitioner suffered a loss of trade, 1 1/2% man as a whole pursuant to §8(d)2 of the Act which corresponds to 7.5 weeks of permanent partial disability benefits at a weekly rate of $593.56.

## CONCLUSION

In light of the above facts and considerations, the Arbitrator finds that Petitioner did sustain an accident on December 31, 2022 that arose out of and in the course of his employment. Petitioner has established a causal connection between the work-related accident of December 31, 2022. The Arbitrator finds the following treatment

reasonable and necessary and therefore Respondent is to pay Petitioner directly for the following medical services pursuant to the fee schedule: University of Chicago $18,788.00; University of Chicago Physicians Group $1,312.00; Injury Centers of IL $22,680.61; ION $2,379.94; Medlegal Associates Corp (Molecular Imaging) $7,500.00 and Midwest Specialty Pharmacy LLC $4,920.65. Petitioner is entitled to TTD benefits from January 1, 2023 through his last doctors visit on April 6, 2023 at the weekly rate of $659.51 for 13 and 5/7 weeks. Finally, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 1 1/2% loss of use of the person as a whole pursuant to §8 of the Act which corresponds to 7.5 weeks of permanent partial disability benefits at a weekly rate of $593.56.



Arbitrator Efi Poziopoulos James

**February 6, 2024**

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 21WC033021 |
| Case Name | Derek Durbin v.<br>State of Illinois - Graham Correctional Center |
| Consolidated Cases | |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 24IWCC0607 |
| Number of Pages of Decision | 18 |
| Decision Issued By | Deborah Simpson, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Thomas C Rich |
| Respondent Attorney | Kayla Koyne |

DATE FILED: 12/16/2024

/s/Deborah Simpson,Commissioner

Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Derek Durbin,
Petitioner,

vs. NO: 21 WC 33021

State of Illinois Graham 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, medical expenses, penalties and fees, permanent disability and temporary disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 17, 2023, is hereby affirmed and adopted.

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

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

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

**December 16, 2024**

o: 11/6/24
DLS/rm
046

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

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

/s/*Raychel A. Wesley*
Raychel A. Wesley

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 21WC033021 |
| Case Name | Derek Durbin v. State of Illinois - Graham Correctional Center |
| Consolidated Cases | |
| Proceeding Type | |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 16 |
| Decision Issued By | Dennis OBrien, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Thomas C Rich |
| Respondent Attorney | Kayla Koyne |

DATE FILED: 4/17/2023

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

/s/ Dennis OBrien, Arbitrator

Signature

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

April 17, 2023

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation Commission

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

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

**ILLINOIS WORKERS' COMPENSATION COMMISSION**
**ARBITRATION DECISION**

**DEREK DURBIN**
Employee/Petitioner

v.

**STATE OF ILLINOIS – GRAHAM CORRECTIONAL CENTER**
Employer/Respondent

Case # **21** WC **033021**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Dennis O'Brien**, Arbitrator of the Commission, in the city of **Springfield**, on **January 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 **November 18, 2021**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

In the year preceding the injury, Petitioner earned $**68,347.03**; the average weekly wage was $**1,314.37**.

On the date of accident, Petitioner was **38** years of age, ***married*** with **2** dependent children.

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

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

Respondent is entitled to a credit of all amounts paid by its group health insurer under Section 8(j) of the Act.

**ORDER**

**Petitioner has failed to prove that he suffered an accident on November 18, 2021 which arose out of and in the course of his employment by Respondent.**

**Petitioner has failed to prove that his current conditions of ill-being, bilateral carpal tunnel and bilateral cubital tunnel syndromes, are causally related to the alleged accident of November 18, 2021.**

**Based upon the findings in regard to accident and causal connection, all other issues are deemed moot.**

**Compensation is therefore 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.

**APRIL 17, 2023**

Signature of Arbitrator

**FINDINGS OF FACT:**

## TESTIMONY AT ARBITRATION

### Petitioner

Petitioner testified that he is currently employed as a Correctional Officer with the Illinois Department of Corrections at Graham Correctional Center, and has been employed by the Department of Corrections for just over 13 years. Prior to working for the Department of Corrections, Petitioner was an infantryman for the United States Army for approximately four years, which involved a hands-on training with weapons and defensive tactics, including shooting and climbing. After being discharged from the Army, Petitioner worked as a stockman and an asset protection associate at Walmart. Petitioner testified that as a stockman he helped with loading and unloading of products and also cart collecting and pushing, saying every part of this job involved the use of his hands and arms.

Petitioner testified that he prepared Petitioner's Exhibit 7, which is a job description, and Petitioner's Exhibit 8, which is a work history timeline. When Petitioner was asked on cross-examination whether the job descriptions included in that form were his jobs throughout the entirety of his time at Graham, or if they were his job duties specifically during the time period that he started noticing symptoms, Petitioner testified that the listed duties were just a few of the job assignments that he had worked.

Petitioner testified that he was a member of the Tac Team and explained that a certain number of hours had to be done to remain certified as a Tac Team Unit Officer. He said he had also served as a control tactics instructor and a chemical agent instructor. He said he would teach officers at the facility as well as new cadets in Springfield.

Petitioner said he did not have gout or hypothyroidism, his blood pressure was "a gray line" as of the date of arbitration, but he was not, and had never been, morbidly obese. He testified he was right hand dominant.

Petitioner testified that he first noticed symptoms in his hands and elbows a few years prior to his going and seeing a doctor. He said he just ignored it as it was not painful at first, he could just shake it off and keep working. He said he occasionally worked overtime, through the tactical unit, and 100 percent of his time in that unit involved using his hands and arms. Petitioner testified that he spent approximately 90 percent of his time at Graham Correctional Center on the wing or gallery, but he could be directed anywhere. He said he could be assigned one job prior to roll call and get assigned to a job during the roll call.

Petitioner testified that job duties grew during the pandemic, that instead of inmates going to the commissary, barbershop or chow hall, all of those services had to go to the inmates. Petitioner said prisoners who normally be workers were not allowed out of their cells. He said that the facility was short staffed during that time. He said that when his job duties increased, he noticed more tingling, and he fumbled with keys. He

said his wrists, hands, and elbows ached a lot more. Instead of see a doctor for treatment, Petitioner said he went to see his attorney. He said his attorney sent him to Dr. Bradley,

Petitioner said he really did not have outside hobbies or activities that involved tools or the use of his hands as he had two children aged three and seven. He said he was a hunter, but he only hunted a couple of days a year. He testified that he is currently on standby on the tactical team, that he that he stepped down from the assistant tactical commander spot because of the issues he was having with his hands. Petitioner said he had not officially quit the tactical team, he had just not gone back to it yet, that he currently has the chance to get back on the tactical team and is waiting for another opening before trying to do so.

Petitioner testified that Dr. Bradley sent him for testing and, after the testing, Dr. Bradley told him he should have surgery. Petitioner said he then had the surgeries on both hands and elbows, as his arms and hands had become more problematic, that even driving to and from work would cause his hands to fall asleep, causing him to rotate hands back and forth. Petitioner said the surgeries helped him, that he no longer woke up in the middle of the night and he hands no longer became numb while driving. Petitioner testified that doing fine motor skills, pinching of the fingers, would bring on symptoms occasionally, with his fingertips going numb or aching. Petitioner said his grip strength was good, but not what it used to be.

Petitioner testified that he thinks there are approximately 500 employees at Graham Correctional Center.

On cross-examination, Petitioner said he was back to work full duty with no restrictions. He said he was not currently seeing Dr. Bradley or any other doctor for his injury or taking any medications for this injury. Petitioner testified that when he began being treated, he went out and purchased over-the-counter braces, which he only wore for a couple of nights before his surgery as he thought they did more harm than good. He said he had not worn them since the surgeries. Petitioner said he has not been denied medical treatment due to late or non-payment of medical bills.

Petitioner has been able to perform his job well since returning to work after his surgeries, and that his performance evaluations which have been completed since his return to work have been positive. He said he currently has the same job title, received a raise on July 1, and now earns more than he did on this date of accident.

Petitioner testified that when the prison first went on lockdown, his job assignments were relief for a short period of time and then worked in housing unit 13 and 14 as the day officer for both those units. Petitioner testified that housing units 13 and 14 were dietary houses with all of the dietary inmates. He said he would get a count on what workers we had in the unit which were up at dietary. They would perform a count, and when the inmates came back to the unit at approximately 8:30 in the morning, and when it was allowed, they would go through the house, unlock certain cells for inmates who were able to use the phones; and then allow those who were dietary workers a chance to shower.

Petitioner said that at that time much of his day was spent “keying,” while that did not take up much of his current workday. Petitioner testified that during COVID there were 100 inmates to a house, in fifty cells, that when checking a cell, if it was too dark or if their flashlight batteries were not working, he would have to key the door to get an actual identification count of the inmates to make sure they were in the cell. He would also have to personally key in each shift of dietary workers, give them a chance to shower, and then key them into

their cells. When dietary trays would come down to the unit he would have to pull the cart down each wing and feed each cell, and then go back again to pick up all the trays. Petitioner testified that if there was an inmate who was sent to segregation, they had to pull out the inmate's property. He said that approximately every 30 minutes they would go down each wing to make sure there were no issues going on. They had to sign their log books in the lockbox at the end of the wing about every 30 minutes. He said that in the job description where he noted what he was doing daily, that was for when he was working in the dietary housing units.

Petitioner testified that he is currently a hearing investigator processing disciplinary tickets and reports were written on individuals, including investigating the issues, inputting information into their computer system, basically keeping track of the ticket process from start to finish. Petitioner testified that handwriting reports for 30 minutes to 1 hour each day was a job duty he was doing when he first noticed having symptoms, but that was no longer one of his current job duties.

Petitioner testified that he used to do cell searches on a daily basis, but as of the date of arbitration did cell searches occasionally, but not daily. Petitioner testified that most of the job duties in the form were the job duties he had when the prison was on lockdown, other than the description of hearing investigator work.

Petitioner testified that while he started experiencing symptoms in his hands and arms in 2019, he stepped down from the TAC team in May of 2021. Petitioner confirmed he began experiencing symptoms before Graham Correctional Center went into lockdown due to COVID. Petitioner said that prior to COVID, while a relief officer, there was no pattern in regard to locking and unlocking cells, that every day was different, that during that time he had to hand write disciplinary reports and daily log books, which took about 30 minutes per day. He said he did not type any documentation.

Petitioner described the cell doors keys at the prison as being slightly larger than a house key, depending on the area they were working. He said some doors are opened electronically by a buzzer, including the front door to healthcare, all the doors in X House, and the entry doors and day rooms in the housing units. He said the segregation unit and X house used larger Folger Adam keys. Petitioner testified that he uses Folger Adam keys daily in segregation and X house. He said that in the housing units they sometimes we had lock issues, though that was pretty rare.

Petitioner said his symptoms worsened between when he first noticed them in 2019 and when he first treated with Bradley.

Petitioner said he uses his right hand to handwrite and mostly uses his right hand when keying cell doors.

Petitioner testified that he did not work overtime except for when he worked overtime for the tactical team.

Petitioner said he sold his motorcycle in the spring or summer of 2020, that he currently does not weightlift frequently, but he did weightlift frequently at the time he first noticed symptoms and when his symptoms worsened.

Petitioner testified that he experienced symptoms prior to his surgery when sleeping, and when driving, He said holding his arm bent for a long period of time caused him to experience symptoms.

When asked who referred him to Dr. Bradley, Petitioner indicated his attorney did, and that his attorney's office called and made his initial appointment with Dr. Bradley. Petitioner said he had to travel about an hour and a half one way to treat with Dr. Bradley. Petitioner indicated that he filled out the detailed job description form at the request of his attorney and that his attorney provided that form for the purpose of this case. Petitioner said he wrote down the symptoms he is currently having for the arbitration hearing, at the request of his attorney. He agreed that he did not note any of those symptoms to Dr. Bradley in his last visit with that physician.

On redirect examination, Petitioner said he received his full salary after surgery because he used his own time, and indicated that he would like his time back. During the time period between 2019 and when he first sought medical care, Petitioner said that while working at Graham Correctional Center, he used his arms and hands about 90 percent of the time.

**Major Trevor Wright**

Major Wright was called as a witness by Petitioner. He testified that he is a shift supervisor at Graham Correctional Center. When asked if any part of Petitioner's testimony was incorrect, he stated he did not recall anything being said which was incorrect. Major Wright said he served as a correctional officer at Graham Correctional Center for 11 years, was promoted to a correctional lieutenant for two and a half years, and was then promoted to the rank of Major, which has been his job title for the last three years. Major Wright testified that as a correctional officer, he did the same things that Petitioner did, except for the hearing investigator position.

On cross examination Major Wright confirmed he is currently Petitioner's supervisor. He indicated that at the time Petitioner first sought treatment in November of 2021, Petitioner did not personally mention to Major Wright that he was having symptoms or experiencing issues with his job or job duties. He said Petitioner has not personally expressed any issues with his ability to do his job as a result of his injuries to him. Major Wright confirmed that since returning from surgeries, Petitioner should have had performance evaluations done, and that to his knowledge they were good.

Major Wright testified that he prepared a roster of Petitioner's job assignments from March 1, 2020 through December 31, 2020, which was contained in Respondent's Exhibit 2. Major Wright explained that in preparing the roster, he pulled the original rosters for each of the days during that time period and went through and created an Excel spreadsheet for every day during that reporting period.

Major Wright testified about the different job assignments which were contained n that roster. He said Gardens involves supervising the inmates who were working in the large garden at the correctional center that provides food for dietary and staff. He said that job assignment would involve minimal keying once the workday had started. He said Zone 1 and Zone 2 patrol would involve supervising inmate movement throughout the zones, but that once the pandemic hit, those officers would be helping with feeding and doing other duties inside the institution. He testified that the Writ duty involves escorting inmates to destinations and supervising them, as required by court writs and medical furloughs, applying mechanical restraints and one officer would always have a hand on the inmate. He said this duty does not involve a significant amount of key turning.

Major Wright indicated that "SM" stood for maternity leave, but should have been paternity leave, that PT stood for paternity time. X House duty included the X house controller or wing officer, who would go out be on the wings maintaining security, doing wing walks, checking on the welfare of all the inmates on the wing, making log entries within every 30 minutes, getting inmates to go different places when needed, or keying doors to allow the medical staff to evaluate inmates, administer drugs or medications. He said X house does involve a higher amount of keying. Major Wright said wing officers would pull on each of the doors to make sure they are secure.

He said 11 DR stood for 11 day room, which is the segregation unit, while 24 DR was a general population house. Tower assignments would involve climbing the tower stairs and maintaining a visual observation of the institution and its outer perimeter. He said Tower assignments did not involve a high amount of key turning. The Visiting room assignment involves supervising inmates and their visitors while visitation status was going on, strip searching the inmates when they came up for the visit and again before they went back to the housing unit. He said that job assignment did not really involve a significant amount of key turning.

Major Wright was asked what would be involved in commissary for a correctional officer, and he said he thought was just temporarily assigned to supervise inmates that were working inside of the commissary, though he did not know exactly as he had never worked in that building.

Regarding the healthcare related assignments, including "HCU," "HCU Telepsych," and "HCU dialysis," Major Wright testified that those job assignments would be the healthcare unit and the guards would escort medical personnel throughout the institution while the institution was on lockdown during the pandemic, as the nursing staff had to go out to the units to administer medication and evaluate inmates and needed a security escort. This work could involve a significant amount of key turning as the guards would be keying open doors to get inmates out or for the administration of medication. "Bus chase" would be the transfer bus and would require Petitioner to be either on the bus driving or in one of the chase vehicles. This work would involve driving, handling property, and applying and removing restraints to the inmates. He said Control job assignments would be the control room officers who would keep track of people going in and out of the housing unit, and watching the day room officer while that officer was out on the wings making wing checks. He said that job did not involve a significant amount of key turning, just opening the control room door to go in and out or to allow the day room officer into the control room.

Major Wright said that if two job assignments were listed on the roster, that meant Petitioner was moved assignments during the shift, but if there was no second assignment noted, Petitioner stayed on the same assignment throughout the day.

Major Wright was asked about the detailed job description form, particularly about the weights of the items as well as the frequency, indicated that they were mostly accurate, but some of the weights seemed a little on the high side, it would depend on how much property an inmate had, a property box might be empty or it might be jam-packed.

On redirect examination Major Wright testified that TA stood for temporary assignment and he agreed that if Petitioner was temporarily assigned to the commissary during the pandemic, he would be shopping for the inmate and then bringing the materials back to the inmate who had purchased them.

Major Wright agreed that a correctional officer or wing officer might use their arms and hands in some manner 90 percent of the time.

Major Wright testified that there are 25 to 30 open repetitive trauma workers' compensation claims at Graham Correctional Center.

## MEDICAL EVIDENCE

Petitioner was seen by Dr. Bradley on November 18, 2021, complaining of right worse than left hand, wrist and elbow pain, saying the pain had been present for at least a couple of years. Petitioner told him that his grip has been getting weaker, and his 4th and 5th digits had the worst numbness. He reported that his symptoms were more persistent, but he was still able to shake out the numbness and tingling. He denies any inciting trauma but said his symptoms were from chronic repetitive use of his upper extremities while working for the past 12 years as a correctional officer. He told the doctor that during the pandemic, in the last 1 to 2 years, during the lockdown, the amount of keying that was required had significantly increased his symptoms. Dr. Bradley recorded a history of Petitioner's work activities as involving lifting of property boxes and supplies weekly with the boxes weighing between 5 and 200lb, as well as numbering five to 40 boxes per week. Petitioner told him of having to lifting resisting offenders off the ground approximately once to twice per week. He described continuous pushing and pulling of doors up to 200 times per day with doors weighing between 50 and 200 pounds, as well as the pushing and pulling of supply carts loaded with food trays, property boxes and other supplies, on a daily basis. Petitioner told him of locking, unlocking and opening cell doors and entry doors and food ports repetitively throughout every day. Petitioner told him that a significant number of padlocks and various places needed to be locked and unlocked. He said he had to cuff and uncuff offenders repeatedly during the day, and help with segregation, where offenders are escorted into areas such as the showers and the cells. He told the doctor of typing three to five hours per day as well as handwriting daily reports for approximately one hour each day. Dr. Bradley's physical examination on this date revealed decreased sensation in the right and left hands, referable to the median and ulnar nerve distributions, with positive Phalen's and Tinel's testing. His assessment at that time was bilateral carpal tunnel and cubital tunnel syndromes. Dr. Bradley noted that in his opinion Petitioner's 12 years of work at the correctional center contributed to and caused these conditions. (PX 4, p.2-4)

Petitioner underwent an EMG with Dr. Yadava on November 18, 2021. After the testing, Dr. Yadava's EMG Nerve Conduction impressions were those of mild right side carpal tunnel syndrome, moderate left side carpal tunnel, mild to moderate bilateral cubital tunnel syndrome, mild Guyon's canal syndrome on the right side, and moderate Guyon's canal syndrome on the left side. (PX 3, p.4)

Petitioner underwent a second EMG with Dr. Phillips on December 8, 2021. While Dr. Phillips's report noted that the referring physician was Dr. Bradley, there is no mention of Dr. Phillips's report contained in Dr. Bradley's records. which does not appear to be referenced in Dr. Bradley's records. Dr. Phillips noted Petitioner giving a one-and-a-half year history of gradually progressive intermittent global bilateral hand numbness, with Petitioner's hands falling asleep if he flexed his elbows for a couple of minutes or talked on the phone. Dr. Phillips noted no Tinel or Phalen signs at the carpal tunnels, no Tinel signs over the canals of Guyon, and no

Tinel signs at the cubital tunnels. He diagnosed mild to moderate carpal tunnel syndrome and mild bilateral ulnar neuropathies across the elbows. (PX 4; PX 5, p.2,3)

Dr. Bradley noted on December 20, 2021 that he discussed the EMG results with Petitioner. Petitioner advised him he had tried braces, with no relief. Petitioner was going to discuss treatment options with his wife. (PX 4, p.4)

Petitioner underwent an open left carpal tunnel release and an open left cubital tunnel nerve decompression on February 16, 2022. The ulnar nerve was found to be tethered in scar tissue at the left elbow, and it was released from that scarring. The carpal tunnel ligament was released n the left wrist and the median nerve retracted and freed of adhesions. (PX 4, p.5-7; PX 6, p.2-4)

Petitioner followed up with Dr. Bradley on March 3, 2022. Petitioner advised the doctor that he had significantly improved, with his left arm no longer waking him up at night. Petitioner's right upper extremity symptoms were said to be unchanged. The office note indicated that Petitioner was to be off work until seen again in two weeks. (PX 4, p.8,10).

Dr. Bradley performed a right cubital tunnel release at the level of the elbow and an open right carpal tunnel release on March 16, 2022. Adhesions were again found on the ulnar nerve at the right elbow and the median nerve was found to be somewhat flattened with thickening of the transverse carpal ligament in the right wrist. The ulnar nerve was released at the right elbow, and the median nerve was released in the right wrist. (PX 4, p.11-13; PX 6, p.5-7)

Petitioner followed up with Dr. Bradley on March 31, 2022, and advised the doctor that he symptoms of pain, numbness and tingling were all significantly improved. Petitioner was released at MMI on this date with a Work Status Report noting that he was still off work until April 4, 2022, but then was released for full duty as of April 4, 2022, with no restrictions. (PX 4, p 14,16,17)

Petitioner was examined at Respondent's request by Dr. Stewart on March 25, 2022. Dr. Stewart noted the Respondent's job description for a correctional officer. He noted Petitioner's having given notice of bilateral carpal and cubital tunnel injuries to Respondent on November 23, 2021. Petitioner described his history of his work and his symptoms to Dr. Stewart. Dr. Stewart summarized Petitioner's treatment and testing by Dr. Bradley, Dr. Yadava and Dr. Phillips. He noted Petitioner's left carpal and cubital tunnel surgeries of February 16, 2022, and his post-surgical findings by Dr. Bradley through March 3, 2022, noting the records of that date were the last he had reviewed. he had no later records, but he was aware that Petitioner had undergone right carpal and cubital tunnel surgeries on March 16, 2022, with a follow up appointment scheduled for the week following Dr. Stewart's examination. (RX 5 p.1-4)

Dr. Stewart during his examination noted the evidence of incisions from recent surgeries, noting the only tenderness in the left elbow was slight tenderness over the ulnar nerve, and positive compression and Tinel testing. Left wrist examination revealed positive compression and Tinel testing as well as positive Phalen's testing and equivocal reverse Phalen's testing, but full strength in all muscle groups. Sensory testing was generally normal, though there was slight diminishment of light touch for the right thumb and index fingertips. Dr. Stewart's assessment was Petitioner was status post bilateral open carpal tunnel releases and bilateral cubital

tunnel releases. Dr. Stewart's opinions in regard to causal connection and need for medical treatment will be summarized based on his deposition testimony, below. (RX 5 p.5,6)

## DEPOSITION TESTIMONY OF DR. MATTHEW BRADY

Dr. Brady testified on behalf of Petitioner by deposition of July 15, 2022. He testified that he was a board-certified orthopedic surgeon with a general orthopedic practice, treating acute injuries and chronic degenerative injuries due to arthritis to the hip, knee, and shoulders, including shoulder replacements. He said most of his patients were referred by other patients or family members. He said he performed three or four carpal and/or cubital tunnel surgeries per week. Dr. Bradley's testimony in regard to history, complaints, physical findings, test results and surgical procedures during the course of his treatment of Petitioner was consistent with the medical records summary, above. (PX 10 p.4-8)

Dr. Bradley testified that medical literature identifies the most common factor over the years for the development of compression neuropathy is repetitive microtrauma to the carpal and/or cubital tunnel. He stated that said microtrauma can numerous different things, including repetitive bending and straightening of the elbow or repetitive impact-type activities to the wrist, which can cause the development of scar tissue and inflammation, putting pressure on the nerves and producing compression neuropathy. Dr. Bradley noted that even though there wasn't one particular activity which Petitioner performed repetitively every day, his job description encompassed a lot of different responsibilities which required the use of both of his upper extremities. He said he was familiar with the physical demands of the job of correctional officers at Graham Correctional Center, and he believed that Petitioner's conditions were causally related to his work as a correctional offer for Respondent. Dr. Bradley was of the opinion that all of Petitioner's care and treatment for his bilateral carpal and cubital tunnel syndromes were reasonable, necessary, and causally related to his employment with Respondent. (PX 10 p.11-17,30,31)

On cross-examination Dr. Bradley said 20 to 25 percent of his practice involved treatment of the hand and elbow. He said he was acquainted with some of the staff assignments at Graham Correctional Center, but not all of them, that he had never been at that facility and had not pulled a cell door or turned a key at any Department of Corrections facility. He said he did not know how many times Petitioner would have to lock or unlock cell doors, nor did he know how many minutes per day Petitioner performed that task. He said he did not know if Folger Adams keys were used at this facility, but he did know the locks could be difficult to open as the inmates altered them, that they were not as simple as his opening his front door. He said he did not know how long per day Petitioner typed, the makeup of his workstation, how long he would handwrite reports or which hand whe would use to write. He knew Petitioner pushed and pulled carts weighing 50 to 800 pounds, but he did not know how often or how long per day he performed that task. He said he did not know how long each day he would have to key doors, but he knew it had significantly increased during the pandemic. He said was the multiple activities that Petitioner performed which required the use of his upper extremities that contributed to his developing carpal and cubital tunnel. (PX 10 p.37,38,41-53)

## DEPOSITION TESTIMONY OF DR. PATRICK K. STEWART

Dr. Stewart testified on behalf of Respondent by deposition of September 13, 2022. He testified that he is a board-certified orthopedic surgeon whose practice is entirely concentrated in surgical and non-surgical treatment of upper extremity problems, both traumatic and congenital. He said approximately two percent of his practice involves performing independent medical examinations. He noted he had reviewed and summarized Petitioner's treatment and testing records, with summaries consistent with the medical record summary above. (RX 6 p.7,8,9-12)

Dr. Stewart spoke of Petitioner's lifting of property boxes and keying, saying that they were of limited periods of time, not for the whole week, and that the keyboarding did not require force, and even repetitious movements, without force, were not a risk factor. (RX 6, p.20,21)

Dr. Stewart noted that his examination of Petitioner's right upper extremity was minimal as he had just recently had surgery on that extremity and the sutures were still present. He said Petitioner still had some provocative involving his left upper extremity when examined by him. (RX 6, p.14)

The Arbitrator notes Petitioner's objection to Dr. Stewart's testifying in regard to his observations during a visit to the Graham Correctional Center and his opinions based upon that visit and sustains that objection as Dr. Stewart did not mention that visit, his observations, or his opinions based upon those observations in his report and Petitioner was not provided the 48 hours of notice of what the witness was to testify in regard to as required by Section 12 of the Act. Ghere vs. Industrial Commission, 278 Ill.App.3rd 840,845 (1996).

Dr. Stewart testified that there are particular activities associated with carpal tunnel, including forceful repetitive activities, vibration exposure, and cold exposure. He said for Cubital tunnel the activities associated with that condition were prolonged forceful grasp, most commonly with the elbow in a flexed position. He did not believe repetitive forceful activities were a significant part of Petitioner's workday. He did not believe typing of writing reports increased Petitioner's risk for those conditions. Nor did he believe typing would have done so. He said he did not believe Petitioner's job duties had caused, contributed to, aggravated or accelerated Petitioner's carpal tunnel syndrome. (RX 6, p 28-29).

On cross-examination, Dr. Stewart was asked, of the IMEs he has done, if he had found causation, and he replied he had, he had done so in the case of a construction and maintenance person who used vibratory tools, jackhammers, and poured concrete, who had a lot of risk behaviors associated with their employment. (RX 6, p 35,36).

The Arbitrator has marked as rejected a large number of Petitioner's proffered exhibits at Dr. Stewart's deposition, Petitioner's Exhibits 1-7 and 12. Petitioner's Exhibit 1 is a series of Tristar notification letters for other claimants and is not relevant to this claim. Petitioner's Exhibit 2 is an IME report for another claimant from a different IME doctor and is not relevant to this claim. Similarly, Petitioner's Exhibit 3 is an IME report for another claimant from a different IME doctor and is not relevant to this claim. Petitioner's Exhibit 4 is an IME report by Dr. Stewart for another Petitioner that works at Pickneyville Correctional Center and is not relevant to this claim. Petitioner's Exhibit 5 is an Arbitrator's decision from a different Arbitrator, on a different claimant, from a different correctional center and is not relevant to this claim and has no precedential value in this claim. Petitioner's Exhibit 6 is an Arbitrator's decision from a different Arbitrator, on a different claimant,

from a different correctional center, is not relevant to this claim, and has no precedential value in this claim. Petitioner's Exhibit 7 is a Commission decision from a different Petitioner on a different claim and the factual testimony is not identical to this claim, but while it can be introduced as precedent, the difference in facts gives it limited value.

## ARBITRATOR CREDIBILITY ASSESSMENT

The Arbitrator finds Petitioner was a credible witness on his own behalf, answering all questions put to him by both attorneys with no apparent attempt to evade. Major Wright is also found to be a credible witness for the same reasons. Both Dr. Bradley and Dr. Stewart answered all questions asked of them by the attorneys and are similarly found to be credible witnesses. The weight to be given to their opinions will be addressed in the Conclusions of Law, below.

## CONCLUSIONS OF LAW:

**In support of the Arbitrator's decision relating to whether an accident occurred which arose out of and in the course of Petitioner's employment by Respondent on November 18, 2021, and whether Petitioner's current conditions of ill-being, bilateral carpal tunnel and bilateral cubital tunnel syndromes, are causally related to the accident of November 18, 2021, the Arbitrator makes the following findings:**

The findings of fact, above, are incorporated herein.

The summaries of medical evidence and deposition testimony, above, are incorporated herein.

Petitioner's testimony, if unrebutted, can be sufficient to prove the hand intensive, sometimes repetitive nature of his work, that is, it can be sufficient to satisfy his burden of proof for an accident arising out of and in the course of his employment by Respondent on November 18, 2021. Respondent introduced evidence which could tend to lessen the weight of Petitioner's testimony, namely the work history gathered by Major Wright and Petitioner's timesheets. Major Wright testified that he prepared a roster of Petitioner's job assignments from March 1, 2020 through December 31, 2020, which was contained in Respondent's Exhibit 2. Major Wright explained that in preparing the roster, he pulled the original rosters for each of the days during that time period.

Major Wright testified about the different job assignments which were contained in that roster. His description of the job duties for "Gardens" assignment (1 day), HCU duty working with health care employees (4 days), Commissary, either supervising inmates working in the commissary or buying items for inmates and delivering them to their cells (2 days), Writ duty, escorting inmates to destinations and supervising them, as required by court writs and medical furloughs (12 days), Bus Chase, driving a bus or being in a following vehicle during prisoner transfers (6 days), Tower duty, which involved looking at the prison grounds and buildings from inside a tower (3 partial days), and Control duty, checking people in and out and visually watching the wings where other officers were working (20 days), noted a relatively small usage of the hands, did not appear to be hand intensive per Major Wright's testimony or even Petitioner's testimony. Another duty not discussed by either witness, but not obviously hand intensive, was hospital Duty (5 days).

Other job assignments did appear, per the testimony of Major Wright and Petitioner, to involve more hand activity, such as Zone Patrol (10 days), X house duty (2 days), DR, supervision of dayroom inmates (32 days), HCU assignments with medical staff going to cells and opening them (4 days) were all described by the witnesses as being more hand intensive, with opening cell doors, moving meal carts and lifting and carrying boxes of inmate belongings which varied in weight of up to 200 pounds. TAC assignment would appear to be the tactical team work, which Petitioner testified involved training and prisoner interaction in removal from cells, etc., which was physical work including the use of the arms and hands (6 days). It should be noted that Petitioner could be required to participate in tactical team work on an emergency basis while assigned to other duties.

Some job assignments were not adequately described by either witness to determine how intensive or non-intensive hand and arm usage was, including Visiting Room, Watch, PRB, R&C Foyer/ESC, SM, and Training.

Of the 306 days included in the roster introduced into evidence, Petitioner actually worked 135 days, 44.12 percent of the work days, and did not work 171 days, 55.88 percent of the work days, due to days "Off," "Off-SP," "Off-SF," "Off-P," "Off-R," "Off-Child C," "Off-A," "Off-H," "Off-A," "PT – Paternity Time," "Sick Family," or "Vacation." Of the 135 days that Petitioner worked, at least 48 of those, 35.55 percent, would have been in what has been described as non-hand intensive duty, leaving with Petitioner working in numerous different assignments which could be described as hand intensive on 87 days over a 306 day period, 28.43 percent, with periods of time working non-hand intensive jobs scattered throughout those 87 days, and many of those 87 days were spent performing duties not described as hand intensive or non-hand intensive by either witness, as noted in the paragraph immediately above.

While Respondent did not include the 321 days of 2021 preceding this alleged accident date in the roster breakdown of assignments, it did introduce Petitioner's timesheets for that period of time in Respondent Exhibit 4. Petitioner's workdays are generically described in that exhibit as "RC," meaning roll call, with occasions of mid-shift changes of assignments getting noted on days that occurred. Days off are noted as "A," Acc. Holiday Taken, "C," Comp Time Taken, "H," Holiday, "O," Day Off, "P," Personal Business, "SF," Sick Family, "SP," Sick Personal, and "V," Vacation. During those 321 days Petitioner actually worked 183 days, 57.01 percent of the days, and was off work 138 days, 42.99 percent of the days. If the percentage of non-hand intensive days and possible hand intensive days were similar to the period in the rosters from 2020, Petitioner would have worked 118 days in work that might have been hand intensive, with those days scattered among 203 off work days and non-hand intensive work days.

Both Dr. Bradley and Dr. Stewart testified to their opinions on causation, with Dr. Bradley strongly of the belief that Petitioner's work, as described to him by Petitioner in a written summary as well in person, was the cause for his carpal and cubital tunnel conditions, while Dr. Stewart was just as strongly of the belief that Petitioner's work did not cause the conditions. The Arbitrator would note that Dr. Stewart's testimony in regard to his actually visiting the correctional center and the opinions he had based on that visit, have not been considered in arriving at the findings in this decision as Petitioner's objections to that testimony have been sustained, as no mention of that visit or of opinions based upon that visit were contained in the examination report provided to Petitioner's counsel by Respondent.

Neither Dr. Bradley nor Dr. Stewart were aware of the different assignments Petitioner was working and the insignificant hand use in many of those assignments. Nor does it appear they were aware of the large amount of time Petitioner was not working in the 627 days prior to his first seeing Dr. Bradley. An award cannot be based upon speculation, conjecture, or surmise., but must have some substantial foundation in the evidence. Swift & Co. vs. Industrial Commission, 302 Ill. 38,43 (1922); County of Cook vs. Industrial Commission, 68 Ill.2d 24,30 (1977). Medical opinions need not be relied upon if they are based upon evidence which is contradicted by other evidence. Horath vs. Industrial Commission, 96 Ill.2d 349,356 (1983). Here, Petitioner's description of his job has been contradicted by the testimony of Major Wright and the detailed evidence of Petitioner's varying duties, many of which were described as non-hand intensive, the great number of days he did not actually work during the 627 days prior to his first seeing Dr. Bradley, and the number of large number of non-hand intensive work days among the days he worked.

**The Arbitrator finds that Petitioner has failed to prove that he suffered an accident on November 18, 2021 which arose out of and in the course of his employment by Respondent.**

**The Arbitrator further finds that Petitioner has failed to prove that his current conditions of ill-being, bilateral carpal tunnel and bilateral cubital tunnel syndromes, are causally related to the alleged accident of November 18, 2021.**

These findings are based upon the evidence cited above, as well as the lack of evidence showing repetitive, forceful use of the hands or arms sufficient to cause or aggravate carpal or cubital tunnel syndromes, per the opinions of Dr. Stewart and a thorough review of the roster exhibit prepared by Major Wright, the testimony of Major Wright, and the timesheets introduced into evidence. Petitioner's work was broken up through the period of 627 days prior to this alleged date of accident, with Petitioner either not working at all or working non-hand intensive duties during the vast majority of those days.

**Based upon the findings in regard to accident and causal connection, all other issues are deemed moot.**

**Compensation is therefore denied.**

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 22WC013278 |
| Case Name | Thomas Qualls v.<br>State of Illinois - Graham Correctional Center |
| Consolidated Cases | |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 24IWCC0608 |
| Number of Pages of Decision | 20 |
| Decision Issued By | Deborah Simpson, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Thomas C Rich |
| Respondent Attorney | Thomas Bowman |

DATE FILED: 12/16/2024

/s/Deborah Simpson,Commissioner

Signature

STATE OF ILLINOIS )
) SS.
COUNTY OF )
SANGAMON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Thomas Qualls,
Petitioner,

vs. NO: 22 WC 13278

State of Illinois Graham Correctional Center,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 6, 2023, is hereby affirmed and adopted.

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

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

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

**December 16, 2024**
o: 11/6/24
DLS/rm
046

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

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

/s/*Raychel A. Wesley*
Raychel A. Wesley

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 22WC013278 |
| Case Name | Thomas Qualls v. State of IL/Graham Correctional Center |
| Consolidated Cases | |
| Proceeding Type | |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 18 |
| Decision Issued By | Jeanne AuBuchon, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Thomas C Rich |
| Respondent Attorney | Thomas Bowman |

DATE FILED: 10/6/2023

**THE INTEREST RATE FOR THE WEEK OF OCTOBER 3, 2023 5.34%**

/s/ Jeanne AuBuchon, Arbitrator

Signature

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

October 6, 2023

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation

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

**THOMAS QUALLS**
Employee/Petitioner

v.

**STATE OF IL/GRAHAM CORRECTIONAL CENTER.**
Employer/Respondent

Case # **22** WC **013278**

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 **Springfield**, on **August 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 **May 5, 2022**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**119,077.00**; the average weekly wage was $**2,289.84**.

On the date of accident, Petitioner was **53** years of age, ***single*** with **0** dependent child(ren).

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

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

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

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

**ORDER**

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

Respondent shall pay Petitioner temporary total disability benefits of $1,526.56/week for 6 4/7 weeks, representing Petitioner's periods of incapacity from June 29, 2022, through July 18, 2022, (2 5/7 weeks) and October 5, 2022, through October 31, 2022, (3 6/7 weeks), as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $**931.11**/week for **66.45** weeks, because the injuries sustained caused the **7.5% loss of the right and left hands (28.5 weeks), and the 7.5% loss of the right and left arms (37.95 weeks)**, as provided in § 8(e) of the Act.

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

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

Jeanne L. AuBuchon

Signature of Arbitrator

**OCTOBER 6, 2023**

## PROCEDURAL HISTORY

This matter proceeded to trial on August 24, 2023, on all disputed issues. The issues in dispute are: 1) whether the Petitioner sustained accidental injuries that arose out of and in the course of his employment; 2) the causal connection between the accident and the Petitioner's bilateral carpal and cubital tunnel syndromes; 3) liability for medical bills incurred; 4) liability for temporary total disability (TTD) benefits from June 29, 2022, through July 18, 2022, and from October 5, 2022, through October 31, 2022; and 5) the nature and extent of the Petitioner's injuries. In addition, at trial the Arbitrator reserved ruling on the Respondent's objection to admission of exhibits that were attached to the deposition of the Section 12 examiner.

## FINDINGS OF FACT

The Petitioner was employed with the Illinois Department of Corrections for almost 32 years. (T. 11) He began in 1990 as a corrections officer at Stateville Correctional Center maximum security facility for about a year – bar rapping, using Folger Adams keys, handcuffing and uncuffing and performing shakedowns. (T. 12-13) He then worked at Taylorville Correctional, a minimum security facility where he served 95 percent of the time as a housing unit officer with 50 percent of that time being in segregation, with his duties being the same as they were at Stateville. (T. 14) The Petitioner then worked at Graham Correctional Center for about 15 years, with 60 percent of his time spent on the wing. (T. 16) He said he used his hands all day – signing inmates in and out hundreds of times a day and keying locks hundreds of times a day. (T. 17) He said he served three of his 15 years at Graham in segregation, which is a lockdown unit where restraints are used, doors are locked and chuckholes are used. (T. 17-18) The Petitioner then worked in dietary as a correctional food supervisor starting in 2008. (T. 18, 44) He said he supervised inmates cooking food, got the materials out for them to cook the food, unlocking doors,

supervising inmates retrieve and unload food and participating in the activities the inmates were performing (T. 18-20)

The Petitioner testified that the prison had been short-staffed for the past 10 years. (T. 20) He said that during the COVID lockdown, he had to do the work that the inmates did, which involved an exponential increase in the use of his arms and hands. (T. 20-21) He said he keyed an estimated 50 locks per shift – 50 percent padlocks and 50 percent door locks – using regular keys. (T. 38)

In a written job description prepared April 6, 2022, the Petitioner stated that as food service program manager, he did not lift, push, pull, bend, stoop, load or unload. (PX6) He wrote that in previous assignments, he lifted property boxes, searched inmates and loaded and unloaded property trucks and records. (Id.) He said that in his current position, he removed stock from shelves 12 times a day, unlocked and locked doors and locks and typed 50 percent of the day. (Id.)

The Respondent submitted a position description for food services program manager that listed administrative and supervisory duties for a majority of work time plus performing other duties as required or assigned which are reasonable within the scope of his duties. (RX4) There were no position descriptions submitted for the Petitioner's job prior to becoming food services program manager.

The Petitioner testified that he did not have gout, diabetes, hypothyroidism or rheumatoid arthritis. (T. 15) He said he was 5-foot-11-inches tall and weighed 285 pounds. (Id.) He said he was never diagnosed as being obese nor with any health issues related with being heavy. (T. 29-30) He takes medication for blood pressure, acid reflux and pituitary adenoma. (T. 30) He said the medication controls his high blood pressure. (T. 31) He did not use tobacco. (T. 35) He did not have any prior injuries to his hands or arms. (T. 42)

The Petitioner said that in the last 15 years at the prison, he started to notice symptoms in his elbows and wrists. (T. 21) He said he lived with it and would shake out his hands, stop lifting and stretch his hands when he needed to. (T. 22) He said that his symptoms work him up two or three times a week. (T. 40) He said the symptoms got so bad that he did research to figure out what was making his elbows and hands hurt so badly and believed he had symptoms of carpal tunnel. (T. 23) He "asked around" and contacted Petitioner's counsel, who told him about Dr. Matthew Bradley, an orthopedic surgeon at Metro-East Orthopedics. (Id.)

On May 5, 2022, the Petitioner saw Dr. Bradley and complained of bilateral elbow, wrist and hand pain with numbness. (PX3) He reported that the symptoms had been present for about 15 years and initially thought they were "just a sign of aging" but progressively worsened to the point that taking pain medication and shaking his hands no longer provided relief. (Id.) Dr. Bradley noted that the Petitioner worked for the Respondent for 32 years, serving in multiple positions, most recently as a food service program manager. (Id.) Dr. Bradley said the Petitioner repetitively locked and unlocked doors, as almost every door was kept locked at all times. (Id.) Dr. Bradley said the Petitioner did repetitive computer work with typing and using a mouse. (Id.)

After a physical examination, Dr. Bradley diagnosed bilateral carpal and cubital tunnel and recommended electromyography and nerve conduction studies (EMG/NCS), bracing, home exercises and over-the-counter anti-inflammatories. (Id.) Dr. Bradley said in his report that the explained to the Petitioner how the chronic, repetitive use of and trauma to his elbows while working for the past 32 years could lead to development of carpal and cubital tunnel syndromes. (Id.) The studies revealed moderate to severe carpal tunnel syndrome on the left, mild to moderate carpal tunnel syndrome on the right, moderate bilateral Guyon's canal syndrome (entrapment neuropathy of the ulnar nerve at the wrist) and mild bilateral cubital tunnel syndrome. (PX4)

The Petitioner testified that wearing a brace did not help, his fingers were still tingling, and his elbows were still hurting. (T. 23-24) On May 12, 2022, he reported to Dr. Bradley that conservative measures had no significant effect on his symptoms. (PX3) Dr. Bradley recommended surgery. (Id.)

On June 29, 2022, Dr. Bradley performed a left cubital tunnel release with left open carpal tunnel decompression, followed by right cubital tunnel decompression and open right carpal tunnel decompression on October 5, 2022. (PX3, PX5) The Petitioner reported significant improvement following each procedure. (PX3) During a visit on October 31, 2022, Dr. Bradley noted that Petitioner's hands were back to near normal, returned Petitioner to work full duty without restriction, and placed Petitioner at maximum medical improvement. (Id.) For residual symptoms, Dr. Bradley recommended the Petitioner continue his home exercise program and use over-the-counter pain medication as needed. (Id.)

On August 5, 2022, the Petitioner underwent a Section 12 examination by Dr. Patrick Stewart, a hand surgeon at Sarah Bush Lincoln. (RX6) The Petitioner's described his duties as food service supervisor and manager similarly to his testimony and reports to Dr. Bradley. (Id.)

Dr. Stewart found no causal connection between the Petitioner's work duties and his compression neuropathies. (Id.) In support of this conclusion, Dr Stewart said the Petitioner had multiple issues and comorbidities – specifically a body mass index over 30 and hypothyroidism – that place patients at an increased risk for compression neuropathies. Dr. Stewart noted that there was repetitive opening of door locks and padlocks that required nominal force, and the locks were normal and smooth operating. (Id.) He said the Petitioner's position was not abnormal for the hands, wrists or elbows in his activities. (Id.) He said there was no prolonged elbow flexion, no repetitive elbow flexion or maintained elbow flexion with a forced grip. (Id.)

Regarding treatment, Dr. Stewart said one week of conservative treatment was not an appropriate time frame to assess whether a patient is going to show levels. (Id.) He said there were no attempts to treat the cubital tunnel with conservative treatment --- specifically elbow splinting. (Id.) Dr. Stewart did not see an indication for the X-rays obtained because there was no indication of trauma, joint discomfort, joint tenderness, swelling or effusion. (Id.) Dr. Stewart believed no additional medical treatment was necessary but thought the Petitioner would benefit from conservative treatment, depending on his symptoms related to the right upper extremity. (Id.) He found the Petitioner at maximum medical improvement as to his left upper extremity. (Id.)

Dr. Bradley testified consistently with his records at a deposition on March 29, 2023. (PX7) Dr. Bradley said he reviewed the handwritten job description prepared by the Petitioner and the report of Dr. Stewart. (Id.) He noted the onset of symptoms from before the Petitioner worked in food service. (Id.) He said that in his practice, he had treated multiple correctional officers and was familiar with the jobs of correctional officers. (Id.) He said the Petitioner's descriptions of his jobs were in line with other correctional officers and food service employees that he had treated over the years. (Id.)

Dr. Bradley opined that the Petitioner's work within the Department of Corrections for the past 32 years – along with comorbidities – contributed to his carpal and cubital tunnel syndromes. (Id.) He thought that to offer a meaningful causation, one needed to look back at what the Petitioner was doing before and after he developed symptoms.

Dr. Bradley disagreed with the findings in Dr. Stewart that the Petitioner's job duties required nominal force; hand, wrist or elbow positions that were not abnormal; no prolonged or repetitive elbow flexion with a forced grip; and that the locks were smooth operating. (Id.) Dr. Bradley said that in speaking to the Petitioner and other correctional officers, he found that the

doors are not smooth operating, that the cell doors are very heavy and often jammed so that the officers have to pull with both hands and push against them to get them to lock. (Id.) He said he had stories of the locks being jammed by the inmates or just failing. (Id.) He did not think correctional officers and the Petitioner's hands were always in natural, normal positions. (Id.) He said the Petitioner was constantly stocking and unstocking shelves, pulling and lifting. (Id.) He said there was plenty of force and abnormal hand positions over the Petitioner's 32 years on the job to conclude that it contributed to his condition. (Id.)

Regarding his decision to perform surgery after a short period of conservative treatment, Dr. Bradley testified that the severity of the Petitioner's nerve compression does not respond to nonoperative treatment, and a patient could get to the point where the nerve becomes damaged so that the damage can't be reversed. (Id.) He said he recommended surgery to hopefully reverse all of the Petitioner's symptoms without resulting in permanent nerve damage. (Id.) Dr. Bradley acknowledged that the Petitioner's symptoms might have improved after retirement, stating that in some patients in a mild or moderate category, the symptoms will improve when the inciting repetitive trauma is taken away. (Id.) He added that in the more severe category, there is much scar tissue, and patients don't improve with nonoperative treatment. (Id.)

On cross-examination, Dr. Bradley was asked about whether he had ever pulled on or opened a cell door at a prison. (Id.) He did not know the frequency with which the Petitioner performed various tasks that he said contributed to his condition, but he said the Petitioner related that all day, every day, he was repetitively having to lock and unlock things – more so in food service than when he was a correctional officer. (Id.) Dr. Bradley said the Petitioner's age, weight and hypothyroid all contributed to his conditions to some degree. (Id.)

Dr. Stewart testified consistently with his report at a deposition on May 16, 2023. (RX7) He explained that some of the tests he performed during his physical examination of the Petitioner were designed to see if there is a difficulty or change in a patient's ability to sense things when the description of symptoms is long-term. (Id.) He said these tests on the Petitioner were normal. (Id.) Regarding the Petitioner's work history, Dr. Stewart said the Petitioner did not reference or indicate that he had a prior work history before working at Graham that he felt to be significant. (Id.) Dr. Stewart stated that he toured the prison and opened and closed doors, locks and padlocks in different housing units, the dining facility and the kitchen area. (Id.) Petitioner's counsel objected to this testimony. (Id.)

As to his opinion that the Petitioner's job duties did not affect the onset, severity or progression of his compression neuropathies, Dr. Stewart explained that opening 150-200 locks only takes under ten minutes to perform for a total workday and allows for greater time for recovery. (Id.) He said the locks were normal locks that function very smoothly and don't require force to open. (Id.) He said there was no allegation of a prolonged forceful grasp that puts people at increased for cubital tunnel nor of repetitive or maintained hyperflexion of the elbow that put the Petitioner at an increased risk. (Id.) Dr. Stewart also said that because the Petitioner had retired at the time of the examination, he would expect the Petitioner's symptoms to improve. (Id.)

On cross-examination, Dr. Stewart acknowledged that he previously examined correctional officers from four Illinois facilities and had never found work-related bilateral compression neuropathies. (Id.) He agreed that he had testified consistently in the past that work-related bilateral compression neuropathies are cumulative in nature. (Id.) He said he did not know nor take into consideration any of the Petitioner's other jobs he held prior to the food service supervisor job he held for the past four or five years. (Id.) He also did not know if the Petitioner was forced

back into cooking duty or loading and unloading food from trucks during the COVID pandemic lockdown at the facility. (Id.) He did not have job descriptions of any of the other positions the Petitioner held prior to being a food service supervisor. (Id.) He added that if a person worked in a hand-intensive job, such as in the forest industry, and had no complaints, difficulties or treatment and developed compression neuropathies years after leaving that work, he would not relate it back to the work in that industry. (Id.)

Also during cross-examination, Petitioner's counsel questioned Dr. Stewart about several exhibits to which Respondent's counsel objected at trial under Illinois Supreme Court Rule (ISCR) 206(h)(2) and on relevance. (RX7, T. 6) Petitioner's Deposition Exhibit 1 is a Section 12 report from an examination of a corrections officer injured in a fall. (PX9) Exhibits 2 and 3 are Section 12 reports by Dr. Ryan Calfee at Washington University School of Medicine and Dr. James Emanuel at Parkcrest Orthopedics from 2021 regarding Department of Correction employees whose carpal and cubital tunnel syndromes were found to be causally related to their work. (Id.)

The Petitioner testified that before the surgery, he had pain and ate ibuprofen. (T. 24) He said his elbows hurt when he drove or did anything that kept his arm in a certain position for any amount of time – like typing. (Id.) He said the surgery reduced his symptoms by 95 percent. (T. 43) The Petitioner retired on June 31, 2022, but went back to work in the same capacity as a contractual worker because the prison was short-staffed. (T. 25-26) He said that since the surgery he had had no problems, but his wrist and elbows get sore after lifting something heavy, and that he wakes up at night maybe once every two weeks. (T. 27-28) He said he takes over-the-counter ibuprofen a couple times a week – depending on what his activity is and how he is feeling. (T. 28) He said he had lifting restrictions that he followed. (T. 33) He said that after the surgeries, he was able to perform his job responsibilities satisfactorily. (T. 36)

## CONCLUSIONS OF LAW

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

As a preliminary matter, the Arbitrator reserved ruling on Respondent's objection to admission of Petitioner's Exhibit 9 – another copy of the deposition of Dr. Stewart with exhibits attached. The Respondent objected to the admission of the attached exhibits based on ISCR 206(h)(2) and relevancy. ISCR 206 is within Part E, which addresses discovery, and specifically pertains to taking depositions. Paragraph (h) provides the procedures for taking depositions by remote electronic means. Most of Rule 206 relates to discovery depositions, but parts thereof refer to evidence depositions. Paragraph (h) does not make a distinction between discovery and evidence depositions.

Subparagraph (2) provides: "Any exhibits or other demonstrative evidence to be presented to the deponent by any party at the deposition shall be provided to the officer administering the oath and all other parties within a reasonable period of time prior to the deposition." (ISCR 206(h)(2))

The fact that there is no discovery under the Workers' Compensation Act, makes this analysis different than in cases in civil court. The only disclosure rule under the Act is the 48-hour rule for expert opinions under *Ghere v. Industrial Comm'n*, 278 Ill. App. 3d 840, 663 N.E.2d (4th Dist. 1996). There is no penalty for failure to disclose any other evidence under the Act. If Dr. Stewart were testifying live at an arbitration hearing, there would be no basis for an objection under ISCR 206(h)(2).

In addition, review of ISCR 206(h) and the comments thereto make it apparent that the

Rule is a logistical or procedural one rather than substantive, with the Supreme Court setting ground rules to allow for the technological advancements in the ways depositions are taken.

The comments from 1999 state:

> "The committee is of the opinion that telephonic and other remote electronic means depositions should be allowed by a specific paragraph of Rule 206. It is meant to reduce unnecessary discovery costs. The committee recommends that all other demonstrative evidence to be presented to the deponent be premarked before being provided to the officer administering the oath and the other parties. The parties may agree pursuant to Rule 201(i) to amend or waive any conditions of paragraph (h). (ISCR 206 Comments)

It is apparent that the purpose of this rule is to ensure that the court reporter, witness and counsel all have the same exhibits while a deposition is being taken remotely. The remedy for violation of this rule would be to adjourn the deposition to make sure that everyone remotely present had the exhibits at hand. The Respondent simply objected and did not ask for adjournment to be able to see the exhibits about which the witness was testifying. The objection on the basis of ISCR 206 is overruled.

Regarding relevancy, this Arbitrator does not commonly sustain relevancy objections but gives the exhibits or testimony the weight she believes the evidence deserves. The Arbitrator sees that Petitioner's Deposition Exhibit 1 could be relevant in the Petitioner's attempt to show bias by Dr. Stewart because he performed another Section 12 examination on a correctional employee for the Respondent. However, the Arbitrator finds this report to be of little to no evidentiary significance as there is no indication that Dr. Stewart's opinion in this case was affected by the fact that the Respondent chose him to examine other correctional employees.

Petitioner's Deposition Exhibits 2 and 3 appear to be an attempt to compare this case with similar cases in which causation was found. However, this relevancy is limited in that each case is different, and this evidence has little bearing, if any, on the facts of the instant case.

Therefore, Petitioner Deposition Exhibits 1-3 are admitted over the objection of the Respondent, but the Arbitrator gives them little weight as explained above.

The Arbitrator also notes objections by the Petitioner to testimony elicited from Dr. Stewart in his deposition about conclusions he drew after visiting the prison. This was not contained in his report, and there was no proof that this information or the conclusions Dr. Stewart drew therefrom was disclosed at least 48 hours before testimony began. The Arbitrator finds this is a violation of the rulings in *Ghere*, and the testimony as to any conclusions drawn from Dr. Stewart's prison visit is hereby stricken.

Last is the preliminary issue of the Petitioner's credibility. The Petitioner's testimony and reports to his doctors were consistent. The doctors also found the Petitioner to be forthright. Therefore, the Arbitrator finds the Petitioner's testimony to be credible.

**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*. Compensation may be allowed where a workman's existing physical structure, whatever it may be, gives way under the stress of his usual labor. *Laclede Steel Co. v. Indus. Comm'n.*, 6 Ill.2d 296 at 300, 128 N.E.2d 718, 720 (Ill. 1955)

Further, 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, 901 N.E.2d 1066, 327 Ill.Dec. 333 (4th Dist., 2009). 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. Indus. Comm'n*, 365 Ill.App.3d 186, 192, 825 N.E.2d 773, 292 Ill.Dec. 185 (2nd Dist. 2005) See also *Darling v. Indus. Comm'n*, 176 Ill.App.3d 186, 530 N.E.2d 1135, 1142 (1st Dist. 1988). Proof of effort required or exertion needed may carry great weight only where the work duty complained of is a common movement made by the general public. *Darling*, 176 Ill.App3d. at 1142. As to whether the Petitioner's work duties complained of were common movements made by the general public, the Arbitrator finds that his duties were not common movements made by the general public. Therefore, proof of effort or exertion is not required.

In the instant case, Drs. Bradley and Stewart disagreed as to whether the Petitioner's repetitive trauma were due to his work. There are a couple of reasons why the Arbitrator gives Dr. Bradley's opinions more weight.

First and foremost, Dr. Stewart did not consider the 30+ years during which the Petitioner performed duties that would contribute to carpal and cubital tunnel syndromes. The Appellate Court has held that work history extending years before a claimant's alleged manifestation date is relevant because a repetitive-trauma injury is one which has been shown to be caused by the performance of the claimant's job and has developed gradually over a period of time, without requiring complete dysfunction. *PPG Indus. v. Illinois Workers' Comp. Comm'n*, 2014 IL App (4th) 130698WC, ¶ 19, 22 N.E.3d 48.

On the other hand, Dr. Bradley did take the Petitioner's work history into consideration in forming his causation opinion. The Arbitrator gives greater weight to the opinions of Dr. Bradley that years of repetitive use of his hands and arms in abnormal positions led up to the Petitioner's conditions. Dr. Bradley's opinions are further supported by the Petitioner's reports that he began experiencing symptoms 15 years prior to seeking treatment – while he was still a corrections officer and before becoming a food service program manager. These reports were consistent and uncontradicted.

Dr. Bradley's opinions also deserve greater weight because he was the Petitioner's treating physician and had more opportunities to become familiar with the Petitioner and his condition – especially prior to having surgery.

Therefore, the Arbitrator finds that the Petitioner has proved by a preponderance of the evidence that his bilateral carpal and cubital tunnel syndromes arose out of and in the course of his employment and were causally related to his work duties.

**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).

Although Dr. Stewart was critical of the number of X-rays taken and what he considered to be a short period of conservative care, Dr. Bradley thoroughly explained the rationale for his course of treatment. Based on this and the findings above, the Arbitrator finds that the medical services provided to the Petitioner were reasonable and necessary and orders the Respondent to pay the medical expenses contained in Petitioner's Exhibit 1. The Respondent shall have credit

for any amounts already paid or paid through its group carrier. Respondent shall indemnify and hold Petitioner harmless from any claims arising out of the expenses for which it claims credit.

**Issue (K): What temporary benefits are in dispute? (TTD)**

According to the Request for Hearing (AX1), the parties dispute TTD benefits for the periods of June 29, 2022, through July 18, 2022, and October 5, 2022, through October 31, 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 Respondent disputed liability for TTD on the basis of liability only. Based on the findings above regarding accident and causation, the Arbitrator finds that the Petitioner was entitled to TTD benefits from June 29, 2022, through July 18, 2022, and from October 5, 2022, through October 31, 2022.

**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.** There was no AMA impairment rating produced. Therefore, the Arbitrator gives this factor no weight.

(ii) **Occupation.** The Petitioner is retired but said he was working as a contract employee for the Respondent. There was no further evidence of what specific work he was performing or how that work may be affected by his condition. The Arbitrator places little weight on this factor.

(iii) **Age.** The Petitioner was 53 years old at the time of the injury. He could still have several work years left during which time he will need to deal with the residual effects of the injury. The Arbitrator places some weight on this factor.

(iv) **Earning Capacity.** There was no evidence of limitation of the Petitioner's earning capacity. Therefore, the Arbitrator places no weight on this factor.

(v) **Disability.** The Petitioner's achieved a good result from his surgeries and was returned to work full duty. However, he testified that he still experiences occasional soreness. The Arbitrator puts some weight on this factor.

Therefore, the Arbitrator finds the Petitioner's permanent partial disability to be 7.5 percent of the left arm, 7.5 percent of the left hand, 7.5 percent of the right arm and 7.5 percent of the right hand.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 22WC024042 |
| Case Name | John Weidemann v.<br>MetroLink/Bi-State Development |
| Consolidated Cases | |
| Proceeding Type | Petition for Review under 19(b)<br>Remand Arbitration |
| Decision Type | Commission Decision |
| Commission Decision Number | 24IWCC0609 |
| Number of Pages of Decision | 23 |
| Decision Issued By | Stephen Mathis, Commissioner |

| | |
|---|---|
| Petitioner Attorney | David Galanti |
| Respondent Attorney | Lisa Reynolds |

DATE FILED: 12/18/2024

/s/Stephen Mathis, 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

JOHN WEIDERMANN,

Petitioner,

vs. NO: 22 WC 024042

BI-STATE DEVELOPMENT,

Respondent.

DECISION AND OPINION ON REVIEW

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

This matter arises from a work-related injury sustained by Petitioner on August 16, 2022. Petitioner was employed as a signal electrician for Respondent. He was unloading a bag of tools from his service truck when he felt pain on the left side of his neck which extended to his left shoulder blade. Petitioner testified that the tool bag weighed about 60 lbs. He consulted his primary care physician who ordered an MRI.

A cervical MRI was performed which showed disc herniation at C3-C4, with mild to moderate spinal stenosis at that level. Mild spinal stenosis at C5-C6 was also reported.

Respondent sent Petitioner to Dr. Kitchens, a specialist in neurosurgery, who diagnosed a cervical strain, and restricted him to light duty work. Petitioner underwent a course of physical therapy, but his neck and arm pain increased over time causing Petitioner to stop working.

Petitioner treated with Dr. Kitchens from September 7, 2022, until October 20, 2022. Dr. Kitchens released Petitioner from treatment offering no further treatment options and returned him to full duty work. Dr. Kitchens expressed the opinion that Petitioner would not benefit from surgical treatment. Dr. Kitchens failed to address the herniation at the C3-4 level that was identified in two MRI scans and by Drs. Gornet and Mirkin.

Petitioner next came under the care of Dr. Gornet, an orthopedic surgeon on October 24, 2022. Dr. Gornet's PA performed the initial physical examination and suspected that the work accident had caused disc injuries at C3-4, C4-5, C5-6, and C6-7. She referred Petitioner to Dr. Blake for an epidural spinal injection as he had failed treatment with physical therapy. Dr. Blake performed a C6-C7 LESI with spread to C3-C4 on November 8, 2022, for a diagnosis of cervical radiculopathy. Petitioner experienced only temporary relief following the injection.

On January 12, 2023, Petitioner underwent a second MRI pursuant to an order by Dr. Gornet which showed a "fairly large" herniation at C3-4 and structural pathology at C5-6 and C6-7. A fragment was identified on the left side at C5-6. Dr. Gornet recommended a multi-level cervical disc replacement to relieve his symptoms of axial neck pain and radiculopathy. Dr. Gornet expressed the opinion that the multi-level pathology and need for surgery were causally related to Petitioner's August 16, 2022, work injury. Dr. Gornet's treatment plan contemplated a multi-level disc replacement surgery at C3-4, C4-5, C5-6, and C6-7.

On January 20, 2023, Petitioner was seen for a Section 12 examination at the request of Respondent by Dr. Mirkin who performed a physical examination and reviewed the medical records and the MRI imaging studies. Dr. Mirkin prepared a report and an addendum which included updated medical records and imaging. Dr. Mirkin expressed the opinion that Petitioner had a pre-existing cervical condition which was aggravated by his August 16, 2022, work injury. Dr. Mirkin noted there was a significant disc herniation evident on the right at the C3-4 level that caused some constriction of the spinal cord. Dr. Mirkin diagnosed cervical pain, cervicalgia, and disc protrusion at C3-4. He expressed the opinion that Petitioner had mild disc bulges at other levels that did not contribute to Petitioner's symptoms.

The Commission notes that Dr. Mirkin agreed with Dr. Gornet about the clinical significance of the C3-4 level disc herniation, Dr. Mirkin however emphasized in his report that no disc replacement device is approved for more than two-level use. More significantly Dr. Mirkin's experience with many patients that have undergone a four-level disc replacement surgery is that almost none had returned to full work activities. Dr. Mirkin acknowleged that a one-level disc replacement at C3-4 could potentially be reasonable. Based upon the foregoing opinions of Dr. Mirkin, the physical nature of Petitioner's employment, and his relatively young age, the Commission modifies the award of prospective medical care made by the Arbitrator to a

more conservative surgery than the four-level disc replacement procedure recommended by Dr. Gornet, i.e. one level disc replacement at level C3-4.

The Commission finds the opinions concerning the surgical recommendation of Dr. Gornet expressed by Dr. Mirkin to be persuasive and on that basis finds that only a one-level disc replacement is medically reasonable and necessary, not four levels, and therefore awards same. All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall approve and pay for Petitioner's prospective medical treatment i.e.disc replacement surgery at the C3-C4 level and all reasonable and necessary care related thereto.

IT IS FURTHER ORDERED BY THE COMMISSION that per the parties' stipulation on the record that Respondent shall pay all reasonable and related medical expenses related to Petitioner's cervical spine. Respondent shall pay the medical expenses outlined in Petitioner's Group Exhibit 11 from August 22, 2022, through July 28, 2023, as it related to his work accident of August 16, 2022, as provided in Sections 8(a) and 8.2 of the Act, pursuant to the medical fee schedule, with the exception of the following expenses:

Labcorp for date of service May 1, 2023, as there was no corresponding medical record entered into evidence or supporting document indicating why laboratory testing was ordered or preformed.

Greenville Family Medicine for dates of service July 26, 2021, August 5, 2021, September 1, 2021, December 22,2021, January 17, 2022, and May 10, 2022, as said expenses were incurred prior to Petitioner's work accident of August 16, 2022, and not causally related to the subject accident; and

Greenville Family Medicine for dates of service November 22, 2022, December 16, 2022, May 2, 2023, and May 16, 2023, as there were no corresponding medical records entered into evidence to support such charges.

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 has or will pay to Petitioner temporary total disability benefits commencing August 22, 2022, through October 23, 2022, representing 9 weeks pursuant to Section 8(b) of the Act, pursuant to the stipulation of the parties.

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 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 $30,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

**December 18, 2024**

o:11/6/24
SM/msb
44

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

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

/s/ *Raychel A. Wesley*
Raychel A. Wesley

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 22WC024042 |
| Case Name | John Weidemann v. MetroLink/Bi-State Development |
| Consolidated Cases | 22WC024039; |
| Proceeding Type | 19(b) Petition |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 18 |
| Decision Issued By | Linda Cantrell, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | David Galanti |
| Respondent Attorney | Juan Arias |

DATE FILED: 9/12/2023

/s/Linda Cantrell, Arbitrator

Signature

**THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 12, 2023 5.30%**

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)**

**John Weidemann**
Employee/Petitioner
v.
**MetroLink/Bi-State Development**
Employer/Respondent

Case # **22** WC **024042**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Linda J. Cantrell**, Arbitrator of the Commission, in the city of **Collinsville**, on **07/28/23**. 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, **8/16/22**, 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 $**73,775.00**; the average weekly wage was $**1,418.75**.

On the date of accident, Petitioner was **38** years of age, ***married*** with **2** dependent children.

Respondent ***has or will pay*** all reasonable and necessary charges for all reasonable and necessary medical services, pursuant to the stipulation of the parties.

Respondent ***has or will pay*** Petitioner temporary total disability benefits from **8/22/22** through **10/23/22**, Representing **9** weeks, pursuant to Section 8(b) of the Act, pursuant to the stipulation of the parties.

Respondent shall be given a credit of $**10,159.20** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**10,159.20**.

Respondent is entitled to a credit of $**TBD and any and all amounts paid** under Section 8(j) of the Act, pursuant to the stipulation of the parties.

**ORDER**

The parties stipulated on the record that Respondent agrees to pay all reasonable and related medical expenses related to Petitioner's cervical spine. Respondent shall therefore pay the medical expenses outlined in Petitioner's Group Exhibit 11 from 8/22/22 through 7/28/23 as it relates to his work accident of 8/16/22, as provided in Sections 8(a) and 8.2 of the Act, pursuant to the medical fee schedule, with the exception of the following expenses:

> Labcorp for date of service 5/1/23 as there was no corresponding medical record entered into evidence or supporting document indicating why laboratory testing was ordered or performed;
>
> Greenville Family Medicine for dates of service 7/26/21, 8/5/21, 9/1/21, 12/22/21, 1/17/22, and 5/10/22 as said expenses were incurred prior to Petitioner's work accident of 8/16/22 and not causally related to the subject accident; and
>
> Greenville Family Medicine for dates of service 11/22/22, 12/16/22, 5/2/23, and 5/16/23, as there were no corresponding medical records entered into evidence to support such charges.

Respondent shall provide and pay for prospective medical treatment, including, but not limited to, a disc replacement at C3-4, C4-5, C5-6, and C6-7, as recommended by Dr. Gornet, and all reasonable and necessary attendant care.

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

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

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

Arbitrator Linda J. Cantrell

ICArbDec19(b)

**September 12, 2023**

STATE OF ILLINOIS )
) SS
COUNTY OF MADISON )

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

| | | |
|---|---|---|
| **JOHN WEIDEMANN,** | ) | |
| | ) | |
| **Petitioner,** | ) | |
| | ) | |
| **v.** | ) | **Case No: 22-WC-024042** |
| | ) | |
| **METROLINK/BI-STATE DEVELOPMENT,** | ) | **Consolidated Case No. 22-WC-024039** |
| | ) | |
| | ) | |
| **Respondent.** | ) | |

## FINDINGS OF FACT

These claims came before Arbitrator Linda J. Cantrell for trial in Collinsville on July 28, 2023 pursuant to Section 19(b) of the Act. On or about 9/13/22, Petitioner filed an Application for Adjustment of Claim alleging injuries to his body as a whole as a result of carrying heavy batteries on 12/2/20. (Case No. 22-WC-024039, AX3). On or about 9/13/22, Petitioner filed an Application for Adjustment of Claim alleging injuries to his body as a whole as a result of picking up tool bags on 8/16/22. (Case No. 22-WC-024042, AX3)

The parties stipulated that Respondent shall receive credit for any and all medical bills paid through its group medical plan, under Section 8(j) of the Act. The parties stipulated on the record that Respondent agrees to pay all reasonable and related medical expenses related to Petitioner's cervical spine. With respect to Case No. 22-WC-024042, the parties stipulated that Petitioner is entitled to temporary total disability benefits from 8/22/22 through 10/23/22 and that Respondent shall receive a credit of $10,159.20 in temporary total disability benefits.

The issues in dispute are causal connection and prospective medical care. The Arbitrator has simultaneously issued a separate Decision in Case No. 22-WC-024039.

## TESTIMONY

Petitioner was 38 years old, married, with two dependent children at the time of the accident. Petitioner was employed by Respondent for 17 years as a signal electrician. He maintained and repaired all signal-related equipment. Petitioner testified that he injured his neck on 12/2/20 while carrying heavy batteries that weighed 70 to 80 pounds. He experienced pain in his neck and right shoulder that worsened in the days following the incident.

Petitioner treated at BarnesCare on 12/8/20 at the direction of Respondent. He underwent physical therapy and was placed at MMI on 1/5/21. Petitioner missed work from 12/13/20 through 1/4/21. He returned to full duty work for Respondent on 1/5/21. Petitioner testified that his symptoms subsided some when he returned to work but he still had ongoing intermittent pain and stiffness in his neck.

Petitioner testified that on 8/16/22 he was lifting his tool bag out of the back of his service truck and had neck pain that radiated to his left shoulder blade. He estimated the bag weighed 60 pounds and he had to lift it awkwardly to get it out of the truck. He completed his work shift and sought treatment with his primary care physician Dr. Siefken on 8/22/22.

Respondent referred Petitioner to Dr. Kitchens whom he treated with from 9/7/22 through 10/20/22. Petitioner testified he did not feel confident with Dr. Kitchens' treatment, and he went to Dr. Gornet. He underwent injections by Dr. Blake that provided relief for a couple of months. Dr. Gornet recommends a four-level disc replacement which Petitioner desires to undergo.

Petitioner testified that his neck is constantly stiff, and he has pain into both shoulders. He has numbness in his forearms and hands that alternates between his left and right side and varies in severity. Petitioner testified he has flare-ups of pain and stiffness that affects everything he does but he works through the symptoms.

Petitioner sustained another work injury on 7/21/23 that is not the subject of this proceeding. He testified that a piece of machinery fell on his forearm and hand, and it jerked him down causing pain in his arm, shoulder, and back. He testified that his neck stiffened up but returned to baseline. He has the same symptoms now that he had prior to 7/21/23.

On cross-examination, Petitioner testified that he was told 15 years ago that he possibly had a cervical disc herniation. He stated that the injury was also work-related while he was employed by Respondent. He did not believe he underwent a cervical MRI or CT scan as a result of that accident. He admitted to a history of chiropractic treatment ten years ago for tweaking his neck or back over the years.

Petitioner agreed he pulled something in his shoulder in March 2021 and reported to Dr. Siefken's office with right shoulder pain. He testified he has taken Nabumetone for a long time for neck and back pain. He underwent physical therapy at Apex Network in August 2021. Petitioner recalled an event in mid-March 2021 where he lifted a 150-pound dog out of the back of a truck and felt a pop. Petitioner testified that those symptoms resolved. He admitted to prior injections in his back, but none related to his cervical spine.

Petitioner testified that he is sure he told Dr. Siefken that his symptoms were related to the work accident that occurred on 8/16/22. He testified that he told Dr. Siefken about his accident 15 years prior and that he had the issue for years. He denied undergoing any cervical MRIs prior to his 8/16/22 work accident. He testified that Dr. Siefken ordered a cervical MRI after his August 2022 work accident that was denied by his private health insurer. He agreed that he reported his work accident to Respondent after the MRI was denied.

Petitioner testified that the EMG/NCS that Dr. Kitchens ordered showed right carpal tunnel syndrome. He agreed that when he saw Dr. Gornet's office on 10/24/22 his symptoms were more right-sided. He testified that his symptoms alternate from one side to the other or both at the same time. He stated that approximately one month after the accident his left side was unbearable, and he could barely function. His left-sided pain subsided with medication and therapy, and he felt more pain in his right side. Petitioner underwent two pre-operative EKGs that were abnormal, but he has been cleared for surgery.

## MEDICAL HISTORY

On 10/20/20, Petitioner underwent x-rays of his thoracic and lumbar spine at Elite Imaging. (RX 3, p. 154-155) Petitioner provided a history of mid to low back pain with pain between his shoulder blades for 15 years that was worsening.

On 12/8/20, Petitioner presented to BarnesCare with neck pain. (PX1) Petitioner reported pulling two 80-pound batteries on a cart up and down steps. He had an onset of neck pain following the incident. Petitioner completed a pain diagram which illustrated sharp, dull, and aching pain in his neck that radiated to his right shoulder. He rated his pain at 8/10. He reported he hurt his neck 15 years prior and was told he had a herniated disc. He underwent physical therapy and chiropractic treatment for that injury and last treated with the chiropractor 10 years ago. He takes Nabumetone and Cyclobenzaprine for his back pain, but it has not helped his neck pain. He called off work on Saturday due to pain and was scheduled off work on Sunday and Monday. He was due back to work today but came to the clinic.

Physical examination of the neck revealed stiffness, tenderness in the right neck and trapezius, and pain with flexion, extension, and rotation. X-rays appeared to be unremarkable except curvature, but the study was waiting to be read by a radiologist. Petitioner was assessed with cervical cervicalgia and a strain. The physician opined that Petitioner's accident was the prevailing factor in causing his condition and need for treatment. Petitioner's pain diagram was found to be consistent with clinical exam. Petitioner was referred to two weeks of physical therapy and placed on restrictions of no lifting, pushing, or pulling greater than 10 pounds and no commercial driving. He was prescribed Methocarbamol and provided a Thermacare wrap.

Petitioner underwent physical therapy at Apex Network. He reported a consistent history of injury, and it was noted Petitioner moved approximately 20 batteries on 12/2/20. He reported his prior neck injury from 15 years prior.

On 12/15/20, Petitioner followed up at BarnesCare and reported improvement with a pain rating of 5/10. He was working within his restrictions. He still had pain and stiffness worse on the right. Petitioner denied radiating pain, numbness, or tingling in his upper extremities. Examination revealed mild tenderness in the right trapezius, full flexion and extension with reported stiffness, limited lateral flexion to the right with reported discomfort, and full rotation with reported stiffness to the right. Petitioner was instructed to continue Methocarbamol, physical therapy, and work restrictions.

Petitioner was last seen at BarnesCare on 1/5/21 and reported feeling better. He rated his pain 0/10. He had been on vacation and not working, but he felt he could work full duty and he was back to baseline. The diagnosis was cervicalgia and strain of the muscle, fascia, and tendon at the neck. Petitioner was released at MMI without restrictions. (PX1, p. 2)

On 3/30/21, Petitioner presented to Mid Illinois Medical Care Associates (MIMCA) with sharp intermittent right shoulder pain that started two weeks ago without injury; however, the note also provided a history of pulling honeysuckle and felt a pop and pain above the right clavicle. (RX3, p. 198) He denied radiating pain. Current problems included low back and thoracic spine pain. Petitioner reported he had been taking Nabumetone for a long time with neck pain and wanted to change. He was prescribed Meloxicam and Flexeril. He was placed on restrictions of no lifting greater than 20 pounds and no overhead work for a few weeks.

On 4/27/21, Petitioner returned to MIMCA and reported his right shoulder pain radiated to his neck. His pain was sharp, intermittent, and cramping. He reported that overall he was improved, but he still had sharp pain off and on with certain activities. He had flare-ups with sleeping on his right side. Petitioner reported he limited his mobility at work. He was instructed to continue medications for pain control. Cervical spine x-rays and physical therapy was ordered. (RX3, p. 201)

On 8/10/21, Petitioner began physical therapy at ApexNetwork for lingering right shoulder pain with intermittent flare-ups. (PX2, p. 30) Petitioner reported chronic tightness and pain in his neck, with sharp pain in his collarbone. Petitioner reported lifting a dog weighing 150 pounds into the back of a truck in mid-March and felt a pop. He reported a previous diagnosis of a cervical herniated disc. Petitioner reported a history of injections in his neck a couple of times with no relief. He reported undergoing physical therapy for neck stiffness without relief and chiropractic treatment for his neck. His current symptoms included aching and stiffness and he rated his pain 8/10. He was unable to sleep on his right side and was careful with activities.

On 8/22/22, Petitioner presented to Greenville Family Medicine for posterior neck pain. (PX3, p. 5) Petitioner provided a history of a herniated disc years ago and last Tuesday he started having issues with it that had not gone away. His symptoms were sharp and stabbing with a gradual onset. Petitioner reported he has had this issue for years and tried physical therapy, muscle relaxers, and an MRI in the past two years. He reported that this time the pain was not letting up and felt different. Petitioner was positive for extremity numbness and weakness, limited range of motion in his cervical spine, and left shoulder blade pain. FNP Beckert diagnosed cervical radicular pain and anxiety. She ordered cervical spine x-rays and refilled Petitioner's prescription for Cyclobenzaprine. She noted Petitioner felt pain in both hands and arms and he would ultimately need a cervical MRI. Petitioner was placed off work through 9/6/22 for recurrent neck pain.

On 8/22/22, Petitioner underwent cervical spine x-rays at Maryville Imaging. (PX4, p. 3) The study revealed straightening of the cervical spine, which could be positional or due to muscle spasm, with normal alignment, vertebral body heights and disc spaces, and no fractures.

On 8/25/22, Petitioner followed up with FNP Beckert and was referred to physical therapy for cervical radicular pain. (PX3, p. 3-4) Petitioner began therapy at HSHS Holy Family Hospital on 8/26/22. (PX2, p. 1) He reported a long history of neck pain that had been getting progressively worse since 8/16/22 after lifting at work. His neck pain was constant and radiated down his left arm. It was noted that the recommended cervical MRI was denied by insurance. Therapy was recommended for 3 times per week for 4 weeks.

On 8/31/22, Petitioner was sent a letter from Cigna denying payment for a cervical MRI. (RX3, p. 136-138)

On 9/1/22, Dr. Daniel Kitchens ordered a cervical MRI for the diagnosis of cervicalgia. (PX5, p. 9) The MRI was performed on 9/6/22 that revealed a disc herniation at C3-4 with mild-to-moderate stenosis, and mild spinal stenosis at C5-6. (PX4, p. 2)

On 9/7/22, Petitioner was examined by Dr. Kitchens for pain in his left-sided neck, left shoulder, and upper arm. (PX5, p. 10) He reported a work injury on 8/16/22 while lifting tools out of his work truck and felt sharp pain in his neck and shoulder blade. He reported that his pain worsened the remainder of the week and moved into his arm until it was unbearable. Dr. Kitchens noted Petitioner's job duties included lifting heavy tools and supplies, working on his knees on the ground and overhead, climbing ladders, working with his arms extended for long periods, walking and carrying equipment long distances on railroad tracks, and driving and sitting in vehicles for long periods. Petitioner reported his left-sided neck pain radiated into his left shoulder blade, upper arm, axilla, forearm, and hand, with weakness in his left hand after the work incident. He has been off work since 8/22/22. Petitioner denied any pain into the right shoulder or arm. He complained of increased pain with lying down and looking to the left. He reported a previous injury 12 years ago when he fell at work and had neck stiffness and some discomfort in his left shoulder. He was unsure of the medical workup. He reported another incident at work years ago which led to neck pain. He reported having intermittent neck pain with occasional flare ups of pain into both shoulders. Petitioner was unsure of any additional work ups such as cervical x-rays or MRIs. He denied treating with a surgeon for his cervical spine. On exam, Petitioner had full 5/5 strength in the upper extremities. Spurling's test was negative.

Dr. Kitchens reviewed the cervical MRI and found a central, right-sided disc herniation at C3-4, loss of normal cervical lordosis associated with multi-level degenerative disc disease, and flattening of disc spaces at C3 through C7. There was no evidence of left-sided disc herniation, foraminal stenosis, or spinal cord injury. Dr. Kitchens diagnosed a cervical strain as a result of the work incident of 8/16/22. He opined that the work incident was not the prevailing factor for the herniation at C3-4 because Petitioner did not have any right-sided symptoms. Dr. Kitchens recommended four weeks of physical therapy, Tizanidine, and Tramadol. He recommended light duty work restrictions and an orthopedic evaluation for his left shoulder symptoms.

On 9/28/22, Petitioner followed up with Dr. Kitchens and reported pain in his neck, bilateral shoulders, and right forearm, with pain, numbness, and weakness in his right hand. (PX5, p. 4) He complained of creaking in his neck. Dr. Kitchens recommended an EMG/NCS of

the upper extremities to evaluate for cervical radiculopathy and peripheral neuropathy. He continued Petitioner on work restrictions.

On 10/4/22, FNP Beckert referred Petitioner to Dr. Matthew Gornet for cervical radicular pain. (PX3, p. 1-2)

On 10/18/22, Petitioner underwent an EMG/NCS of the bilateral upper extremities. (PX6, p. 1) Dr. Khariton noted the study showed no evidence of cervical radiculopathy or bilateral brachial plexopathy. It showed mild prolongation of the right median motor-sensory latency at the wrist, which could represent right carpal tunnel syndrome. The left upper extremity testing was normal.

On 10/20/22, Petitioner followed up with Dr. Kitchens and reported continued neck and bilateral shoulder pain. (PX5, p. 1) He complained of right hand and finger numbness and pain between his shoulder blades. Physical exam showed full strength of the upper extremities. Dr. Kitchens continued to diagnose a cervical strain as a result of the work accident without signs or symptoms of cervical radiculopathy or myelopathy. He opined that Petitioner would not benefit from surgery and released Petitioner from care. He opined that Petitioner could return to work without restrictions as of 10/25/22.

On 10/24/22, Petitioner was examined by Dr. Gornet's PA Joggerst. (PX7, p. 12) Petitioner complained of headaches and neck pain radiating to his right trapezius, scapula, and arm to his first and second digits. He complained of left trapezius and scapula pain, but his symptoms were worse on the right. Petitioner reported his symptoms began on 8/16/22 when he lifted a 60-pound tool bag from his truck and pulled it toward him. He felt sharp pain in the left side of his neck that radiated to his shoulder blades. He thought his symptoms would improve and reported the accident to his employer the following Friday when his pain increased. Petitioner reported that his employer sent him to Dr. Kitchens who recommended light duty which his employer did not accommodate. Petitioner reported he had a work injury in December 2020 and was off work for two weeks and underwent therapy. He returned to full duty work without restrictions.

Physical examination revealed restriction and guarding with range of motion in all directions of his cervical spine. Petitioner complained of increased pain with flexion and extension. He had full strength of the upper extremities. Sensation was normal. X-rays of the cervical spine showed well-preserved disc heights. Petitioner was stable on flexion and extension. Dr. Gornet reviewed the cervical MRI dated 9/6/22 and found it to moderate-to-poor quality; however, he noted disc protrusions at C3-4, C4-5, C5-6, and C6-7. He found a central, right-sided disc protrusion at C3-4 with cord compression, a disc protrusion at C4-5 flattening the cord, a large disc protrusion and annular tear at C5-6, and a disc protrusion and annular tear at C6-7, midline to the right. PA Joggerst indicated the work injury could certainly have aggravated Petitioner's underlying degenerative condition and caused disc injuries at C3-4, C4-5, C5-6, and C6-7. PA Joggerst recommended an epidural steroid injection at C6-7 and placed Petitioner on light duty restrictions. Petitioner was prescribed Meloxicam and Cyclobenzaprine. PA Joggerst opined that Petitioner's current symptoms and need for treatment were causally connected to the work injury of 8/16/22.

On 11/4/22, Petitioner called Dr. Gornet's office and requested a trial to return to work because his worker's compensation benefits were terminated. (PX7, p. 11) He reported his pain continued to affect his daily living. PA Collins advised that due to cord compression he should use extreme caution returning to work. PA Collins allowed Petitioner to return to full duty without restrictions beginning on 11/10/22 and clarified that Petitioner was not at MMI.

On 11/8/22, Petitioner underwent an ILESI at C6-7 performed by Dr. Helen Blake. (PX8, p. 1)

On 1/12/23, Petitioner underwent a cervical spine MRI at MRI Partners of Chesterfield ordered by Dr. Gornet. (PX9, p. 1) The study showed a central and right lateral recess and separate left foraminal protrusion at C6-7 with a cranially extruded disc fragment in the left lateral recess and medial foramen, resulting in moderate to severe left greater than right foraminal stenosis, ventral cord flattening, and mild central canal stenosis, a midline annular tear/fissure and protrusion at C6-7 resulting in mild central canal stenosis but no foraminal stenosis, a midline annular tear/fissure and protrusion at C4-5 resulting in dural displacement but no definite central canal or foraminal stenosis, and a right paracentral-lateral recess and separate left foraminal protrusions at C3-4 resulting in right ventral cord flattening, mild central canal stenosis, and moderate left foraminal stenosis.

Dr. Gornet interpreted the MRI as showing a fairly large herniation at C3-4 deforming the spinal cord, which he opined fit very well with Petitioner's axial symptoms. Dr. Gornet noted Petitioner had structural pathology from acute injuries at C5-6 and C6-7 with a decent sized fragment on the left at C5-6. Dr. Gornet reviewed Dr. Kitchens' records. He noted that Dr. Kitchens did not believe Petitioner's symptoms were associated with C3-4 because Petitioner had no right-sided symptoms, but Dr. Kitchens did not mention the large herniation on the left side at C5-6. Dr. Gornet noted Petitioner was working and his exam showed full motor strength. He indicated Petitioner was not at MMI and recommended observation.

On 1/20/23, Petitioner was examined by Dr. Peter Mirkin pursuant to Section 12 of the Act. (RX2, p. 102) Dr. Mirkin noted the history of Petitioner's work accidents in December 2020 and August 2022. Petitioner reported that his left-sided symptoms improved dramatically, but he had persistent right-sided symptoms, including numbness and tingling in his hand. He complained of limited range of motion in his neck. Examination revealed 60% of normal cervical range of motion, positive Spurling sign, motor and sensory exam was intact, tenderness to the right posterior shoulder, and decreased sensation on the dorsolateral aspect of the right wrist. Dr. Mirkin reviewed updated cervical spine x-rays which showed loss of lordosis. He reviewed the MRI and believed it showed a significant disc herniation on the right at C3-4 that caused some constriction of the spinal cord. He diagnosed cervical pain, cervicalgia, and a disc protrusion at C3-4. Dr. Mirkin indicated Petitioner had mild disc bulges at other levels which were non-contributory. He opined that Petitioner's symptoms were initially caused by the 12/2/20 work incident and were re-aggravated by the 8/16/22 incident. He advised that if Petitioner could not live with his symptoms, he recommended a myelogram to determine if surgery at C3-4 was appropriate. He opined that surgery was not indicated at any other level. Dr. Mirkin opined that Petitioner was not at MMI, but he did not require work restrictions.

On 2/28/23, Petitioner called Dr. Gornet's office and spoke with PA Joggerst. (PX7, p. 9) He reported he was working full duty without restrictions, but his neck symptoms flared-up and he was fairly miserable. He complained of left trapezius and scapular pain and some symptoms on the right side. He reported the steroid injection wore off and he wanted to pursue surgery. PA Joggerst indicated they would request medical clearance for surgery.

On 3/23/23, Petitioner followed up with Dr. Gornet with continued left trapezius and scapular pain and some symptoms on the right side. (PX7, p. 2) Dr. Gornet felt Petitioner's symptoms were consistent with MRI findings of a large herniation at C3-4 with cord deformity. He also noted acute injuries at C5-6 and C6-7 with another large fragment at C5-6. Dr. Gornet reviewed Dr. Mirkin's Section 12 report and noted Dr. Mirkin again did not comment on the large herniation at C5-6, or the protrusions from C3 through C7. Dr. Gornet indicated Petitioner had a multifocal problem and he recommended disc replacements at C3-4, C4-5, C5-6 and C6-7. He allowed Petitioner to work full duty without restrictions.

On 5/23/23, Dr. Mirkin provided an addendum report following review of updated records of Dr. Gornet and the cervical MRI dated 1/12/23. (RX2, p. 108) Dr. Mirkin found the MRI was of moderate quality. He found a significant protrusion with cord compression at C3-4 and mild bulging at other levels. Dr. Mirkin's previous opinions remained unchanged. He opined that Petitioner's condition was either caused and/or aggravated by the December 2020 incident and aggravated by the August 2022 incident. He opined that the MRI of 9/6/22 was most contemporaneous with the work injury and was of excellent quality and revealed a lesion at C3-4 which could potentially be surgical. Dr. Mirkin noted the other levels did not require surgery and there was no disc replacement device approved for more than two level use. Dr. Mirkin noted he had seen many patients who have undergone a four-level disc replacement surgery and that almost none had returned to full work activities. Dr. Mirkin noted Petitioner was able to work full duty when he was seen.

On 6/12/23, Petitioner underwent a cervical CT scan at CT Partners of Chesterfield. (PX10) The study was reported to show C3-4 right paracentral and C4-5 and C5-6 central protrusions resulting in moderate C3-4, mild C4-5, and mild to moderate C5-6 central canal stenosis with no definite foraminal stenosis. There was a probable central protrusion at C6-7. There was no significant facet arthropathy. Petitioner followed up with Dr. Gornet that day and complained of significant neck pain, headaches, and pain to both trapezius, down his right arm to his hand, and left side. Dr. Gornet again recommended structural treatment at C3-4, C4-5, C5-6, and C6-7.

Dr. Matthew Gornet testified by way of deposition on 6/1/23. (PX12) Dr. Gornet is a board-certified orthopedic surgeon who specializes in spine surgery. His testimony was consistent with his treating records. Dr. Gornet opined that treating only C3-4 rather than addressing all levels would not address the pathology that was causing Petitioner's symptoms. He testified that Petitioner has clear multi-level pathology including large herniations particularly at C5-6 on the left. He opined that Petitioner's symptoms correlated very well with the MRI findings. He testified that Petitioner would need a CT scan and medical clearance prior to surgery.

On cross-examination, Dr. Gornet testified he reviewed the cervical MRI dated 9/6/22 and agreed with the radiologist that the neural foramen at C3-4 were patent, but stated there was evidence of disc herniations at C4-5, C5-6, and C6-7. He testified it is possible that Petitioner's right hand symptoms were caused by carpal tunnel syndrome. He did not relieve a myelogram was necessary. Dr. Gornet opined that Petitioner's worked accident of 8/16/22 caused the acute disc pathology on the left at C5-6 and C6-7, and aggravated his underlying degenerative condition at C3-4 and C4-5. He testified that the disc injury at C3-4 would give Petitioner axial neck pain but would not explain Petitioner's arm symptoms into his hand. He opined that Petitioner's radicular symptoms on the left are coming from C5-6 that has a very acute injury. He testified that the FDA does not approve procedures but approves devices. He testified that a four-level disc replacement would be an off-label usage which the FDA has recorded is between the physician and patient and use of off-label devices is permitted by the courts. Dr. Gornet based his causation opinion on Petitioner's ability to perform full duty work without restrictions for at least one year prior to his accident with no medical treatment. He testified that once the event occurred Petitioner sought treatment, was placed off work, and objective studies show multi-level pathology, which was confirmed by two other physicians, one of which recommends surgery. He opined it would not be unusual for Petitioner to have flare-ups prior to his accident as he had pre-existing degeneration.

Dr. Daniel Kitchens testified by way of deposition on 12/7/22. (RX1) Dr. Kitchens is a board-certified neurosurgeon. He testified that the MRI performed on 9/6/22 showed a disc herniation at C3-4 which was central and to the right, with loss of normal cervical lordosis and multi-level degeneration at C3-4, C4-5, C5-6, and C6-7. He did not see any disc herniation or foraminal stenosis on the left, or any evidence of spinal injury. Dr. Kitchens diagnosed a cervical strain as a result of the 8/16/22 work incident. He opined that the work accident was not a prevailing factor in causing the disc herniation at C3-4 because Petitioner did not have any signs of motor or sensory loss associated with the herniation and the finding was incidental. Dr. Kitchens opined that the work incident did not aggravate or accelerate the C3-4 disc herniation.

Dr. Kitchens recommended physical therapy to treated Petitioner for a causally related cervical strain. He released Petitioner at MMI on 10/20/22 without the need for additional treatment. Dr. Kitchens testified that Petitioner was not a surgical candidate because he did not have signs of cervical radiculopathy or myelopathy. He disagreed with Dr. Gornet's opinion that the work incident caused disc injuries at C3-4, C4-5, C5-6, and C6-7, because there was no evidence Petitioner had symptoms related to those levels and the mechanism of injury did not involve an axial loading or significant force to the spine that would cause damage to four discs. Dr. Kitchens noted the incident involved Petitioner lifting tools out of a truck which was an everyday activity. He testified that the subsequent MRI ordered by Dr. Gornet was not reasonable or necessary because Petitioner did not initially have right-sided symptoms and there was no evidence on the MRI that he had any disc protrusions on the left that would account for his left-sided symptoms.

On cross-examination, Dr. Kitchens testified he disagreed with Dr. Gornet that the 9/6/22 MRI was of poor-to-moderate quality, and he found it to be of excellent quality. He testified that he does not perform disc replacement surgeries. He testified that an EMG/NCS is not 100%

dispositive of cervical radiculopathy secondary to a disc herniation and he has operated on patients where he suspected a herniation but had a negative EMG/NCS test for radiculopathy.

Dr. Peter Mirkin testified by way of deposition on 6/5/23. (RX2) Dr. Mirkin is a board-certified orthopedic spine surgeon. Dr. Mirkin noted Petitioner complained of pain in his neck, both shoulders, and numbness and tingling in his left hand. He noted that Petitioner's pain diagram showing pain in his neck and down his right upper extremity was inconsistent with Petitioner's verbal complaints. Dr. Mirkin noted the MRI showed a significant disc herniation at C3-4, primarily on the right, causing compression of the spinal cord. He testified that the bulges at other levels were noncontributory as they did not affect the spinal cord or nerve roots. He ordered a myelogram to delineate the anatomy better because Petitioner's symptoms waxed and waned and alternated between sides. Dr. Mirkin opined that Petitioner's condition was at least made symptomatic if not caused by the work injury. He testified that he recommends fusions for people that perform heavy work, but the type of procedure depends on the physician. He testified that Petitioner could work full duty as he was already doing so and wanted to do so.

Dr. Mirkin testified that Petitioner did not require surgery at any level other than C3-4. He testified that he could not tell a difference when comparing Petitioner's MRIs. He believed Petitioner was very honest and wanted to work.

## CONCLUSIONS OF LAW

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

Circumstantial evidence, especially when entirely in favor of the Petitioner, is sufficient to prove a causal nexus between an accident and the resulting injury, such as a chain of events showing a claimant's ability to perform manual duties before accident but decreased ability to still perform immediately after accident. *Pulliam Masonry v. Indus. Comm'n*, 77 Ill. 2d 469, 397 N.E.2d 834 (1979); *Gano Electric Contracting v. Indus. Comm'n*, 260 Ill.App.3d 92, 96–97, 631 N.E.2d 724 (1994); *International Harvester v. Indus. Comm'n*, 93 Ill.2d 59, 442 N.E.2d 908 (1982).

When a pre-existing condition is present, a claimant must show that "a work-related accidental injury aggravated or accelerated the pre-existing [condition] such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of the preexisting condition." *St. Elizabeth's Hospital v. Workers' Comp. Comm'n*, 371 Ill. App. 3d 882, 888, 864 N.E.2d 266, 272 (2007). Accidental injury need only be a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 205, 797 N.E.2d 665, 673 (2003) (emphasis added). Even when a pre-existing condition exists, recovery may be had if a claimant's employment is a causative factor in his or her current condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 797 N.E.2d 665 (2003). Allowing a claimant to recover under such circumstances is a corollary of the principle that employment need not be the sole or primary cause of a claimant's condition. *Land & Lakes Co. v. Indus. Comm'n*, 359 Ill. App. 3d 582, 834 N.E.2d 583 (2005). Employers are to take their employees as they find them. *A.C. & S. v. Industrial Comm'n*, 304 Ill. App. 3d 875, 710 N.E.2d 837 (1999) citing *General Electric Co. v. Industrial Comm'n*, 89 Ill. 2d 432, 434, 433 N.E.2d 671, 672 (1982). The law is clear that if a

preexisting condition is aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. *Rock Road Constr. v. Indus. Comm'n*, 227 N.E.2d 65, 67-68 (Ill. 1967), 37 Ill. 2d 123; see also *Illinois Valley Irrigation, Inc. v. Indus. Comm'n*, 66 Ill. 2d 234, 362 N.E.2d 339 (1977).

Respondent does not dispute Petitioner sustained injuries that arose out of and in the course of his employment with Respondent on 8/16/22 when he was lifting his tool bag out of the back of his service truck and had neck pain that radiated to his left shoulder blade. He estimated the bag weighed 60 pounds and he had to lift it awkwardly to get it out of the truck. He completed his work shift and sought treatment with his primary care physician Dr. Siefken on 8/22/22.

There is no dispute that Petitioner had treatment to his cervical spine prior to 8/16/22. Petitioner sustained a work injury on 12/2/20 that resulted in a diagnosis of cervicalgia and strain of the muscle, fascia, and tendon. (Case No. 22-WC-024039). Petitioner underwent physical therapy and was prescribed medications and work restrictions. He was released at MMI without restrictions on 1/5/21 at which time he reported feeling better with a pain rating of 0/10. He reported he felt he could work full duty and he was back to baseline. Petitioner testified that his symptoms subsided some when he returned to full duty work on 1/5/21, but he still had some intermittent pain and stiffness in his neck.

Petitioner treated again in March 2021 for acute right shoulder pain that radiated to his clavicle after pulling honeysuckle and felt a pop. He was prescribed medication and light duty restrictions for two weeks. On 4/27/21, Petitioner reported his right shoulder pain radiated to his neck. Cervical spine x-rays were ordered; however, no films or reports were admitted into evidence. Petitioner received physical therapy in August 2021 for lingering right shoulder pain and intermittent flare-ups. He reported chronic tightness and pain in his neck, with sharp pain in his collarbone. Petitioner reported lifting a dog weighing 150 pounds into the back of a truck in mid-March and felt a pop. Petitioner testified that his symptoms following the March 2021 incidents resolved and he continued to work full duty without restrictions.

There was no evidence that Petitioner received treatment for his cervical spine for one year prior to his work accident on 8/16/22. He worked full duty without restrictions as a signal electrician. Dr. Kitchens noted Petitioner's job duties included lifting heavy tools and supplies, working on his knees on the ground and overhead, climbing ladders, working with his arms extended for long periods, walking and carrying equipment long distances on railroad tracks, and driving and sitting in vehicles for long periods.

Petitioner reported a consistent history of injury to Greenville Family Medicine on 8/22/22. He reported that last Tuesday he started having issues with his neck that had not gone away. The Arbitrator notes that the previous Tuesday was the reported date of accident of 8/16/22. Petitioner described his symptoms as sharp and stabbing with a gradual onset. He admitted to a history of prior neck pain but reported that this time the pain was not letting up and felt different. Petitioner was positive for extremity numbness and weakness, limited range of motion in his cervical spine, and left shoulder blade pain. FNP Beckert diagnosed cervical radicular pain and ordered cervical spine x-rays. Petitioner was placed on light duty restrictions

that Respondent did not accommodate. He was evaluated for physical therapy on 8/25/22 and provided a history of neck pain that had been getting progressively worse since 8/16/22 after lifting at work. His neck pain was constant and radiated down his left arm.

Respondent referred Petitioner to Dr. Kitchens for treatment. He ordered a cervical MRI that showed a disc herniation at C3-4 with mild-to-moderate stenosis, and mild spinal stenosis at C5-6. Petitioner provided a consistent history of injury of lifting tools out of his work truck on that caused sharp pain in his neck and shoulder blade. He reported that his pain worsened the remainder of the week and moved into his arm until it was unbearable. Dr. Kitchens diagnosed a cervical strain as a result of the work incident, but the accident was not the prevailing factor for the herniation at C3-4 because Petitioner did not have any right-sided symptoms and the finding was incidental. Dr. Kitchens recommended four weeks of physical therapy, medications, and light duty restrictions.

Petitioner testified he was not confident in Dr. Kitchens' treatment, and he chose to treat with Dr. Gornet. Petitioner was prescribed medications and placed on light duty restrictions. He underwent an epidural steroid injection at C6-7 by Dr. Blake that provided relief for a couple of months. Dr. Gornet ordered a new cervical MRI that he interpreted as showing a fairly large herniation at C3-4 deforming the spinal cord, which he opined fit very well with Petitioner's axial symptoms. Dr. Gornet noted Petitioner had structural pathology from acute injuries at C5-6 and C6-7 with a decent sized fragment on the left at C5-6. Dr. Gornet noted that Dr. Kitchens did not mention the large herniation on the left side at C5-6 or the other herniations that were also seen on the MRI dated 9/6/22. Dr. Gornet recommended disc replacements at C3-4, C4-5, C5-6, and C6-7.

The Arbitrator is more persuaded by the opinions of Dr. Gornet than those of Drs. Kitchens and Mirken. Dr. Mirkin agreed that Petitioner was a surgical candidate as a result of the injuries he sustained on 8/16/22; however, he recommended a single-level surgery at C3-4 and opined that the bulges at other levels were noncontributory as they did not affect the spinal cord or nerve roots. Dr. Mirkin opined that Petitioner's condition was at least made symptomatic if not caused by the work injury. He agreed that the type of surgery to be performed depended on the physician.

Dr. Gornet opined that Petitioner's symptoms correlated very well with the MRI findings. He opined that Petitioner's worked accident of 8/16/22 caused the acute disc pathology on the left at C5-6 and C6-7, and aggravated his underlying degenerative condition at C3-4 and C4-5. Dr. Gornet opined that treating only C3-4 rather than addressing all levels would not address the pathology that was causing Petitioner's symptoms. He testified that the disc injury at C3-4 would give Petitioner axial neck pain but would not explain Petitioner's arm symptoms into his hand. He opined that Petitioner's radicular symptoms on the left are coming from C5-6 that has a significant acute herniation. He testified that a four-level disc replacement is an off-label usage which the FDA has recorded is between the physician and patient and use of off-label devices is permitted by the courts. Dr. Gornet based his causation opinion on Petitioner's ability to perform full duty work without restrictions for at least one year prior to his accident with no medical treatment. He testified that once the event occurred Petitioner sought treatment, was placed off work, and objective studies show multi-level pathology, which was confirmed by two other

physicians, one of which recommends surgery. He opined it would not be unusual for Petitioner to have flare-ups prior to his accident as he had pre-existing degeneration.

The Arbitrator is not persuaded by Dr. Kitchens' opinion that the work accident caused a cervical strain as Petitioner has not returned to baseline and there is objective evidence of disc pathology which was confirmed in part by Dr. Gornet and Dr. Mirkin. The evidence does not support Dr. Kitchens' findings that Petitioner does not have signs of cervical radiculopathy or that Petitioner has no symptoms related to the pathology confirmed at C3-4, C4-5, C5-6, and C6-7. Dr. Kitchens also opined that Petitioner's mechanism of injury did not involve an axial loading or significant force to the spine that would cause damage to four discs. He testified that Petitioner's actions of lifting tools out of a truck was an everyday activity. The Arbitrator is not persuaded that lifting a 60-pound tool bag out of the back of a truck in an awkward position as Petitioner described to be everyday activity. Further, Dr. Kitchens testified he does not perform disc replacement surgeries, but admitted he has performed operations on patients where he suspected a herniation but had a negative test for radiculopathy.

Based on the evidence as a whole, the Arbitrator finds that Petitioner's current condition of ill-being in his cervical spine is causally connected to the work accident that occurred on 8/16/22.

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

**Issue (K): Is Petitioner entitled to prospective medical care?**

The parties stipulated on the record that Respondent agrees to pay all reasonable and related medical expenses related to Petitioner's cervical spine. Respondent shall therefore pay the medical expenses outlined in Petitioner's Group Exhibit 11 from 8/22/22 through 7/28/23 as it relates to his work accident of 8/16/22, as provided in Sections 8(a) and 8.2 of the Act, pursuant to the medical fee schedule, with the exception of the following expenses:

Labcorp for date of service 5/1/23 as there was no corresponding medical record entered into evidence or supporting document indicating why laboratory testing was ordered or performed;

Greenville Family Medicine for dates of service 7/26/21, 8/5/21, 9/1/21, 12/22/21, 1/17/22, and 5/10/22 as said expenses were incurred prior to Petitioner's work accident of 8/16/22 and not causally related to the subject accident; and

Greenville Family Medicine for dates of service 11/22/22, 12/16/22, 5/2/23, and 5/16/23, as there were no corresponding medical records entered into evidence to support such charges.

Pursuant to the stipulation of the parties, Respondent shall receive credit for any and all medical expenses paid through its group medical plan, pursuant to Section 8(j) of the Act.

The Arbitrator further finds that Petitioner is entitled to receive the additional care recommended by Dr. Gornet. Petitioner has persistent symptoms and has not returned to baseline despite conservative care, including medications, activity and work modifications, physical therapy, and an injection. Therefore, Respondent shall provide and pay for prospective medical treatment, including, but not limited to, a disc replacement at C3-4, C4-5, C5-6, and C6-7, as recommended by Dr. Gornet, and all reasonable and necessary attendant care.

This award shall in no instance be a bar to further hearing and determination of any additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

Arbitrator Linda J. Cantrell

September 12, 2023
DATE

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 23WC008430 |
| Case Name | Jake Seets, III v.<br>Metro East Industries, Inc. |
| Consolidated Cases | |
| Proceeding Type | Petition for Review under 19(b)<br>Remand Arbitration |
| Decision Type | Commission Decision |
| Commission Decision Number | 24IWCC0610 |
| Number of Pages of Decision | 22 |
| Decision Issued By | Raychel Wesley, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Giambattista Patti |
| Respondent Attorney | James Keefe, Jr. |

DATE FILED: 12/23/2024

/s/Raychel Wesley,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

JAKE SEETS, III,

Petitioner,

vs. NO: 23 WC 08430

METRO EAST INDUSTRIES,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 6, 2024, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the reasonable and necessary medical expenses listed in Petitioner's Exhibit 7, pursuant to §8(a) and subject to §8.2 of the Act. This award excludes expenses related to services rendered by MRI Partners on August 14, 2023, and expenses related to services rendered by Dr. Bradley on September 18, 2023, which were unrelated to Petitioner's right knee condition. Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in §8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $960.11 per week for a period of 40 & 1/7ths weeks, representing April 12, 2023 through January 17, 2024, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b), this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any. Respondent shall have a credit of $6,649.74 for temporary total disability benefits already paid. Any permanent partial disability advance will be applied to an award of permanency.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall provide and pay for the follow-up visits recommended by Dr. Matthew Bradley, as provided in §8(a) of the Act.

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

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

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

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

**December 23, 2024**

/s/ *Raychel A. Wesley*

RAW/wde

O: 11/6/24

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/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 23WC008430 |
| Case Name | Jake Seets, III v.<br>Metro East Industries, Inc. |
| Consolidated Cases | |
| Proceeding Type | 19(b) Petition<br>Remand Arbitration |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 19 |
| Decision Issued By | Jeanne AuBuchon, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Giambattista Patti |
| Respondent Attorney | James Keefe Jr |

DATE FILED: 2/6/2024

/s/ Jeanne AuBuchon, Arbitrator
Signature

**THE INTEREST RATE FOR THE WEEK OF FEBRUARY 6, 2024 5.045%**

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)**

**Jake Seets, III**
Employee/Petitioner

v.

**Metro East Industries**
Employer/Respondent

Case # **23** WC **008430**

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 **January 17, 2024**. 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, **2/28/23**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**74,888.32**; the average weekly wage was $**1,440.16**.

On the date of accident, Petitioner was **47** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of $**0.00** for TTD, $**N/A** for TPD, $**N/A** for maintenance, and $**N/A** 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 listed in Petitioner's Exhibit 7, pursuant to the medical fee schedule, as provided in Section 8(a) of the Act. – except for MRI Partners services on August 14, 2023, and Dr. Bradley's services on September 18, 2023. Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $960.11 per week for the period of 4/12/23 through 1/17/24, representing 40-1/7 weeks, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $6,649.74 for temporary total disability benefits that have been paid. Any PPD advance will be applied to an award of permanency.

Respondent shall authorize and pay for medical treatment, specifically follow-up visits with Dr. Matthew Bradley, 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.

Jeanne L. AuBuchon
Signature of Arbitrator

**February 6, 2024**

ICArbDec19(b)

## PROCEDURAL HISTORY

This matter proceeded to trial on January 17, 2024, pursuant to Sections 19(b) and 8(a) of the Illinois Workers' Compensation Act (hereinafter "the Act"). The issues in dispute are: 1) whether the Petitioner sustained accidental injuries that arose out of and in the course of his employment; 2) the causal connection between the accident and the Petitioner's right knee condition; 3) payment of medical expenses based on liability; 4) entitlement to temporary total disability (TTD) benefits from April 12, 2023, through January 17, 2024, based on liability; and 5) entitlement to prospective medical care to the Petitioner's right knee as to post-surgical follow-up treatment.

## FINDINGS OF FACT

At the time of the accident, the Petitioner was 47 years old and employed by the Respondent for 24½ years as a welder repairing rail cars. (AX1, T. 33) He said that on February 28, 2023, he was on his knees welding on a tire tube when he went to get up to move down to the next section of the car to weld, and his knee popped. (T. 36) He said he was working alone on the end of the car, and coworker Chad Votava was working at the other end of the car. (T. 37-38) He said Mr. Votava walked down to him, and he told Mr. Votava that his knee popped. (T. 38)

The Petitioner stated that he had no knee problems that caused him to see a doctor nor had any treatment or testing on his right knee before the accident. (T. 51)

Mr. Votava testified that he was working with the Petitioner when the Petitioner told him during a break after getting off the railcar that he had pain in his knees from crawling and "mentioned it popped." (T. 76, 81) He did not recall walking over to the Petitioner on top of the car and talking about the injury. (T. 81) Mr. Votava said that afterwards, he could tell the Petitioner was uncomfortable. (T. 78)

The Petitioner's cousin and coworker, Tony Walker, testified that on the day of the accident, he saw the Petitioner limping and asked what was the matter, to which the Petitioner stated that he was up on a car, tweaked his knee, heard a pop and was going to tell somebody. (T. 87) He said that supervisor Brad Long pulled up in a golf cart at the truck shop, and the Petitioner walked towards Mr. Long. (T. 89)

The Petitioner testified that after the accident, he saw Mr. Long and told him that he needed to have his knee looked at, that he was welding a tire tube and that his knee popped. (T. 39) He said Mr. Long replied that he saw the Petitioner walking funny and that he would contact Assistant Vice President Joel Beer and get the Petitioner a doctor's appointment. (Id.) The Petitioner said Mr. Long told him he was going to the main office to check in with his audit and would bring him paperwork to fill out. (Id.) The Petitioner testified that he also told Mr. Long that he had a knot on his shoulder and a hernia and inquired about a doctor's appointment to have those looked at, to which Mr. Long replied that he would ask Mr. Beer and get back with the Petitioner. (T. 40) The Petitioner said he saw Mr. Long on March 3, 2023, and asked him if he heard anything about a doctor's appointment, and Mr. Long stated that he forgot, but Mr. Beer told him he would have another supervisor, Tony Leadbetter bring him the paperwork. (T. 40-41) He said Mr. Leadbetter gave him the report form and told him to fill it out and bring it back to the office, but no one witnessed him complete the report. (T. 53-54)

The Petitioner identified the accident report he completed on March 3, 2023. (T. 41, PX1, RX1) The report did not state a date or time of injury and described the accident as "pulling on door and lifting tire tube or getting up down off my knees working on railcars." (PX1, RX1) The report said he verbally mentioned his injury to his bosses, Mr. Long and Jerry Twitchell. (Id.) As to what was bothering him, the Petitioner wrote: arm, both knees and belly. (Id.) The report did

not list any witnesses. (Id.) The Petitioner testified that he did not write in the date of the accident because he was also reporting the problems with his shoulder and hernia and did not know whether to put in dates for those injuries. (T. 42) He said Mr. Long told him he would ask Mr. Beer and write in the date. (Id.) The Petitioner testified that he did not list Mr. Votava as a witness to the accident because he thought a witness would be someone standing there working with him and seeing the accident, and Mr. Votava was not at his side. (T. 54, 69)

Mr. Long testified that he was the Alorton shop manager for the Respondent and described the procedure for reporting an injury, specifically, getting with the supervisor or himself, who takes the employee upstairs to the office and gives the employee the form to fill out while the supervisor is present and fills out the supervisor portion of the accident report. (T. 24-25) He said this process occurs immediately after the employee reports the injury. (T. 25-26)

As to the Petitioner's accident, Mr. Long testified that the Petitioner wanted to fill out an accident report to get his knees checked out "because there was no specific injury" and did not mention a pop. (T. 12-13) Mr. Long denied that the Petitioner reported a specific accident to him on February 28, 2023, when he pulled up on a golf cart. (T. 114) But he said he remembered pulling up on a golf cart and the Petitioner approaching him. (T. 115) Mr. Long said the Petitioner told him that he mentioned to safety personnel that he wanted to get his knees checked out and that Mr. Long replied: "No, this is the first I'm hearing of it, and I will check with Joel to find out more information about that." (T. 14) Mr. Long then denied telling the Petitioner that he had to speak with Mr. Beer, but stated that he did speak with Mr. Beer regarding the Petitioner's request to fill out an accident report. (Id.) Also in his testimony Mr. Long stated three other times that the Petitioner did not ask to fill out an accident report. (T. 15) But he said he did advise the Petitioner to fill out an accident report. (T. 16) When shown the accident report submitted by the Petitioner,

he said he had never seen it and was not present when the Petitioner completed it. (T. 17, 24) Mr. Long said he did not sign a supervisor report. (T. 27)

Mr. Long also testified that Mr. Twitchell was not working on February 28, 2023, or on March 3, 2023. (T. 28) The Petitioner testified that he included Mr. Twitchell on the report because he reported his hernia to Mr. Twitchell in October or November and had included his hernia in his accident report. (T. 55, 69-70)

Mr. Beer testified that he facilitates workers' compensation claims. (T. 94) He explained that the company's policy was that as soon as a traumatic incident occurs and a worker needs treatment, they fill out an accident report with either a supervisor or a leadman, he or his subordinate gets notified, files the claim and sets up an appointment for the worker to get treatment as quickly as possible. (T. 95) He could not recall the exact circumstances of the reporting the accident but said that as soon as they got the report, they made an appointment as soon as the doctor could get the Petitioner in for treatment. (T. 96) He characterized Mr. Long as being probably one of the most prompt managers they had as far as getting papers to him in a timely manner. (T. 97) Mr. Beers said he was not at the shop at the time of the accident or report. (T. 102)

At the direction of the Respondent, the Petitioner sought treatment on March 7, 2023, at Midwest Occupational Medicine, where he saw Dr. Panayliotis Ellinas and complained of right shoulder ache, right anterior shoulder nodule, umbilical hernia and bilateral knee ache. (PX2, RX2) Dr. Ellinas wrote that the Petitioner told him he had not sustained any specific injury and that the believed all of his issues came from many years of performing his regular everyday duties. (Id.) After an examination, Dr. Ellinas diagnosed right shoulder ache, right anterior shoulder and possible subcutaneous nodule, umbilical hernia and bilateral knee ache, all of which Dr. Ellinas

noted as non-occupational. (Id.) He advised the Petitioner to see his primary care provider. (Id.) Regarding restrictions and/or limitations, Dr. Ellinas wrote in his records "work as tolerated." (Id.)

The Petitioner testified that Dr. Ellinas did not examine his knees but asked what happened and where the pain was, to which the Petitioner said on the left side under his kneecap. (T. 45-46) The Petitioner said he returned to work and continued to work, during which time he continued to be in pain. (T. 46-47). He said he reported that both of his knees hurt because he was using his left knee more to compensate for his right. (T. 70-71)

The Petitioner next sought care at Multicare Specialists on April 12, 2023, which he said was when he could get an appointment. (T. 46-47, PX3) He saw chiropractor Dr. Jonathon Brooks, who noted that the Petitioner stated that on March 6, 2023, the Petitioner was kneeling on both knees, was going to get up from the kneeling position and felt a pop and sharp pain in his right knee. (PX3) The Petitioner testified that the accident date in the records was not accurate. (T. 48) After an examination, Dr. Brooks diagnosed a right medial meniscus tear, ordered physical therapy and an MRI and took the Petitioner off work. (PX3) The Petitioner testified that he has not worked since then. (T. 48)

The MRI was performed on April 12, 2023, and Dr. Brooks stated at a visit on April 17, 2023, that it revealed a complex, nondisplaced tear of the posterior horn medial meniscus with no acute ligament injury. (PX3, PX4) Dr. Brooks planned to get the Petitioner to see a surgeon. (PX3)

On May 1, 2023, the Petitioner saw Dr. Matthew Bradley, an orthopedic surgeon at Metro-East Orthopedics, and reported that on March 5, 2023, he was kneeling on both knees, wearing knee pads and doing some welding when he went to stand, twisting slightly and his right knee caught. (PX5) As he continued to extend his knee, there was a very palpable pop followed by

severe pain in his knee. (Id.) After reviewing the MRI and performing an examination, Dr. Bradley diagnosed a right knee medial meniscus tear with a small partial patellar tendon tear and recommended surgery. (Id.) He opined that the accident described by the Petitioner was causally related to his ongoing right knee pain and need for treatment. (Id.) Dr. Bradley imposed work restrictions of desk work only. (Id.)

As to the date of accident reported to Dr. Bradley, March 5, 2023, was a Sunday, and the Petitioner testified that he did not work on Sundays. (T. 49)

On June 27, 2023, a records review was performed at the Respondent's request by Dr. George Paletta, an orthopedic surgeon at The Orthopedic Center of St. Louis. (RX4, Deposition Exhibit 2) He pointed to differences in the Petitioner's reports about the accident, seemingly starting out as a repetitive use injury, then describing the specific incident. (Id.) Dr. Paletta stated that with each successive physician evaluation, the Petitioner's history became more refined and specific to a specific incident of injury. (Id.) Dr. Paletta diagnosed medial compartment and patellofemoral compartment arthritis with a complex degenerative-type tear of the medial meniscus and associated patella tendinopathy. (Id.) He opined that the reported event of February 28, 2023, did not cause or aggravate this condition, noting that the initial injury report did not document any specific incident of injury or date of injury. (Id.) He said it was unclear why that would not have been reported on the injury report or to Dr. Ellinas. (Id.) He said all the MRI findings were chronic in nature, and there was nothing to suggest any acute pathology. (Id.) He opined that the Petitioner's work activities were neither a causative nor contributing factor. (Id.) He said the treatment recommended was not unreasonable, but the need for treatment was not related to any work injury or condition aggravated by work activities. (Id.)

The Respondent submitted video surveillance footage of the Petitioner from May 7, 2023, and September 22, 2023. (RX5) The footage from May 7, 2023, shows the Petitioner carrying a cardboard box on his left shoulder, supporting it with his left hand and walking. (Id.) The September 22, 2023, footage showed the Petitioner taking large bags out of the passenger compartment of his pickup truck and putting them on the back of a four-wheeler. (Id.)

Dr. Paletta reviewed the May 7, 2023, surveillance video and issued a supplemental report on July 18, 2023, noting no evidence of any motion limitations, restrictions or limp pattern. (RX4, Deposition Exhibit 2) He stated that the video did not change his prior opinion. (Id.)

On September 18, 2023, the Petitioner saw Dr. Bradley with shoulder complaints in addition to his knee issue. (PX5) X-rays, an MRI and an injection were performed on the Petitioner's shoulder. (Id.)

Dr. Bradley testified consistently with his records at a deposition on September 20, 2023. (PX8) He stated that in talking with him, the Petitioner was not "overly clear sometimes." (Id.) He said the Petitioner would answer questions and "kind of ramble for a while," and that he had to be kept very focused. (Id.) He described the Petitioner as "a very simple individual" and very straightforward and honest but easily confused. (Id.) Dr. Bradley said he didn't believe the exact day of the accident was clear to the Petitioner because he kept asking: "Is it when I filled out the paperwork? Is it when I went and saw the doctor? Is it when I actually did it? Is it when my supervisor saw me?" Dr. Bradley thought early March 2023 was an accurate time frame for when the accident occurred. (Id.) He said he asked the Petitioner repetitive questions and repeated his exams and found they were very consistent. (Id.) He said it was his practice to ask for further details and clarification when a patient is vague. (Id.)

As to the MRI findings, Dr. Bradley thought they were consistent with some degenerative disease that predated the injury and at least an acute-on-chronic injury to the meniscus. (Id.) He found it hard to believe that the Petitioner was able to kneel down, bend down and do the welding that he had for 27 years if he had the degree of a meniscus tear that was shown on the MRI. (Id.) In addition, Dr. Bradley stated that the Petitioner had some patellar tendinitis that was probably a combination of pre-existing as well as an acute exacerbation. (Id.) Dr. Bradley said the mechanism of injury and physical examination were consistent with a meniscus tear and he found no symptom fabrication or magnification. (Id.)

Dr. Bradley critiqued Dr. Ellinas's reports as being very vague – stating that all examinations were negative but not stating what examinations, other than McMurray's, were performed. (Id.) He also said Dr. Ellinas's diagnosis of knee aching is not a diagnosis but a symptom. (Id.) Dr. Bradley also noted the Petitioner's vagueness in his reports to Dr. Ellinas, explaining that at that time, the Petitioner was complaining of multiple issues and "in his mind" there was no one particular injury that caused all of his conditions. (Id.)

The Petitioner underwent physical therapy from April 12, 2023, through October 17, 2023, for a total of 80 visits. (PX3) During that time, he reported some improvement but continued pain and soreness and was awaiting approval of surgery by the Respondent's insurer. (PX3, PX5)

On October 18, 2023, Dr. Bradley performed an arthroscopic partial medial meniscectomy of the right posterior horn medial meniscus and chondroplasty of the trochlea and medial femoral condyle. (PX6) At a follow-up visit on October 30, 2023, Dr. Bradley ordered physical therapy. (PX4) The Petitioner underwent nine physical therapy sessions from November 6, 2023, through November 27, 2023. (PX3) At the latest visit to Multicare Specialists on November 27, 2023, the

Petitioner reported to Dr. Brooks that he was feeling about 75 percent improved but felt weak when walking. (Id.)

On November 14, 2023, Dr. Paletta testified consistently with his reports. (RX4) He said the evolution of the mechanism of injury raised a question as to how the Petitioner's symptoms may have actually begun. (Id.) As to the MRI findings, Dr. Paletta explained that the pattern of the meniscus tear was complex – going in multiple directions and in multiple planes – and more commonly a long-standing, chronic tear associated with degenerative changes. (Id.)

On cross-examination, Dr. Paletta agreed that there are advantages to taking a history directly from the patient and examining the patient as opposed to a medical record review. (Id.) He acknowledged that because he didn't personally examine the Petitioner, he did not have an opportunity to ask the Petitioner to clarify his reports about the accident. (Id.) He also said he did not receive any clarification from the Respondent and was not aware of whether the Petitioner was instructed to fill out the injury report to state everything that was bothering him or to state something specific. (Id.) He agreed that the Petitioner did not appear to be a great historian, but that did not necessarily mean he was being dishonest or lying. (Id.) He said that he would not conclude a patient was not truthful based on contradicting accident dates. (Id.)

Dr. Paletta also agreed that Dr. Ellinas's records did not show that he performed a Lachman's test, which is a test for ligament stability that Dr. Paletta said he typically would perform on a patient reporting knee pain. (Id.) He agreed that Dr. Ellinas's records showed a negative McMurray's test for possible meniscus tear but did not state how that test was performed. (Id.) He added that sometimes this test can be negative when there is a meniscus tear. (Id.)

Dr. Paletta acknowledged that a torn meniscus could be acute and that a degenerative meniscus tear could become symptomatic as a result of a mechanism of injury as described by the

Petitioner to Dr. Brooks and Dr. Bradley. (Id.) He said his opinion that the injury was not related to any particular work activity was based on the entire history – including the Petitioner's statement that his injury occurred gradually over time – and the appearance of the findings on the MRI. (Id.)

Dr. Bradley saw the Petitioner on November 30, 2023, and stated that overall, the Petitioner was doing well and did not have any pain. (PX4) He was reporting some continued weakness in his quadraceps, although that was getting better. (Id.) Dr. Bradley wanted the Petitioner to have four more weeks of physical therapy and thought that after that was completed, he could return to work full duty without restrictions. (Id.)

The Petitioner testified that at the time of arbitration, he was feeling the best he had felt in a long time. (T. 49) He said he still had a follow-up appointment pending with Dr. Bradley. (T. 51) The Petitioner said he wanted to return to work. (T. 50, 73)

## CONCLUSIONS OF LAW

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

As a preliminary matter, the Arbitrator finds the Petitioner to be generally credible. The Petitioner's explanation of his injury did become more specific as time went on. Although this was a major factor for Dr. Paletta's analysis, the Arbitrator does not see this as an issue. Rather, after observing the Petitioner testify, the Arbitrator agrees with Dr. Bradley's characterization of the Petitioner as a "simple individual" who at times is not "overly clear" but is straightforward and honest. It is apparent from the records that Dr. Ellinas did not push the Petitioner for explanations about the conditions about which he was complaining, while the providers at Multicare Specialists and Dr. Bradley did.

On the other hand, Mr. Long's testimony was not credible, as he contradicted himself several times. In addition, he did not follow company protocol for reporting an accident. Although he acknowledged that an injury was reported to him, Mr. Long did not ensure that the Petitioner filled out the incident report correctly and did not fill out a supervisor's report.

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

In order to obtain compensation under the Act, a claimant bears the burden of proving by a preponderance of the evidence two elements: (1) that the injury occurred in the course of the claimant's employment and (2) that the injury arose out of the claimant's employment. *McAllister v. Ill. Workers' Comp. Com'n*, 2020 IL 12484, ¶ 32.

In this case, the parties disagreed that there was an accident that occurred at all. If there was an accident as described by the Petitioner, it would have been in the course of and arising out of the Petitioner's employment. Therefore, a risk analysis under *McAllister* is unnecessary.

There was conflicting evidence as to when this alleged accident occurred. The Application for Adjustment of Claim showed, and the Petitioner testified that the accident occurred on February 28, 2023. The incident report from March 3, 2023, had no accident date. There were no accident dates in Dr. Ellinas's records for any of the injuries for which the Petitioner was seeking treatment other than that the conditions occurred during his history of working for the Respondent. The Petitioner told Dr. Brooks the incident occurred on March 6, 2023, and told Dr. Bradley it occurred on March 5, 2023 – both of which were in error, as they would have occurred after the Petitioner reported his injuries to the Respondent. Just as Dr. Paletta and Dr. Bradley did not seem concerned by the differing accident dates reported, neither is the Arbitrator. The proposed dates are all within a few days of the claimed accident date.

There also is apparent conflict as to how the injury occurred. The injury report listed a number of activities to which the Petitioner attributed the three injuries he was reporting – shoulder, hernia and knees. As Dr. Paletta pointed out, there seemed to be an evolution as to how this injury occurred – with the injury report and Dr. Ellinas's records appearing to show injuries that occurred over time while the reports to Dr. Brooks and Dr. Bradley gave specifics about the incident the Petitioner described in his testimony. However, Dr. Bradley explained how this could occur, and the Arbitrator agrees. After the Petitioner's complaints were narrowed down to his knee, his reports became detailed and consistent. The Arbitrator finds other evidence that an accident occurred – specifically the testimony of Mr. Votava and Mr. Walker, which was consistent with the Petitioner's testimony.

Despite the confusion, the Arbitrator finds that an incident did occur on February 28, 2023, in which the Petitioner's knee popped while standing up from a kneeling position while performing his welding duties, causing pain. Thus, the Arbitrator finds that the Petitioner has proved by a preponderance of the evidence that the Petitioner's injury occurred in the course of and arose out of his employment.

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

An accident need not be the sole or primary cause as long as employment is a cause of a claimant's condition. *Sisbro, Inc. v. Indus. Comm'n,* 207 Ill. 2d 193, 205, 797 N.E.2d 665, 278 Ill.Dec. 70 (2003). An employer takes its employees as it finds them. *St. Elizabeth's Hosp. v. Workers' Comp. Comm'n,* 371 Ill.App.3d 882, 888, 864 N.E.2d 266, 309 Ill.Dec. 400 (5th Dist. 2007). A claimant with a preexisting condition may recover where employment aggravates or accelerates that condition. *Caterpillar Tractor Co. v. Industrial Comm.,* 92 Ill. 2d 30, 36, 440

N.E.2d 861, 65 Ill.Dec. 6 (1982). Employers are to take their employees as they find them. *A.C.& S. v. Industrial Comm'n*, 304 Ill.App.3d 875, 883, 710 N.E.2d 837, 238 Ill.Dec. 40 (1st Dist. 1999)

When a preexisting condition is present, a claimant must show that "a work-related accidental injury aggravated or accelerated the preexisting [condition] such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of the preexisting condition." *St. Elizabeth's Hospital*, 371 Ill.App.3d at 888.

Circumstantial evidence, especially when entirely in favor of the Petitioner, is sufficient to prove a causal nexus between an accident and the resulting injury, such as a chain of events showing a claimant's ability to perform manual duties before accident but decreased ability to still perform immediately after accident. *Pulliam Masonry v. Industrial. Comm'n*, 77 Ill. 2d 469, 471-472, 397 N.E.2d 834, 34 Ill.Dec. 162 (1979); *Gano Elec. Contracting v. Industrial Comm'n*, 260 Ill.App.3d 92, 96–97, 631 N.E.2d 724, 197 Ill.Dec. 502 (4th Dist. 1994); *International Harvester v. Industrial Com.*, 93 Ill.2d 59, 63-64, 442 N.E.2d 908, 66 Ill.Dec. 347 (1982).

Dr. Paletta and Dr. Bradley agreed that the Petitioner had a degenerative knee condition. Dr. Paletta believed the Petitioner's meniscus tear was degenerative as well. Dr. Bradley believed the Petitioner had an acute-on-chronic meniscus tear. Dr. Paletta acknowledged that a torn meniscus could be acute and that a degenerative meniscus tear could become symptomatic as a result of a mechanism of injury as described by the Petitioner to Dr. Brooks and Dr. Bradley.

Also, Dr. Paletta's opinion relied extensively on the fact that the Petitioner's description of how his injuries occurred began as generally occurring throughout his work history and evolved over time. As stated above, Dr. Bradley plausibly explained how this evolution occurred in light

of the Petitioner's personal traits and the fact that several injuries were being considered initially and were narrowed down to his knee later.

As the Petitioner's treating physician, Dr. Bradley had opportunities to become familiar with the Petitioner and his condition that Dr. Paletta did not have. The most prominent reason for giving little weight to Dr. Paletta's opinion is that he did not personally examine or speak to the Petitioner. He had no opportunity to inquire further about the incident or the Petitioner's injuries and clear up any confusion posed by the medical records and accident report and acknowledged this lack of opportunity.

For all these reasons, the Arbitrator gives more weight to Dr. Bradley's opinions than to Dr. Paletta's.

In addition, the circumstantial evidence supports Dr. Bradley's causation opinion. Until the incident, the Petitioner was able to perform his work duties before accident but had a decreased ability to still perform them afterwards.

Lastly, the video surveillance adds little to the inquiry here. The videos showed only seconds of activity that included lifting and walking. There is no indication that the Petitioner was performing tasks similar to or for comparable periods of time as he would while working for the Respondent.

Therefore, the Arbitrator finds that the Petitioner's right knee condition was causally related to the work accident.

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

The right to be compensated for medical costs associated with work-related injuries is at the very heart of the Workers' Compensation Act. *Hagene v. Derek Polling Const.*, 388 Ill. App. 3d 380, 383, 902 N.E.2d 1269, 1273 (2009).

Petitioner's Exhibit 7 contains the Petitioner's medical billing information. These bills include an MRI by MRI Partners on August 14, 2023, and charges by Dr. Bradley on September 18, 2023, that relate to the Petitioner's shoulder and are unrelated to this claim. These charges shall be excluded.

Based on the findings above regarding accident and causation, all other medical services as listed in Petitioner's Exhibit 8 are found to be reasonable and necessary. Therefore, the Arbitrator orders the Respondent to pay the medical expenses contained in Petitioner's Exhibit 7 – except for the MRI Partners services on August 14, 2023, and Dr. Bradley's services on September 18, 2023 -- pursuant to Section 8(a) of the Act and in accordance with medical fee schedules. The Respondent shall have credit for any amounts already paid or paid through its group carrier. Respondent shall indemnify and hold Petitioner harmless from any claims arising out of the expenses for which it claims credit.

**Issue (K): Is Petitioner entitled to any prospective medical care?**

Upon establishing causal connection and the reasonableness and the necessity of recommended medical treatment, employers are responsible for necessary prospective medical care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d. 13 (1997). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 325 Ill. App. 3d 527, 758 N.E.2d 18 (2001).

As of the date of arbitration, the Petitioner was still treating with Dr. Bradley to follow up from his surgery and had not been released. Based on the findings above regarding causation and

prior medical bills, the Arbitrator finds the follow-up treatment recommended by Dr. Bradley is reasonable and necessary. Therefore, the Arbitrator finds that the Petitioner is entitled to prospective medical care, specifically follow-up treatment with Dr. Bradley. The Respondent shall authorize and pay for such.

**Issue (L): What temporary benefits are in dispute? (TTD)**

The parties dispute TTD benefits from April 12, 2023, through the date of trial on January 17, 2024. 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.

Dr. Brooks gave the Petitioner restrictions of desk work only on April 12, 2023. There was no evidence that these restrictions were accommodated by the Respondent. The Petitioner has been unable to return to his usual work since then and had not been released to work as of the date of arbitration.

Therefore, the Petitioner is entitled to temporary TTD benefits pursuant to Section 8(b) of the Act for 40 & 1/7 weeks from April 12, 2023, through January 17, 2024.

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 | 21WC031633 |
| Case Name | Tom Sutton v.<br>Gorman Ready Mix |
| Consolidated Cases | |
| Proceeding Type | Petition for Review under 19(b)<br>Remand Arbitration |
| Decision Type | Commission Decision |
| Commission Decision Number | 24IWCC0611 |
| Number of Pages of Decision | 31 |
| Decision Issued By | Amylee Simonovich, Commissioner,<br>Kathryn Doerries, Commissioner |

| | |
|---|---|
| Petitioner Attorney | David Galanti |
| Respondent Attorney | Sarah Hocking |

DATE FILED: 12/23/2024

/s/Amylee Simonovich,Commissioner
Signature

DISSENT: /s/Kathryn Doerries,Commissioner
Signature

STATE OF ILLINOIS )
) SS.
COUNTY OF MADISON )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TOM SUTTON,

Petitioner,

vs. NO: 21 WC 31633

GORMAN READY MIX,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 17, 2023, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that 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 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 $4900.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

**December 23, 2024**

O112924
AHS/ldm
051

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

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

**Dissent**

I agree, in part, with the majority's decision to affirm and adopt the Decision of the Arbitrator. I respectfully disagree, however, with the prospective medical benefits awarded for the four-level cervical disc replacement surgery recommended by the treating surgeon, Dr. Gornet. For the reasons set forth below, I would deny prospective medical benefits for this procedure.

Following Dr. Gornet's initial evaluation on November 16, 2021, Petitioner underwent an MRI of the cervical spine which Dr. Gornet interpreted as showing four disc herniations at C3-C4, C4-C5, C5-C6, and C6-C7. Dr. Gornet also noted facet joint encroachment at C4-C5 contributing to foraminal narrowing at that level. (PX1 at 9) Dr. Gornet subsequently ordered an injection at C6-C7 and indicated that "four-level treatment" and a CT scan would be required if Petitioner's symptoms did not improve. (PX1 at 9) Dr. Blake administered an interlaminar epidural steroid injection at C6-C7 on March 8, 2022. Petitioner followed up by telephone with Dr. Gornet's office on March 18, 2022, and complained of significant neck pain and headaches. (PX1 at 7) Physician assistant Nathan Collins advised Petitioner that approval would be requested for a four-level cervical disc replacement. *Id*. A CT scan was not ordered. Petitioner returned to Dr. Gornet's office and was seen by the physician assistant on April 28, 2022. (PX1 at 6) The physician assistant noted that Petitioner was scheduled for an IME with Dr. Bernardi and indicated they would continue seeking approval for the four-level disc replacement. The physician assistant further noted that a CT scan of his cervical spine will be required *once approval* for the surgery has been obtained, not before. (PX1 at 6)

Dr. Bernardi performed a Section 12 examination on May 10, 2022. (RX2, Dep. Ex #2) Dr. Bernardi opined that surgery was not medically necessary, and in particular he was of the opinion that Petitioner should not undergo a four-level disc replacement. Dr. Bernardi cited two published papers; the first addressing the Mobi-C cervical disc device and the second addressing the ProDisc-C device. Dr. Bernardi noted that cervical disc replacement is intended to address cervical radiculopathy or myelopathy. Petitioner did not have either condition. Dr. Bernardi further indicated there is no surgical society that recommends cervical disc replacement or even cervical decompression for neck pain without any neurological features. Dr. Bernardi also noted that the FDA has only approved the use of artificial cervical disc devices for one or two levels; no approval has been issued for implanting the devices at three or four disc levels. Another reason for concern was the fact that Dr. Gornet recommended disc replacement *prior to* obtaining a CT scan, which Dr. Bernardi noted was needed to evaluate the facet joints since the MRI findings raised suspicion for facet joint arthritis. Arthritic facets are a contraindication for disc replacement Dr. Bernardi stated. As mentioned above, Dr. Gornet's records show he observed facet joint pathology at C4-C5 which was encroaching and contributing to foraminal narrowing at that level. (PX1 at 9)

Petitioner returned to Dr. Gornet on July 25, 2022. (PX1 at 4) The majority of the office visit note set forth Dr. Gornet's response to the IME report. Dr. Gornet agreed that Petitioner was neurologically normal on examination; however, he disagreed with Dr. Bernardi's opinion that

surgical intervention was inappropriate where the cervical spine condition is limited to axial neck pain. Dr. Gornet wrote, "In publishing the world's largest series of treatment of axial neck pain, we have found that these patients do extremely well with surgical intervention and that the surgical intervention is equivalent to patients who are treated with stenosis and/or radiculopathy." Dr. Gornet acknowledged Dr. Bernardi's criticism of the four-level disc replacement as an off-label use of the medical device, but instead of attempting to refute the criticism with the merits of his proposed four-level disc replacement, Dr. Gornet instead rebuked Dr. Bernardi for raising the issue because Dr. Bernardi has prescribed medical products for off-label uses in the past "and seems to have no problems using products off label when they apply to his patients, but somehow objects to the off label usage with patients who he performs IMEs for." (PX1 at 5) Notably, Dr. Gornet did not respond to Dr. Bernardi's concern regarding possible facet joint arthritis as a contraindication for disc replacement. No CT scan was ordered.

Dr. Gornet testified via deposition on February 2, 2023. (PX8) Dr. Gornet testified he is currently participating in a clinical trial involving cervical disc replacement. (PX8 at 4-5) Dr. Gornet further testified he previously participated in 46 or 47 "FDA IDE" (Investigational Device Exemption) clinical trials. (PX8 at 5) Dr. Gornet did not describe the nature, scope, and investigative purpose for the ongoing current cervical disc replacement clinical trial. Regarding Petitioner's condition, Dr. Gornet testified he ordered an injection for the C6-C7 level after the MRI revealed four central herniations. Dr. Gornet further testified he advised Petitioner that if injection failed to improve the pain, then "his *only other option"* would be cervical disc replacement" at those four levels. (PX8 at 8-9) After the injection failed to provide long lasting relief, Dr. Gornet formally recommended that Petitioner move forward with the four-level disc replacement. (PX8 at 11) Dr. Gornet testified that each of the four cervical discs had age appropriate disc degeneration. (PX8 at 25) He further described the condition of the discs following the accident as "acute on chronic" and opined that the accident aggravated the pre-existing underlying condition. (PX8 at 31) Of the four discs, the most degenerative findings were seen at C3-C4 and C5-C6. (PX8 at 25) Of those two levels, Dr. Gornet testified that the C5-C6 disc was probably the most significant. *Id*. Dr. Gornet never explained on what basis he came to the conclusion that all four discs were pain generators, and he never adequately explained why operating at one or two levels rather than four levels would be insufficient to cure or relieve the effects of the injury.

Dr. Gornet testified his surgical recommendation was intended to address Petitioner's axial neck pain and headaches. (PX8 at 11) Dr. Gornet further testified that the majority of Petitioner's presenting problem was axial neck pain with some mild radicular symptoms radiating into the left trapezius and shoulder and arm. (PX8 at 11) Dr. Gornet further noted that "but if you really ask him, the disability for him is his neck pain and headaches." (PX8 at 11) Dr. Gornet testified he has performed disc replacement to treat neck pain in the past and noted he published a peer-reviewed article addressing the use of disc replacement for axial neck pain. (PX8 at 11) Dr. Gornet testified that his published study showed that patients treated surgically with disc replacement for axial neck pain did just as well as patients who underwent disc replacement for radiculopathy. (PX8 at 11-12) On cross-examination, Dr. Gornet testified he was not treating Petitioner for

numbness and tingling and noted Petitioner had normal sensation. (PX8 at 36) Dr. Gornet reiterated that "We're treating him for axial neck pain" and headaches, though there was a "small component lateralizing to the left." (PX8 at 36) Dr. Gornet then characterized Petitioner's cervical spine injury as a structural injury without neurological compression. (PX8 at 36-37)

On re-direct, Dr. Gornet testified that the presence of neurological deficit is not a necessary prerequisite for cervical disc replacement. (PX8 at 43) Dr. Gornet testified "That's why we peer-reviewed and published that; to demonstrate the clinical benefit by patient-reported outcomes, not just Dr. Gornet saying these patients did well." (PX8 at 43) On re-cross examination, Dr. Gornet testified that it was *he* who wrote the published paper. (PX8 at 44)

Dr. Bernardi testified via deposition on February 17, 2023. (RX2) Dr. Bernardi is a board certified neurosurgeon and described his practice as 100% devoted to the treatment of the spine, performing surgeries two days per week. Dr. Bernardi testified he performs one or two IMEs per week. Dr. Bernardi testified that Petitioner's cervical MRI showed congenital stenosis of the spinal canal, meaning the Petitioner's canal was narrower than average. (RX2 at 20-21) Petitioner also had multilevel degenerative disc disease, most predominately at C3-C4. The MRI also suggested arthritis affecting at least the C4-C5 facet joint on the right side. (RX2 at 20-21)

Dr. Bernardi testified that persistent radiculopathy is an indication for surgery, whereas neck pain by itself is not an indication for surgery. (RX2 at 38) Dr. Bernardi testified that Petitioner's initially documented complaints to Dr. Gornet and the symptoms reported by Petitioner during the IME were not consistent for radiculopathy. Dr. Bernardi testified he later reviewed Dr. Gornet's July 25, 2022 office visit note (following the IME examination) and noted that Dr. Gornet clearly stated that Petitioner does not have a neurological problem. (RX2 at 40-41) Dr. Bernardi testified that Dr. Gornet was recommending surgery despite Dr. Gornet's expressed agreement that Petitioner's exam findings were neurologically normal. (RX2 at 41) Dr. Bernardi believes the medical community as a whole agrees that neck pain, standing alone without associated neurological symptoms, is not an indicator for surgery.

Dr. Bernardi further testified that the artificial disc device manufacturer's online materials show that the device is intended to treat radiculopathy and Petitioner does not have any nerve pain. (RX2 at 43) Dr. Bernardi further testified that the device has been tested for one level and two level procedures and received approval for one or two levels. (RX2 at 43) On cross-examination, Dr. Bernardi testified he personally does not perform disc replacement and has not received training for the devices. (RX2 at 54) Dr. Bernardi admitted to performing spine surgery on patients who have normal neurological findings; however, he explained that in some patients the degree of nerve compression is not sufficient to produce objective neurological findings and he only performs surgeries on that type of patient where there is a clear pattern of recognizable symptoms matching the physical findings and objective imaging findings. (RX2 at 56-57) On re-direct, Dr. Bernardi testified the reason he has no interest in performing disc replacement is that he would

never perform a procedure on a patient that he himself would not undergo if he was a patient, and disc replacement is one of those procedures. (RX2 at 59-60)

Respondent then submitted the proposed surgery for utilization review through Genex Services, which operates a utilization review program that is URAC accredited in compliance with Section 8.7 of the Act. (RX8) Dr. Sumeet Vadera performed the review and non-certified the surgery. Dr. Vadera authored his report dated March 24, 2023. (RX9) Dr. Vadera twice attempted to hold a peer-to-peer conference with Dr. Gornet, leaving a message with an assistant on March 22, 2023, and a voicemail on March 23, 2023. Dr. Vadera completed his review on the 24th after Dr. Gornet failed to participate.

Dr. Vadera used the Official Disability Guidelines (ODG) for the utilization review, specifically the 2021 edition of the ODG addressing "Neck and Upper Back: Artificial Disc Replacement (ADR) for Neck and Upper back Conditions." (RX9) His report identified the criteria and recommendations for anterior disc replacement. The ODG indicates that cervical disc replacement is "conditionally recommended" as an alternative to discectomy and fusion for one or two level degenerative disc disease *with* radiculopathy and/or myelopathy, provided there is strict compliance with the criteria listed therein. (Emphasis added.) (RX9 at 2) Dr. Vadera then noted that the ODG do not support cervical disc replacement for more than two disc levels. Dr. Vadera's report noted that cervical disc replacement is contraindicated when the patient's symptoms are confined to axial neck pain. (RX9 at 3) Dr. Vadera's report also noted that cervical disc replacement is contraindicated when the patient suffers from facet joint arthritis. Dr. Vadera further noted that the ODG does not support a deviation from the ODG (more than two-levels) in the absence of objective evidence of radiculopathy corresponding to those disc levels. (RX9 at 2) Because Petitioner did not exhibit radiculopathy, and because the surgery contemplated four disc levels, Dr. Vadera non-certified the proposed surgery. (RX9 at 2)

On May 22, 2023, Petitioner returned to Dr. Gornet and brought with him the utilization review report. Dr. Gornet wrote in this office visit note that the utilization review relied on the ODG. Dr. Gornet indicated he previously "sat on the panel initially for cervical disc replacement with ODG." Dr. Gornet further stated that ODG is a "for profit company whose guidelines and literature is actually set by the owner of the company." (PX1at 1) Dr. Gornet indicated that this information is not disclosed by ODG. Dr. Gornet further indicated that "there is no reason to appeal, as any utilization review that uses ODG guidelines will not authorize multilevel cervical disc replacement." *Id*. Dr. Gornet noted Petitioner's exam findings remained unchanged. No CT scan was ordered.

Dr. Vadera testified via deposition on May 5, 2023. (RX 10) Dr. Vadera is a board certified neurosurgeon licensed to practice medicine in California, Florida, Massachusetts, New York, and Illinois. (PX10 at 4-6) Dr. Vadera testified his practice encompasses spine surgery, general neurosurgery, and surgery for epilepsy. (RX10 at 6) Dr. Vadera testified he reviewed about 78 pages of medical records and performed a utilization review concerning the surgery recommended to Petitioner. Dr. Vadera testified that the four-level cervical disc replacement at C3-C4, C4-C5,

C5-C6, and C6-C7 was not medically necessary and did not follow the guidelines. (RX10 at 10) Dr. Vadera testified that the ODG allows cervical disc replacement for one or two disc levels. Additionally, aside from the ODG, Dr. Vadera testified that four-level disc replacements are generally not considered medically necessary and are not supported by the medical literature. (RX10 at 11) Dr. Vadera further testified that a four-level cervical disc replacement "doesn't really make a lot of medical sense." (RX10 at 11) Dr. Vadera further testified that Dr. Gornet's proposed four-level disc surgery is generally outside the standard of care. (RX10 at 12) Dr. Vadera testified that within a reasonable degree of medical certainty that Petitioner should not have the surgery recommended by Dr. Gornet. (RX10 at 13)

On cross-examination, Dr. Vadera testified his surgical practice includes brain surgery, spine surgery and surgery for epilepsy; however, he was not fellowship trained in spine surgery. (RX10 at 14-15) Dr. Vadera testified that 50% to 60% of the surgeries he performs pertain to the treatment of epilepsy and the remaining 40% pertain to the spine. (RX10 at 16) Dr. Vadera testified he does occasionally perform artificial disc replacement. (RX10 at 16) Regarding multilevel disc replacement, Dr. Vadera performs up to a maximum two-level disc replacement. (RX10 at 16-17) In contrast, Dr. Vadera has performed multilevel fusions exceeding two levels. (RX10 at 18) Dr. Vadera agreed that the theory behind disc replacement is that it provides mobility for the patient; however, he reiterated that implanting artificial discs at more than two disc levels is not within the standard of care. (RX10 at 19) Notably, Petitioner's attorney asked Dr. Vadera whether he knew of any physicians in his home state of California who perform cervical disc replacement at more than two-levels, and Dr. Vadera replied, "None of my colleagues or anyone I know or work closely with does that." (RX10 at 19) Dr. Vadera further testified that a fusion performed in the spine will put pressure on the adjacent discs, and the idea behind disc arthroplasty is to protect the adjacent disc levels. Dr. Vadera then noted that performing a four-level disc arthroplasty does not make clinical sense because in that scenario there would be no remaining significant cervical disc levels needing protection. (RX10 at 20-21) In the past, the ODG did not allow disc replacement for more than one level and then a few years ago the guidelines were updated to allow for two-levels. Dr. Vadera testified he performs one-level disc replacements and more recently he has performed two-level disc replacements. (RX10 at 21-22)

Under Section 8(a) of the Act, claimants are entitled to receive medical benefits for all necessary medical and surgical services so long as they are "reasonably required to cure or relieve from the effects of the accidental injury." 820 ILCS 305/8(a). Section 8.7 affords employers the option to request evaluation of proposed or provided treatment to determine the appropriateness, efficiency, and efficacy of the treatment based on medically accepted standards. 820 ILCS 305/8.7. Section 8.7(i)(3) permits employers to deny payment or refuse authorization for payment of treatment on the grounds that the extent and scope of the proposed or provided treatment is excessive and medically unnecessary. 820 ILCS 305/8.7(i)(3). When payment or authorization is denied pursuant to utilization review, the claimant must prove by a preponderance of the evidence that a variance from the standards of care is reasonably required to cure or relieve the effects of the injury. 820 ILCS 305/8.7(i)(4). A utilization review must be considered "along with all other

evidence and in the same manner as all other evidence, in the determination of the reasonableness and necessity of the medical bills or treatment." 820 ILCS 305/8.7(i).

Per the utilization review report and Dr. Vadera's testimony describing the guidelines, the ODG conditionally recommends cervical disc replacement as an alternative to discectomy and fusion for degenerative disc disease in patients suffering from radiculopathy and/or myelopathy. The ODG further provides that cervical disc replacement is conditionally recommended for one or two disc levels. Dr. Gornet's proposed surgery represents a deviation from the guidelines as to both limitations. Dr. Gornet did not participate in a peer-to-peer conference with Dr. Vadera and he chose not to appeal the non-certification. This Commission has previously held that a treating physician's failure to engage in a peer-to-peer appeal from an adverse utilization review decision may be considered when judging the physician's credibility. See *Cordon vs. Healthcare Solutions*, 18 IWCC 22, 2018 Ill. Wrk. Comp. LEXIS 48. Dr. Gornet failed to provide a reason why a deviation from the guidelines was reasonable and medically necessary. Instead, Dr. Gornet complained that the ODG guidelines were "set by the owner of the company" and that an appeal would be futile because any utilization review "that uses ODG guidelines will not authorize multilevel cervical disc replacement." Dr. Gornet may be correct inasmuch that the ODG clearly states that cervical disc replacement for more than two disc levels remains currently outside the parameters for medically reasonable and necessary disc replacement. Nonetheless, Section 8.7 affords treating physicians the opportunity to overcome a non-certification by providing a credible medical rationale explaining why a deviation from the standard of care is appropriate, and in this case Dr. Gornet failed to furnish a credible explanation.

Dr. Gornet's complaint regarding the ODG guidelines is unfounded. The utilization review process set forth in Section 8.7 of the Act provides that the "evaluation must be accompanied by means of a system that identifies the utilization of health care services based on standards of care of nationally recognized peer review guidelines as well as nationally recognized treatment guidelines and evidence-based medicine based on standards as provided in this Act." 820 ILCS 305/8.7(i)(2). The Official Disability Guidelines used by Genex's URAC accredited program have been described by one physician as being "developed from review of medical literature" and are "medically accepted standards" and "nationally recognized peer review and treatment guidelines." See *Salinas vs. Quality Assurance Staffing*, 17 IWCC 159, 2017 Ill. Wrk. Comp. LEXIS 162. Dr. Gornet's response characterizing the ODG guidelines as nothing more than standards set by a non-disclosed for-profit company is not credible. Dr. Gornet's criticism also ignores the crucial fact that the Illinois legislature adopted the utilization review process for the workers' compensation system.

The ODG are also consistent with the Food and Drug Administration's (FDA) current approval of cervical disc replacement for one or two levels. The lack of FDA approval is not controlling; however, FDA approval and restrictions are valid factors to be considered. The available findings from medical research studies, or the lack thereof, which may support or call into question the off-label use of a medical device is another factor. Given the history and risks associated with medical devices, I believe the lack of FDA approval, or the scope of existing FDA

approval and accompanying restrictions, should be accorded due consideration when addressing treating doctors' recommended off-label use of drugs and medical devices. Additionally, if off-label use is disputed, I believe the existence of FDA approval should be validated, and our determinations should be informed by evidence of published peer-reviewed research studies when made available and debated by the medical witnesses. The status, results, strength, and quality of those research studies should be taken into account along with evidence of general acceptance in the medical community.

On several occasions, this Commission has previously denied medical benefits for non-FDA approved diagnostic testing and treatment services. In *Salley vs. State of Illinois, Choate Mental Health*, 21 IWCC 269, 2021 Ill. Wrk. Comp. LEXIS 249, the Commission denied medical expenses incurred for MRI spectroscopy ordered by Dr. Gornet. Dr. Gornet testified that MRI spectroscopy was being used in FDA clinical trials in which he was involved; however, the Commission noted that the fact that the FDA *might approve* the procedure in the future does not establish that the procedure is generally accepted, reasonable or necessary in the present. Then in *Bauer v. State of Illinois, Chester Mental Health Ctr.*, 22 IWCC 391, 2022 Ill. Wrk. Comp. LEXIS 381, the Commission again considered Dr. Gornet's recommended use of MR Spectroscopy and affirmed the arbitrator's denial of prospective medical benefits for the test. This time, Dr. Gornet testified the MR Spectroscopy had been approved by the FDA to diagnose back pain; however, the employer's IME physician, Dr. Bernardi, testified that the test was *not* approved by the FDA. Dr. Bernardi also testified that no medical research information was available other than Dr. Gornet's own research study. The arbitrator noted the absence of any documentation corroborating FDA approval, and further noted that an internet search including the FDA's website did not show any such approval. The arbitrator also noted that the Appellate Court had recently affirmed the Commission's denial of MR Spectroscopy in a prior case, *Lewis v. Ill. Workers' Comp. Comm'n*, 2021 IL App (5th) 200302. In *Cordon vs. Healthcare Solutions*, 18 IWCC 22; 2018 Ill. Wrk. Comp. LEXIS 48, this Commission denied prospective medical benefits for a left knee Carticel biopsy followed by Carticel implantation and anteromedialization of the tibia, which had been recommended to repair a chondral injury to the patella but not yet approved by the FDA. The treating surgeon indicated that Carticel was commonly being used for patellas despite being approved only for tibiofemoral lesions; however, the Commission noted the doctor's failure to rebut the adverse utilization review and rejected the requested surgery. And in a case discussed in greater detail below, this Commission previously denied prospective medical benefits for a three-level cervical disc replacement recommended by Dr. Gornet. See *Helens vs. Global Brass*, 18 IWCC 460, 2018 Ill. Wrk. Comp. LEXIS 1184.

In our workers' compensation system, the Commission has analyzed with caution treatment services considered to be experimental. See *Houston vs. K. Hovnanian Town & Country Management LLC*, 13 IWCC 116, 2013 Ill. Wrk. Comp. LEXIS 164 (prospective medical denied for recommended off-label experimental use of a cochlear implant to address persistent tinnitus where alternative recommendations had been made for a second opinion assessment and psychological evaluation). See also, *Cholewiak vs. XPO Logistics Freight, Inc*., 20 IWCC 0380, 2020 Ill. Wrk. Comp. LEXIS 767 (denying medical expenses incurred for compound topical

analgesics found to be experimental); and *Garrison vs. Cottage Care*, 10 IWCC 979, 2010 Ill. Wrk. Comp. LEXIS 1089 (denying medical expenses for experimental Phenol injections).

Treatment considered experimental may still be found reasonable and necessary in appropriate settings. See e.g., *Fesi vs. Carol Stream Fire Protection District*, 13 IWCC 260, 2013 Ill. Wrk. Comp. LEXIS 292. In *Fesi,* the treating physician, Dr. Lipov, recommended what he called a "sub-q spinal cord stimulator" which he developed by combining a dorsal column stimulator with a peripheral stimulator, and for which he was conducting a research study for Medtronic. The device was considered experimental and the employer's IME physician opined that the risks outweighed the benefits. The arbitrator denied prospective medical benefits and awarded PTD benefits. On review, the Commission reversed, vacating the awarded PTD benefits as premature and ordering authorization for prospective medical treatment. A significant factor was the fact that an external trial stimulator would be used first to determine its success for the claimant before implanting a permanent device. The Commission therefore decided to award the trial stimulator, and if successful, then the employer was to authorize the permanent implant.

In the instant case, Dr. Gornet acknowledges that multilevel cervical disc replacement is not approved for three and four disc levels or for axial neck pain without neurological features. Dr. Gornet correctly points out that physicians have discretion to use FDA approved devices for off-label use and relies on his own medical studies to support his proposed off-label use of the device; however, treatment services must still be shown to be reasonable and necessary pursuant to Section 8(a) of the Act, and as I noted above, I believe the strength and quality of the research studies should be assessed. Significantly, this Commission previously considered a three-level disc replacement recommended by Dr. Gornet and denied that request. See *Helens vs. Global Brass*, 18 IWCC 460, 2018 Ill. Wrk. Comp. LEXIS 1184.

In *Helens*, the claimant sustained a neck injury when the arm of a crane came from behind and pinned his head against a cylinder. Dr. Gornet ordered an MRI which showed disc pathology at C4-C5, C5-C6, and C6-C7. Like the Petitioner in the case a bar, the claimant in *Helens* presented with mostly axial neck pain and headaches. The claimant denied numbness and tingling in the arms. Dr. Gornet recommended a three-level disc replacement and agreed the claimant did not have radiculopathy. The employer's IME physician, Dr. Bernardi (same IME physician) opined that the proposed surgery was not indicated, and like the present case, testified that cervical disc replacements are intended to treat cervical radiculopathy or myelopathy. Dr. Bernardi also noted that the FDA had not approved disc replacement at three levels. Dr. Gornet provided the same response in *Helens* as given in the present case; that the FDA does not govern the practice of medicine and that Dr. Bernardi himself used FDA approved products for off-label use. Interestingly, the Commission's decision in *Helens* included additional testimony by Dr. Gornet which was not elicited in the case at bar. Dr. Gornet was asked in *Helens* whether he ever submitted a recommendation for three-level disc replacement to a group health insurance plan. Dr. Gornet testified he probably had not "because of their stricter guidelines." Dr. Gornet further testified he was not aware of any group insurance plan that would "currently" cover three disc levels. The arbitrator found persuasive Dr. Bernardi's view that the identifiable location of the

claimant's symptoms could not be determined and that "simply be replacing all three cervical discs will not provide a high probability of alleviating the symptoms." The arbitrator further commented, "Frankly, the Arbitrator is admittedly concerned by the request for the award of such a significant surgical procedure that has apparently not yet been approved by the US Food & Drug Administration." The Commission agreed and found that the claimant failed to prove Dr. Gornet's recommended three-level disc replacement was reasonable and necessary.

Likewise, I find the four-level disc replacement surgery recommended by Dr. Gornet in this case has not been proven reasonable and necessary. As this Commission observed in *Peckinpaugh vs. Memorial Hospital of Carbondale,* Dr. Gornet conducts his own medical research and clinical trials, publishes his findings, and then cites to his published studies to support his recommended treatment. See *Peckinpaugh vs. Memorial Hospital of Carbondale*, 18 IWCC 570, 2018 Ill. Wrk. Comp. LEXIS 753, where the Commission noted that Dr. Gornet "appears to rely significantly on research he himself has been involved in and his own results rather than the current standards and literature of the surgical spine community." I might find Dr. Gornet's off-label recommendations more convincing if he brought forth published peer-reviewed medical research studies in which he was not a participant.

Additionally, there is a concern for facet joint arthritis in Petitioner's cervical spine, and Dr. Gornet recommended disc replacement without first obtaining a CT scan as noted by Dr. Bernardi. Per the ODG as well as Dr. Bernardi, the presence of facet joint arthritis is a contraindication for disc replacement. Also concerning is Dr. Gornet's failure to explain on what basis he came to the conclusion that all four discs are pain generators, and he never explained why operating at one or two levels would be insufficient to cure or relieve the effects of the injury. And assuming all four discs are indeed pain generators, Dr. Gornet never discussed why a hybrid procedure combining a two-level disc replacement with fusion at the other levels would be an insufficient alternative. Finally, once treatment is denied based on the results of a utilization review, the employee has the burden of proof to show by a preponderance of the evidence that a variance from the standards of care is reasonably required to cure or relieve the effects of the injury, and in this case that burden has not been met.

For all the above reasons, I respectfully dissent in part from the majority's affirmance of the arbitration award directing Respondent to authorize and pay for the four-level cervical disc replacement recommended by Dr. Gornet.

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

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 21WC031633 |
| Case Name | Tom Sutton v. Gorman Ready Mix |
| Consolidated Cases | |
| Proceeding Type | 19(b) Petition |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 19 |
| Decision Issued By | Linda Cantrell, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | David Galanti |
| Respondent Attorney | Sarah Hocking |

DATE FILED: 9/7/2023

**THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 6, 2023 5.30%**

/s/Linda Cantrell, Arbitrator

Signature

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

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

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

**Tom Sutton**
Employee/Petitioner

v.

**Gorman Ready Mix**
Employer/Respondent

Case # **21** WC **031633**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Linda J. Cantrell**, Arbitrator of the Commission, in the city of **Collinsville**, on **07/27/23**. 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 **Admissibility of C. Brian Tanner's biomechanical analysis**

**FINDINGS**

On the date of accident, **11/10/21**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

Petitioner's current condition of ill-being in his cervical and lumbar spine ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**39,745.00**; the average weekly wage was $**794.90**.

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

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

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

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

**ORDER**

Respondent shall pay the medical expenses outlined in Petitioner's Group Exhibit 7, as provided in Sections 8(a) and 8.2 of the Act, pursuant to the medical fee schedule.

Respondent shall provide and pay for prospective medical treatment, including, but not limited to, a disc replacement at C3-4, C4-5, C5-6, and C6-7, as recommended by Dr. Gornet, and all reasonable and necessary attendant care.

C. Brian Tanner's accident and biomechanical analysis is admissible in its entirety. (RX1)

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 7, 2023**

Arbitrator Linda J. Cantrell

ICArbDec19(b)

**STATE OF ILLINOIS )**
**) SS**
**COUNTY OF MADISON )**

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

| | | |
|---|---|---|
| TOM SUTTON, | ) | |
| | ) | |
| Employee/Petitioner, | ) | |
| | ) | |
| v. | ) | Case No.: 21-WC-031633 |
| | ) | |
| GORMAN READY MIX, | ) | |
| | ) | |
| Employer/Respondent. | ) | |

## FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Collinsville on July 27, 2023 pursuant to Section 19(b) of the Act. On 11/16/21, Petitioner filed an Application for Adjustment of Claim alleging injuries to his body as a whole and left hand as a result of a motor vehicle accident on 11/10/21. (AX2) The parties stipulated that the disputed issues relate solely to Petitioner's cervical and lumbar spine and not to his left small finger. The issues in dispute are accident, causal connection, medical expenses, and prospective medical care as it relates to Petitioner's cervical and lumbar spine, and the admissibility of Charles Brian Tanner's biomechanical analysis.

## TESTIMONY

Petitioner was 49 years old, married, with no dependent children at the time of the accident. He has been employed by Respondent as a truck driver for nine years. His job duties included driving, welding, mechanic work, and operating heavy equipment. On 11/10/21, Petitioner was hauling rock in a semi-tractor trailer. He pulled out of a quarry and traveled northbound on US 67 when his trailer was struck from behind by a Lexus SUV. He testified that he told the responding police officer that he was driving 40 to 45 mph at the time of the collision. Petitioner testified that since the accident he has had an opportunity to drive the same route with a similar load and his speed at the time of the collision would have been 28 to 30 mph. He did not look at his speed at the time of the accident because he was accelerating to merge into traffic.

Petitioner testified that it felt like the seat was pushing him forward upon impact, like he was being sucked back into his seat with the truck being pushed forward. Petitioner testified that this force was more than he would experience going over bumps, potholes, or docking his truck in his customary workday. Petitioner's truck travelled approximately 125 feet after the collision before he stopped the truck. Petitioner testified that he exited his truck, called 911, and walked to the Lexus. He stated he did not initially feel anything wrong with his neck or back, but he had

pain in his left hand and pinky finger. He testified that his left hand was on the steering wheel and his right hand was shifting gears upon impact. He began to experience tension and tightness in his low back and neck later that evening.

Petitioner saw Dr. Gornet on 11/16/21. Petitioner testified he never treated with a surgeon or underwent any MRIs for his neck or low back prior to 11/10/21. He never missed time from work for his neck or low back while working for Respondent. Petitioner testified that he was in a car accident at the age of 16 and saw a chiropractor because his spine was pulled out of alignment. He had no issues with his back since that treatment. He denied any neck or back pain the morning of 11/10/21.

Petitioner underwent surgery on his left small finger by Dr. Kutnik on 3/15/22. He last treated with Dr. Kutnik on 7/20/22. Petitioner testified that he is in constant pain, which increases when driving trucks due to the bouncing and jerking it causes. He rated his pain at rest at 4/10. He testified that his 3rd, 4th, and 5th fingers on his right hand are constantly numb. He has numbness in his right arm that radiates to his right shoulder while driving. He has limited range of motion in his neck due to pain. He testified that the force of the impact on 11/10/21 was absolutely more severe than the normal bouncing and jerking he experiences driving his truck.

Petitioner testified that he has constant numbness above his hips across his low back. Bending over for more than five minutes increases his pain. Driving his truck increases his symptoms and causes his legs and feet to go numb with a burning sensation. He takes muscle relaxers to help him sleep. Petitioner continues to work within Dr. Gornet's light duty restrictions. Dr. Gornet has recommended a cervical surgery which he desires to undergo.

On cross-examination, Petitioner testified he treated with chiropractor Dr. Dykeman from 2016 through July 2021 for symptoms between his shoulder blades and denied any treatment for his neck. He testified that he may have had symptoms into his neck from his shoulder blade issues, but he did not have a problem with his neck. He testified that he treated with Dr. Dykeman for general adjustments on his back. Petitioner testified he treated at Jerseyville Community Hospital Medical Group in 2015 for muscle spasms below his shoulder blades. He broke both of his arms in a motorcycle accident in 1994.

Petitioner agreed he refused medical care at the scene of the accident on 11/10/21. He agreed he did not seek treatment the week after the accident. Petitioner has not been taken off work since the accident. Dr. Gornet limited his driving time to no more than three hours of commercial driving per day. He testified that from the time of the accident until this Spring he has driven more than three hours and sometimes up to eight hours per day. He does not drive more than three hours at a time. He has never complained to Respondent that he is performing work beyond his restrictions. Petitioner has performed his same job duties since the accident to the best of his abilities. He drives semis, concrete mixer trucks, and dump trucks for Respondent and has to hop down from the bottom rung of the steps to exit the vehicles. He testified that he stays in his truck cab when his trailer is being loaded and unloaded with rock.

Charles Brian Tanner testified on behalf of Respondent. Mr. Tanner obtained a mechanical engineering degree from the University of Notre Dame in 1988 and a Master's

Degree in Engineering Mechanics in 1990. He took several biomechanics courses at Ohio State University, including the first-year medical school gross anatomy course, biomechanics proper within the college of engineering, and he worked as a research assistant in an orthopedic biomaterials laboratory. Mr. Tanner was a research engineer at Transportation Research, Inc. for four years and provided contract support engineering services for the National Highway Traffic and Safety Administration, including design and development of crash test dummies and the study of motion and force and its effects on the cervical spine in an accident. He then became employed at SEA where he has worked for 30 years. He performs forensic investigations of accidents, product design evaluation, and product analysis. Mr. Tanner is a senior mechanical engineer and biomechanist at SEA. He is a member of the Society of Automotive Engineers where he has served as a technical paper reviewer on an accident reconstruction committee. He is also a member of the American Society of Mechanical Engineers and an engineering honors society Pi Tau Sigma. He became licensed as a professional engineer in Ohio in 1994. He is also licensed in Illinois, Michigan, Indiana, Kentucky, Pennsylvania, and New York. He is certified in data retrieval from air bag control modules.

Mr. Tanner testified that he was involved in investigating Petitioner's accident, which included collecting and preserving evidence at the scene and the vehicles involved. He performed a momentum analysis to determine the speed change and acceleration that Petitioner's tractor-trailer underwent as a result of the collision. He testified that he often performs both the accident reconstruction and biomechanics analysis of accidents. His colleague performed the accident reconstruction in Petitioner's case. He testified that his analysis is contained in the last two pages of the report prepared by SEA. (RX1)

Mr. Tanner testified that Petitioner was driving a 1987 Ford LT 900 tractor with a loaded dump trailer on 11/10/21. Petitioner turned left onto northbound US Route 67 in Jersey County, Illinois. His tractor accelerated for about 15 seconds in the left lane and reached a speed of 40 to 50 mph when a 2008 Lexus RX 350 struck the rear left corner of Petitioner's trailer with the left front corner of the Lexus. Petitioner's truck was loaded with approximately 40,000 to 50,000 pounds of rock, with a combined tractor trailer weight of approximately 72,560 pounds. He testified that the Lexus was a small SUV.

Mr. Tanner testified that data was collected from the air bag control module of the Lexus and Petitioner's tractor did not contain a module. Mr. Tanner explained that when looking at crash test data you look at the Delta-V which is the change in speed of the vehicle as a result of the collision measured by an accelerometer mounted inside the air bag control module. He testified that the recorded speed change in the Lexus was between 24.74 to 30 mph over 115 milliseconds upon impact, and Petitioner's tractor had a change in speed of 1.36 to 2.08 mph.

Mr. Tanner concluded that the forces Petitioner was exposed to in his cervical and lumbar spine in the collision would be similar to what he would experience during his normal truck driving tasks in coupling a tractor to a trailer or backing into a dock. He testified that he performed testing on truck drivers and studies what kind of speed changes and accelerations are associated with coupling a tractor to a trailer, backing into a dock, and driving over rough road. He opined that Petitioner's exposure in the accident was not biomechanically consistent with the occurrence of significant structural changes in his cervical or lumbar spine.

Mr. Tanner testified there have been multiple studies done within the field of biomechanics on the injury threshold to the cervical spine and how those injuries occur. He testified that a person would have to be at the limited range of motion of the neck and exceed a force threshold that's moderate in level or be below the range of motion in the neck but exceed the force threshold that is much higher than it would be at the limited range of motion. He opined that the motion Petitioner experienced in his neck upon impact was well short of the limit of range of his neck motion and that the forces involved in the accident were similar to the forces he experienced performing his normal daily driving. He testified that the same analysis and opinions apply to Petitioner's lumbar spine.

Mr. Tanner testified that biomechanical engineering is different from biomechanics in that you apply biomechanics to the human body to determine how the body responds to impacts including movement and forces. He testified that the sensors in dummies contain injury threshold data that was developed by biomechanical engineers to determine normal range of motion which the federal government developed into motor vehicle safety standards. He testified that he considered Petitioner's height, weight, body position, and activities inside his tractor.

On cross-examination, Mr. Tanner testified that he is not a medical doctor and does not hold any medical degrees. Mr. Tanner has a small ownership interest in SEA. He spends 90% of his time performing automobile accident reconstructions, and 10-20% of those are for plaintiffs. He agreed that with a rearend collision such as Petitioner's, the driver is typically thrust back into the seat which depends on the severity of the accident. He testified that Petitioner was driving 40 to 50 mph based on the Ring doorbell video he reviewed given the normal values of a tractor-trailer accelerating a distance of 550 feet as stated in the police report. He stated the Lexus was driving 73 mph and killed both occupants upon impact. Mr. Tanner testified that if Petitioner was actually driving slower it would not change the calculation as the only data required is the speed of the Lexus and the weight of the two vehicles to determine the change in speed of the tractor-trailer. He testified that the forces applied to the lumbar spine would damage vertebrae before they would damage a disc based on biomechanical literature.

Petitioner was called as a rebuttal witness and stated the accident was like driving 15 mph while backing up a trailer which you do not do. He testified that the impact was far more than coupling a trailer.

## MEDICAL HISTORY/EXPERT EVIDENCE

Medical records that pre-dated Petitioner's accident were admitted into evidence. On 3/3/15, Petitioner presented to Jerseyville Clinic as a new patient with a chief complaint of lower back pain on the left side and muscle spasms. (RX11, p. 5) Petitioner reported no known injury with an onset of a couple of days ago that worsened. Petitioner was diagnosed with a back strain and muscle spasm. On 7/30/15, Petitioner presented to the JCH Medical Group with mid to low back pain that came on suddenly when he bent down to tie his shoes a couple of days ago. He had difficulty sitting/walking/etc. His lumbosacral spine exhibited tenderness on palpation with muscle spasms and limited range of motion, with pain elicited by motion. (RX11, p. 8) Petitioner was placed off work through 8/3/15. Lumbar spine x-rays revealed mild degenerative changes of

the lower lumbar facet joints with mild loss of disc space at L3-4 and L4-5, and straightening of the normal lumbar lordosis. (RX4, p. 6)

Petitioner began treating with Rosewood Chiropractic Clinic (RCC) in February 2016 for a sore back with numbness and tingling. (RX4, p. 9) He received chiropractic treatment in February, March, and May 2016.

On 7/1/16, Petitioner returned to RCC for symptoms in his upper back, shoulder, and under his shoulder blade. (RX4, p. 23) Petitioner reported he woke up with symptoms without trauma. He attended eight chiropractic visits through 7/25/16.

Petitioner presented to Jerseyville Clinic on 11/7/16 with aches and pains from the bottom of his buttocks to the bend in his knees and the top part of his calf. (RX11, p. 10) Petitioner reported that his groin muscles hurt the past couple of days and were intermittent.

Petitioner returned to RCC on 1/4/17 and reported right-sided low back and mid-back pain since Saturday with no trauma. (RX4, p. 24) On 5/15/17, Petitioner returned to RCC for a series of visits. He reported he felt a pop last week with right mid-back pain and his symptoms affected his sleep. On 5/19/17, Petitioner reported he was sore but felt really good and his sleep was improved. He reported right shoulder and neck pain that started last night. On 5/24/17, Petitioner reported he did really good and after four hours of sitting the wrong way on Monday he felt it right away. Petitioner continued to treat at RCC every couple of weeks in June and July 2017 and then monthly in August, September, and October 2017. He attended three visits in November 2017 with complaints of low back pain and symptoms into his groin. (RX4, p. 25-26)

Petitioner attended a couple of visits at RCC in February 2018 for mid and low back pain into his hips that was affecting his sleep and position. (RX4, p. 26) He underwent for four chiropractic treatments in March 2018 for low back pain on the right that went into his gluteal region. (RX4, p. 26-27) Petitioner treated in May and June 2018 for mid and low back pain. On 5/11/18, Petitioner reported he bent over to pick up a piece of paper and felt instant pain with sharp pinches and spasms. He returned to RCC in November and December 2018 with low back pain. (RX4, p. 28) On 11/30/18, Petitioner reported he had a coughing spell two days ago and had pain since.

On 7/14/20, Petitioner returned to RCC for pain in his upper mid back, low back, and cervical/thoracic joints. He complained of a stiff neck. Treatment focused on his lower cervical and upper thoracic spine. (RX4, p. 28)

On 7/12/21, Petitioner presented to RCC with mid-back and neck pain that was just starting. (RX4, p. 29) He reported driving a different truck and having an easier job. The levels of adjustment included C3-4.

On 11/16/21, Petitioner underwent a lumbar spine MRI ordered by Dr. Matthew Gornet. Dr. Ruyle interpreted a significant L4-5 circumferential disc bulge with a central right foraminal protrusion, extruding into the right foreman, a L3-4 circumferential disc bulge with right paracentral and left foraminal protrusions, a L2-3 circumferential disc bulge with a left foraminal

to far lateral protrusion resulting in moderate left greater than right foraminal stenosis, and a central protrusion at L5-S1 resulting in dual displacement. (PX2)

Petitioner was examined by Dr. Gornet the same day and reported low back pain central to both sides, right greater than left, both buttocks and hips, and occasional tingling in his feet. (PX1) Petitioner also complained of pain into the base of his neck to his occipital to both sides and occasional tingling and numbness in both hands, and headaches. Petitioner reported his symptoms began on 11/10/21 when he was driving a tractor trailer and was struck from behind by an SUV. Petitioner reported that he initially thought he could tolerate his symptoms, but his pain increased over the following days. He reported that his symptoms were constant and worse with bending, lifting, and prolonged sitting and standing. His headaches were becoming more frequent. Petitioner admitted to a history of prior chiropractic treatment every few months for maintenance and thought his last visit was 7 to 8 months ago.

Dr. Gornet reviewed the lumbar MRI and interpreted a large central disc herniation at L4-5 and a central tear in the disc at L5-S1, which he found consistent with Petitioner's complaints of right-sided back pain. Dr. Gornet reviewed cervical spine x-rays that revealed some loss of disc height at C3-4 and C5-6 with pseudo-translation subtly at C4-5, and questionable foraminal narrowing on the right at C5-6 and C6-7. Dr. Gornet recommended a cervical MRI and continued chiropractic care. Dr. Gornet opined that Petitioner's symptoms were related to the work accident and allowed Petitioner to continue working full duty.

On 11/19/21, Petitioner presented to Dr. Andrew Dykeman, D.C. at Rosewood Chiropractic Clinic. (RX4, p. 4) Petitioner complained of pain in his mid and low back and neck that started after a motor vehicle accident on 11/10/21. He reported he was driving a large semi-truck that was struck in the rear passenger side. Petitioner reported increased pain with standing and walking, intermittent headaches, and intermittent tingling in his upper arms. Dr. Dykeman noted Petitioner had been coming to his office for various musculoskeletal issues since 2016. He stated that Petitioner usually presents once or twice a year and is treated with chiropractic manipulative therapy and adjustments for a limited treatment plan and is released after his goals are met. Dr. Dykeman diagnosed acute sprain/strain of the cervical, thoracic, and lumbar spines with segmental dysfunction and associated muscular hypertonicity superimposed upon degenerative disc disease of the lumbar spine. Petitioner was to treat 2 to 3 times per week for 5 to 6 weeks.

On 11/22/21, Petitioner reported to Dr. Dykeman that he felt a few twinges but took it easy all weekend. He reported some improvement with treatment. He continued to note improvement with treatments through December with fluctuating symptoms. On 1/14/22, Petitioner reported no radiating symptoms or bad headaches.

On 12/15/21, Petitioner was examined by Dr. Kutnik for an undisputed left small finger injury resulting from the accident on 11/10/21. Petitioner believed his left small finger got caught and forcibly deviated as he had some bruising and swelling after the incident. Dr. Kutnik diagnosed a small finger radial collateral ligament tear and performed surgery on 3/25/22. Dr. Kutnik placed Petitioner at MMI on 7/20/22 and Petitioner felt that he was doing well.

The cervical MRI was performed on 1/11/22. Dr. Ruyle interpreted a central right foraminal protrusion with extruded disc material in the right foramen at C6-7 resulting in severe right foraminal stenosis, a C5-6 circumferential disc bulge with bilateral protrusions, a C4-5 circumferential disc bulge with bilateral protrusions resulting in severe bilateral foraminal stenosis, and a C3-4 right lateral recess foraminal protrusion with ventral cord flattening and mild central canal stenosis. (PX3)

On 1/31/22, Petitioner followed up with Dr. Gornet and complained of neck pain, headaches, and left-sided pain to the left trapezius, shoulder, and arm. Petitioner continued to complain of low back pain. Dr. Gornet reviewed the cervical MRI and interpreted central disc herniations at C3-4, C4-5, C5-6, and C6-7. He noted foraminal narrowing particularly at C4-5 which he felt was an acute herniation with facet encroachment. He further noted significant pathology at C3-4 at the large herniation occupying the foreman. Dr. Gornet put Petitioner's low back treatment on hold and recommended a single injection at C6-7. He stated that if the injection was unsuccessful, he would require a four-level cervical disc replacement.

Dr. Blake performed a C6-7 epidural steroid injection on 3/8/22 with a post-procedure pain rating of 4/10. Petitioner contacted Dr. Gornet's office on 3/18/22 and reported significant neck pain and headaches, with radiculopathy in his left trapezius, shoulder, and arm. He reported the injection provided some relief; however, he noticed worsening pain with prolonged driving at work. PA Nathan Collins restricted Petitioner's driving time to no more than three hours total per day.

On 4/28/22, Petitioner returned to Dr. Gornet's office and reported he was working but he was fairly miserable. Dr. Gornet recommended a disc replacement at C3 through C7. Petitioner was restricted to no driving over the road more than three hours per day.

On 5/10/22, Petitioner was examined by Dr. Robert Bernardi pursuant to Section 12 of the Act. (RX7) Dr. Bernardi noted Petitioner had no prior treatment for cervical spine issues; however, he received chiropractic treatment for his lumbar spine. Dr. Bernardi noted Petitioner thought he was driving approximately 25 mph when the collision occurred. His fully loaded truck trailer was lifted, several anchor bolts broke, and the rear axle fell off on one side. The passenger of the Lexus SUV was dead at the scene and the driver was airlifted and subsequently died. Petitioner declined medical attention at the scene and noticed some tightness in his neck that evening that progressively worsened. Petitioner reported pain in the occipital area with a constant headache, with radiating pain in his neck bilaterally. He reported a pulling sensation with cervical extension, numbness in all of his fingers in both hands, legs, and feet.

Dr. Bernardi reviewed Petitioner's post-accident medical records. Physical examination of Petitioner's cervical spine was unremarkable, with some restricted range of motion. Dr. Bernardi diagnosed multi-level degenerative disc disease and possibly degenerative facet disease that pre-existed Petitioner's accident. He did not find any neurological deficits that were causally related to the work accident. He reviewed the cervical MRI and disagreed with Dr. Gornet's findings of disc herniations at C3-4 and C4-5, and radiologist Dr. Ruyle's findings of disc protrusions at C3-4 and C6-7. Dr. Bernardi stated, "The cause of Mr. Sutton's neck and extremity complaints, as is virtually always the case following motor vehicle accidents, remains

uncertain." He opined that Petitioner could have sustained a myofascial sprain/strain as a result of the accident, which is the only thing that could account for the delay between his accident and on the onset of his symptoms. He opined that sprains/strains heal promptly and reliably and would not account for Petitioner's ongoing symptoms. Dr. Bernardi opined that Petitioner's presentation was incompatible with his condition as he did not have periscapular pain, nerve root tensions signs, or radiating arm pain that followed a dermatomal distribution. Dr. Bernardi opined that the central stenosis at C3-4 was not clinically significant to cause Petitioner's symptoms. Dr. Bernardi questioned Petitioner's credibility as he contacted his attorney when his neck symptoms worsened instead of going to the emergency room or his primary care physician, and he was referred to Dr. Gornet's office by his attorney. He opined that the chiropractic care recommended by Dr. Gornet and the medications were reasonable and related to the work accident. He opined that Petitioner did not require further treatment or restrictions as it related to his accident. Dr. Bernardi opined that Petitioner reached MMI on 1/28/22 when he completed his chiropractic care with Dr. Dykeman.

On 7/25/22, Dr. Gornet noted Petitioner continued to work full duty, with a small driving restriction due to his headaches. He opined that the more plausible explanation for Petitioner's symptoms was that he had pre-existing degeneration and sustained a disc injury that was symptomatic with axial neck pain. On 11/28/22, Dr. Gornet noted Petitioner's neck pain radiated to both trapezius, greater on the left. Petitioner complained of left shoulder numbness and tingling down his arm to his hand. His low back treatment was placed on hold. He reported back pain central to both sides, greater on the left. Petitioner remained motivated to continue working although he often drove more than three hours per day.

Dr. Matthew Gornet testified by way of deposition on 2/2/23. (PX8) Dr. Gornet is a board-certified orthopedic surgeon. He testified that the lumbar MRI revealed a large central herniation at L4-5 which fit best within Petitioner's structural back pain with more right-sided symptoms. He noted a central disc tear at L5-S1 and possibly a small central protrusion at L3-4. He ordered a cervical MRI due to Petitioner's axial neck pain and headaches which revealed disc herniations at C3 through C7, with significant foraminal narrowing on the left, particularly at C4-5 which showed an acute-on-chronic herniation and facet encroachment and aggravated his degenerative condition. He testified that the right-sided foraminal stenosis showed significant pathology at C3-4 with a large herniation occupying the foramen. He testified that he ordered the injection at C6-7 as it is the widest area and less risky due to tightness in Petitioner's cervical spine, which can provide relief at all four levels.

Dr. Gornet testified that the majority of Petitioner's complaints were axial in nature, with some mild radiculopathy to the left trapezius, shoulder, and arm, with significant headaches. He recommends disc replacements at C3 through C7 which is necessary and related to the work accident. Petitioner would require a CT scan, new MRI, and medical clearance prior to surgery. Dr. Gornet opined that Petitioner's lumbar spine symptoms were causally related to the work accident. His lumbar spine treatment is on hold pending cervical surgery.

Dr. Gornet opined that Petitioner's accident as Dr. Bernardi described it in his Section 12 report could certainly cause enough force to injure Petitioner's spine and aggravate his pre-existing degenerative foraminal stenosis, particularly when Petitioner was not prepared for the

impact. He testified that Petitioner had age-appropriate disc degeneration, greater at C3-4 and C5-6, which became symptomatic as a result of the accident. He testified that he examined Petitioner six days after the accident, and he was fairly symptomatic at that point. He testified that Dr. Bernardi does not operate if a patient solely has axial neck pain and in his experience, 99% of the time the operation completely cures the patient's headaches and improve his neck pain. Dr. Gornet testified that Petitioner was able to perform his activities of daily living prior to the accident, had limited chiropractic treatment for maintenance, no imaging studies or clinical course of treatment, worked full duty without restrictions, with no indication that he performed an activity that caused his current condition of ill-being except the work accident.

Dr. Robert Bernardi testified by way of deposition on 2/17/23. (RX2) Dr. Bernardi is a board-certified neurosurgeon. His physical examination revealed moderate restriction of the cervical spine at 50% of normal range of motion. He testified that the cervical MRI revealed congenital stenosis, which is a smaller spinal canal, multi-level degenerative disc disease most pronounced at C3-4, spondylosis in the discs from C3 through C6, and arthritis affecting the C4-5 facet joint on the right causing foraminal narrowing. He did not believe Petitioner had spinal cord compress that would explain the numbness and tingling in his hands.

Dr. Bernardi testified it is reasonable to assume that Petitioner's acute symptoms were related to the work accident. He testified that "whiplash" symptoms develop in a delayed fashion which run their course within a couple of weeks. He opined that Petitioner's ongoing symptoms were not related to the work accident. Dr. Bernardi opined that Petitioner reached MMI on 1/28/22 when he completed chiropractic care. He agreed that most of Petitioner's prior chiropractic care was for his mid-to-low back, but he did treat on several occasions for neck pain up to four months prior to the work accident. He testified he has never personally treated with a chiropractor and has no idea what "maintenance" means or how frequent one would treat for maintenance. He opined that Petitioner's visit with Dr. Gornet, chiropractic treatment, medications, and MRI were reasonable and related to the work accident. He opined that neck pain not associated with neurological symptoms or signs is not an indication for surgery and Petitioner had no objective neurological signs. He testified that Dr. Gornet has also not found radiculopathy but notes left-sided radicular symptoms. He opined that a four-level disc replacement is not medically recommended, and he would not recommend surgery for axial neck pain. Dr. Bernardi suspected based on his intuitive impression that Petitioner was barley aware that he had been hit at the time of impact because his trailer weighed about 80,000 pounds. He testified that people with chronic neck pain use the motor vehicle accident as an anchor or hook to pin all of their future complaints on.

On cross-examination, Dr. Bernardi testified he did not see any overt signs that Petitioner was magnifying his symptoms. He agreed there were no complaints of headaches in Petitioner's prior medical records. He testified that pathology of the cervical spine can cause headaches and Petitioner's pain was at the top of the neck or suboccipital. Dr. Bernardi testified he is not trained and does not perform disc replacement surgeries. He agreed Petitioner was struck with enough force to cause a ruptured ligament in his hand. He performs cervical surgeries 25% of the time on patients with normal neurological exams because the need for surgery is driven by symptoms, but the symptoms have to be in a recognized pattern that is consistent with the disease process. He testified that in order for Petitioner's headaches to be considered radicular in nature they

would have to extend into his parascapular area or the region around the shoulder blade and into his arm, except C3-4 which radiates into the area around the clavicle and does not radiate into the arm.

Dr. Sumeet Vadera testified by way of deposition on 5/5/23. (RX10) Dr. Vadera is a board-certified neurosurgeon. He performed a Utilization Review on 3/24/23 and recommended that the four-level disc replacement surgery not be certified as the procedure was not conditionally recommended by the Official Disability Guidelines and Petitioner did not have radiculopathy. Dr. Vadera testified that anterior disc replacements are conditionally recommended for one-level or two-level cervical degenerative disc disease with radiculopathy and/or myelopathy. He testified that he does not perform disc replacements. His report was prepopulated by a nurse practitioner working for Physio Solutions who hired him. Dr. Vadera's practice is divided equally between treating patients with epilepsy and performing spine surgeries. He did not clinically examine Petitioner and admitted that clinical examination is an important tool for a surgeon to determine if surgery is necessary.

A Traffic Crash Reconstruction Response Report prepared by the Illinois State Police was admitted into evidence. (RX3) The passenger of the Lexus was deceased upon arrival. The passenger was removed in order to extract the driver who was airlifted and subsequently succumbed to his injuries. With respect to Petitioner's trailer, damage was noted to the rear passenger corner, the dump bed, dump bed rails, rear tandem wheels, and mud flap. The responding officer observed the rear tandem axle and associated wheels were damaged and pushed out of alignment with the frame of the trailer. The front door driver skin of the Lexus wedged between the bottom of the dump bed and the trailer's rearmost passenger wheels. The reported vehicle speed of the Lexus was between 72.1 and 78.3 mph in the seconds leading up to the collision.

C. Brian Tanner was retained by Respondent to prepare an accident analysis. (RX1) Following a review of the Illinois State Police report, as well as the Lexus ACM data, Mr. Tanner performed a momentum analysis. He opined that the law of conservation of momentum establishes that the quantity of momentum and a collision never changes, therefore the total momentum before a collision is equal to the momentum after a collision. When the Delta-V, or change in speed of one vehicle is known, the Delta-V of the other vehicle can be calculated by multiplying the mass ratio of the two vehicles by the known Delta-V. Using this approach, Mr. Tanner concluded that the change in speed experienced by Petitioner's tractor-trailer during the collision was less than 2 mph and an average acceleration of less than 1 g in the forward direction.

Mr. Tanner performed a biomechanical analysis and concluded that that the forces Petitioner was exposed to in his cervical and lumbar spine would be similar to what he experienced during such normal truck driving tasks, such as coupling a tractor to a trailer or backing into a dock, and smaller than those experienced when climbing into and out of his cab, or when falling to his back from a seated position in bed. He opined that the exposure in the accident was not biomechanically consistent with the occurrence of a significant structural injury to the cervical or lumbar spine.

Mr. Lane Ehlert testified by way of deposition on 7/21/23. (RX5) Mr. Ehlert is a mechanical engineer and was an employee of SEA. He testified as to the foundation of the SEA report and the momentum analysis he conducted that lead to his conclusion that the Delta-V or speed change experienced by Petitioner's tractor-trailer during the collision was less than 2 mph.

## CONCLUSIONS OF LAW

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

"To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that he has suffered a disabling injury which arose out of and in the course of his employment." *Sisbro, Inc. v. Industrial Comm'n,* 797 N.E.2d 665, 671 (2003). "In the course of employment" refers to the time, place, and circumstances surrounding the injury. *Id.* That is to say, for an injury to be compensable, it generally must occur within the time and space boundaries of the employment. There is no dispute that Petitioner was on the clock hauling rock for Respondent when his tractor-trailer was rearended on 11/10/21.

An injury "arises out of" one's employment if its origin is in a risk connected with or incidental to the employment. *Id.* A risk is incidental to the employment "…when it belongs to or is connected with what the employee has to do in fulfilling his or her job duties. In order to meet this burden, a claimant must prove that the risk of injury is peculiar to the work *or* that he or she is exposed to the risk of injury to a greater degree than the general public. *McAllister v. Ill. Workers' Comp. Comm'n*, 2020 IL 124848. Illinois courts recognize the following three categories of risks: "1) risks distinctly associated with the employment; 2) risks personal to the employee; and 3) neutral risks which have no particular employment or personal characteristics." *Id.* A risk is distinctly associated with the employment if the employee was "performing (1) acts he or she was instructed to perform by the employer, (2) acts that he or she had a common law or statutory duty to perform, or (3) acts that the employee might reasonably be expected to perform incident to his or her assigned duties." *Id.*

The evidence is overwhelming clear that Petitioner was performing acts distinctly associated with his employment as a truck driver for Respondent on 11/10/21. He was hauling rock as instructed by his employer and carrying out his assigned job duties when the motor vehicle accident occurred.

Based on the evidence as a whole, the Arbitrator finds that Petitioner sustained accidental injuries that arose out of and in the course of his employment with Respondent on 11/10/21.

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

Circumstantial evidence, especially when entirely in favor of the Petitioner, is sufficient to prove a causal nexus between an accident and the resulting injury, such as a chain of events showing a claimant's ability to perform manual duties before accident but decreased ability to still perform immediately after accident. *Pulliam Masonry v. Indus. Comm'n*, 77 Ill. 2d 469, 397 N.E.2d 834 (1979); *Gano Electric Contracting v. Indus. Comm'n*, 260 Ill.App.3d 92, 96–97, 631

N.E.2d 724 (1994); *International Harvester v. Indus. Comm'n*, 93 Ill.2d 59, 442 N.E.2d 908 (1982).

A claim is not denied simply because a claimant suffers from a preexisting condition. The law holds that accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it is a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 205, 797 N.E.2d 665, 672-673 (2003). [Emphasis added]. "Petitioner need only show that some act or phase of the employment was a causative factor of the resulting injury." *Fierke v. Indus. Comm'n*, 309 Ill. App. 3d 1037, 723 N.E.2d 846 (2000). Employers are to take their employees as they find them. *A.C. & S. v. Indus. Comm'n*, 304 Ill. App. 3d 875, 710 N.E.2d 837 (1999) citing *General Electric Co. v. Indus. Comm'n*, 89 Ill. 2d 432, 434, 433 N.E.2d 671, 672 (1982). If a preexisting condition is aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. *Rock Road Constr. v. Indus. Comm'n*, 227 N.E.2d 65, 67-68 (Ill. 1967), 37 Ill. 2d 123; see also *Illinois Valley Irrigation, Inc. v. Indus. Comm'n*, 66 Ill. 2d 234, 362 N.E.2d 339 (1977).

There is no dispute that the motor vehicle accident on 11/10/21 was significant enough to cause the death of both occupants of the Lexus SUV that rearended Petitioner's vehicle. The Traffic Crash Reconstruction Response Report estimated the Lexus was traveling between 72.1 and 78.3 mph in the seconds leading up to the collision. The collision caused damage to the rear of Petitioner's trailer, including the dump bed, dump bed rails, rear tandem wheels, and mud flap. The responding officer observed the rear tandem axle and associated wheels were damaged and pushed out of alignment with the frame of the trailer. The front door driver skin of the Lexus wedged between the bottom of the dump bed and the trailer's rearmost passenger wheels. This supports Petitioner's testimony that it felt like the seat was pushing him forward upon impact, like he was being sucked back into his seat with the truck being pushed forward. Contrary to Mr. Tanner's biomechanical conclusions, Petitioner testified that this force was more than he would experience going over bumps, potholes, or docking his truck in his customary workday. Dr. Bernardi agreed that Petitioner was struck with enough force to cause a ruptured ligament in his hand, but it was his intuitive impression that Petitioner was barley aware that he had been hit at the time of impact because his trailer weighed about 80,000 pounds. The Arbitrator does not find Dr. Bernardi's speculations persuasive or supported by the evidence. Mr. Tanner testified that Petitioner's trailer was loaded with approximately 40,000 to 50,000 pounds of rock, with a combined tractor trailer weight of approximately 72,560 pounds.

Petitioner was working full duty without restrictions at the time of accident. He worked for Respondent for nine years and his job duties included driving, welding, mechanic work, and operating heavy equipment. He admitted to a history of chiropractic treatment which focused on maintenance, pain between his shoulder blades, and his mid-to-low back. Petitioner denied any issues or treatment specifically related to his cervical spine. He never treated with a surgeon or underwent a cervical or lumbar MRI prior to 11/10/21. Petitioner testified that he never missed work for his neck or back while employed by Respondent which is supported by the medical evidence.

In 2015, Petitioner had complaints of mid-to-low back pain and muscle spasms. He was diagnosed with a lumbar strain. Lumbar spine x-rays revealed mild degenerative changes of the

lower lumbar facet joints with mild loss of disc space at L3-4 and L4-5 and straightening of the normal lumbar lordosis. No treatment was recommended, including an MRI or referral to a specialist. In 2016, Petitioner began receiving chiropractic treatment for a sore back with numbness and tingling, and pain in his upper back, shoulder, and under his shoulder blade. In 2017, Petitioner received chiropractic treatment for right mid-back and low back pain. He underwent a series of chiropractic treatments and then monthly visits. In 2018, Petitioner underwent chiropractic treatment for mid-to-low low back pain into his hips and groin. There was no evidence Petitioner received any treatment in 2019.

On 7/14/20, Petitioner received chiropractic treatment for pain in his upper-mid back, low back, and cervical/thoracic joints. He complained of a stiff neck. Treatment focused on his lower cervical and upper thoracic spine. He returned for additional chiropractic care in July 2021 for mid-back and neck pain that was just starting.

From 2015 through July 2021, Petitioner received sporadic chiropractic treatments with a primary focus on his mid-to-low back that never resulted in diagnostic studies or a referral to a specialist. Petitioner testified that immediately following the accident he had pain in his left hand and pinky finger. He did not experience neck symptoms until later that evening that worsened by morning. Petitioner reported to Dr. Bernardi that his neck symptoms started approximately seven hours after the accident, and it was not until the next morning he knew something was wrong.

Dr. Bernardi testified it is reasonable to assume that Petitioner's acute symptoms were related to the work accident. He testified that "whiplash" symptoms develop in a delayed fashion which is consistent with the onset of Petitioner's symptoms. He opined that "whiplash" injuries should resolve within one to two weeks post-injury. He did not provide an opinion as to why Petitioner continued to experience symptoms months after the injury or that Petitioner's condition returned to pre-accident baseline. Rather, Dr. Bernardi testified that people with chronic neck pain use the motor vehicle accident as an anchor or hook to pin all of their future complaints on. He did not find any signs of symptom magnification.

Dr. Bernardi testified that pathology of the cervical spine can cause headaches and Petitioner's pain was at the top of the neck or suboccipital. He agreed there was no evidence that Petitioner had headaches prior to the accident. He agreed that a person can be a surgical candidate absent neurological findings, which consists of 25% of his surgeries, because surgery is driven by the patient's symptoms. He agreed with Dr. Gornet that Petitioner did not have neurological findings but disagreed that a disc replacement was appropriate which is a surgery he is not trained in and does not perform.

Dr. Gornet ordered a cervical MRI due to Petitioner's complaints of neck pain and headaches. Dr. Ruyle interpreted the MRI as showing a central right foraminal protrusion with extruded disc material in the right foramen at C6-7 resulting in severe right foraminal stenosis, a C5-6 circumferential disc bulge with bilateral protrusions, a C4-5 circumferential disc bulge with bilateral protrusions resulting in severe bilateral foraminal stenosis, and a C3-4 right lateral recess foraminal protrusion with ventral cord flattening and mild central canal stenosis. Dr. Gornet agreed with Dr. Ruyle and diagnosed disc herniations at C3 through C7, with significant foraminal narrowing on the left, particularly at C4-5 which showed an acute-on-chronic

herniation and facet encroachment. Dr. Gornet testified that the right-sided foraminal stenosis showed significant pathology at C3-4 with a large herniation occupying the foramen. He testified that the majority of Petitioner's complaints were axial in nature, with some mild radiculopathy to the left trapezius, shoulder, and arm, with significant headaches.

Dr. Gornet opined that Petitioner's accident could certainly cause enough force to injure his spine and aggravate his pre-existing degenerative foraminal stenosis and cause acute-on-chronic injuries, particularly when Petitioner was not prepared for the impact. He testified that Petitioner had age-appropriate disc degeneration, greater at C3-4 and C5-6, which became symptomatic as a result of the accident. He testified that he examined Petitioner six days after the accident, and he was fairly symptomatic at that point. He supported his opinion on the fact that Petitioner was able to perform his activities of daily living prior to the accident, had limited chiropractic treatment for maintenance, had no imaging studies or clinical course of treatment, worked full duty without restrictions, and had no indication that he performed an activity that caused his current condition of ill-being except the work accident.

The Arbitrator is less persuaded by Dr. Vadera opinions. Dr. Vadera performs 50% of his time treating spinal conditions. He testified that performing a physical examination is an important part of the decision-making process when considering surgery and he never met or examined the Petitioner.

The Arbitrator is also less persuaded by Mr. Tanner's biomechanical opinions. He opined that the forces Petitioner was exposed to in his cervical and lumbar spine would be similar to what he experienced during such normal truck driving tasks, such as coupling a tractor to a trailer or backing into a dock, and smaller than those experienced when climbing into and out of his cab, or when falling to his back from a seated position in bed. Petitioner adamantly denied Mr. Tanner's conclusion and testified that his reaction inside his truck upon impact was absolutely more severe than the normal bouncing and jerking he experiences driving his truck, and was far more than coupling his trailer. Dr. Bernardi agreed that Petitioner was struck with enough force to cause a ruptured ligament in his hand that required surgery. He opined that it is reasonable to assume that Petitioner's acute symptoms were related to the work accident and the force was enough to cause a "whiplash" injury to his cervical spine. The Arbitrator also does not find Mr. Tanner's testimony credible that the forces applied to the lumbar spine would damage vertebrae before they would damage a disc based on biomechanical literature.

Based on the evidence as a whole, the Arbitrator finds that Petitioner's current conditions of ill-being in his cervical and lumbar spine are causally connected to the work accident that occurred on 11/10/21.

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

**Issue (K): Is Petitioner entitled to prospective medical care?**

Upon establishing causal connection and the reasonableness and the necessity of recommended medical treatment, employers are responsible for necessary prospective medical

care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d. 13 (1997). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 325 Ill. App. 3d 527, 758 N.E.2d 18 (2001).

Based on the finding as to causal connection, the Arbitrator finds that Petitioner is entitled to medical benefits related to his work injury. Dr. Bernardi testified that Petitioner's visit with Dr. Gornet, chiropractic treatment, medications, and MRI were reasonable and related to the work accident. He opined it is reasonable to assume that Petitioner's acute symptoms were related to the work accident, and suggested Petitioner's symptoms were the result of a whiplash-type injury. He opined that Petitioner would have been at MMI after he completed chiropractic treatment recommended by Dr. Gornet.

Respondent shall therefore pay the medical expenses outlined in Petitioner's Group Exhibit 7, as provided in Sections 8(a) and 8.2 of the Act, pursuant to the medical fee schedule.

The Arbitrator further finds Petitioner is entitled to receive the additional care recommended by Dr. Gornet. Despite conservative care, Petitioner has persistent symptoms that prevent him from returning to full duty work. Therefore, Respondent shall provide and pay for prospective medical treatment, including, but not limited to, a disc replacement at C3-4, C4-5, C5-6, and C6-7, as recommended by Dr. Gornet, and all reasonable and necessary attendant care.

**Issue (O): Admissibility of C. Brian Tanner's biomechanical analysis.**

There is no question that C. Brian Tanner was properly qualified as an expert in the field of biomechanical engineering. Petitioner contends that Mr. Tanner cannot opine about the cause of Petitioner's specific injuries because his is not a medical doctor. In Respondent's view, Mr. Tanner's qualifications as a biomechanical engineer are precisely what qualifies him to give the testimony regarding the force of Petitioner's body, the types of injury that amount of force could cause, and whether Petitioner's alleged injuries were consistent with that analysis.

Because the parties disagree about what testimony a biomechanical engineer is qualified to give, a brief discussion on the field of biomechanics is appropriate. Biomechanical engineering or biomechanics is a multidisciplinary field that involves the application of mechanical principles to biological systems, or injury mechanics. Channing R. Robertson, John E. Moalli & David L. Black, *Reference Guide on Engineering*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 901 (Federal Judicial Center, 3rd ed. 2011). To distinguish the role of a medical doctor from that of a biomechanical engineer, the Reference Guide on Engineering published by the Federal Judicial Center and National Research Council explains: "The traditional role of the physician is the diagnosis (identification) of injuries and their treatment, not necessarily a detailed assessment of the physical forces and motions that created injuries during a specific event." *Id*. at 901. Therefore, a biomechanical expert may opine about whether Petitioner's "alleged damages were caused by the conduct in question." *Id*. at 942-43. As with other expert testimony, a court must review the adequacy and admissibility of expert opinions on causation in light of its scientific basis and the law.

Illinois courts have held that biomechanical engineers are qualified to testify on injury mechanisms. *McKeon v. City of Morris,* 2016 LEXIS 131126, at *6 (N.D. Ill. Sep. 26, 2016) While not qualified to diagnose injuries, the biomechanical engineer could "interpret the diagnoses of plaintiff's treating physicians in order to opine on the likely mechanisms of plaintiff's injuries." *Phillips v. Raymond Corp.*, 364 F. Supp. 2d 730, 742 (N.D. Ill. 2005).

Petitioner is not challenging Mr. Tanner's testimony that the collision resulted in minimal accelerations and forces on Petitioner's body. These opinions about the mechanics and movements involved in the accident are clearly within Mr. Tanner's expertise in biomechanics, which is demonstrated by his educational degrees in mechanical engineering, his numerous publications related to injury mechanics, his extensive training and work experience in an orthopedic biomaterials laboratory and at the National Highway Traffic Safety Administration developing and testing crash test dummies and injury assessment tools, and his consulting experiences at SEA focused on accident reconstruction and injury causation since 1994.

These qualifications also provide the basis for Mr. Tanner to opine that the forces Petitioner was exposed to in his cervical and lumbar spine would be similar to what he experienced during such normal truck driving tasks, such as coupling a tractor to a trailer or backing into a dock, and that the exposure was not biomechanically consistent with the occurrence of a significant structural injury to the cervical or lumbar spine. Although Petitioner characterizes Mr. Tanner's opinions as "medical", none of Mr. Tanner's opinions diagnose or attempt to diagnose Petitioner's injuries. While Mr. Tanner cannot testify about a *legal* conclusion that will determine the outcome of the case, he can offer opinions about the ultimate *factual* issues in the case. There is a factual dispute over whether the accident caused Petitioner's injuries and his opinions and testimony in this regard are admissible.

This award shall in no instance be a bar to further hearing and determination of any additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

Arbitrator Linda J. Cantrell _____ DATE _____

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 21WC022517 |
| Case Name | Donald E. Martin Jr. v.<br>Dollar General (Store #4394) |
| Consolidated Cases | |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 24IWCC0612 |
| Number of Pages of Decision | 20 |
| Decision Issued By | Stephen Mathis, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Richard Johnson |
| Respondent Attorney | PETER SINK |

DATE FILED: 12/23/2024

/s/Stephen Mathis, Commissioner
Signature

24IWCC0612

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 Other (explain) maintenance award | ☐ Second Injury Fund (§8(e)18) |
| | ☐ PTD/Fatal denied |
| ☐ Modify Choose direction | ☒ None of the above |

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DONALD MARTIN,

Petitioner,

vs. NO: 21 WC 022517

DOLLAR GENERAL STORE,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability,maintenance and vocational rehabilitation, and nature and extent of dis ability.and being advised of the facts and law, reverses the Decision of the Arbitrator as stated below on the issue of entitlement to maintenance benefits only and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

On December 22, 2020, Petitioner was employed by Respondent as the store manager. Petitioner testified persuasively that among his responsibilities as store manager was maintaining an area of safe ingress and egress from the store location. On December 22, 2020, Petitioner observed a car parked in the no parking zone in the front of the store at the exit door. Petitioner requested the driver move his car to the parking lot.

Petitioner testified that a few minutes later the driver of the car came into the store and created a disturbance. As he approached Petitioner, the driver, hereinafter assailant, entered an area restricted to store personnel. The assailant's girlfriend escorted him out of the store, but he returned shortly thereafter. As Petitioner was telephoning the police the assailant attacked Petitioner. Petitioner raised his left arm to block the punches when he felt pain in his left shoulder. A police report was prepared, and Petitioner notified his supervisor of the accident on the day of the assault.

Petitioner engaged in a course of physical therapy to treat his left shoulder but ultimately required rotator cuff surgery which was performed on April 7, 2021. The intraoperative findings reflect a massive rotator cuff tear, subacromial decompression, extensive debridement of the

anterior superior and posterior labrum as well as extensive debridement of the subacromial bursa. The biceps tendon was significantly torn. The infraspinatus and supraspinatus were completely torn. There was extensive tearing of the anterior, superior, and posterior labrum.

Petitioner testified that he returned to light duty work on June 17, 2021, after his period of temporary total disability. Upon his return Respondent initially accommodated his restricted work activity. On November 5, 2021, Petitioner underwent a Functional Capacity evaluation which yielded restrictions regarding lifting. Dr. Li, Petitioner's treating physician imposed permanent restrictions on lifting to 35 lbs. below the waist occasionally, 20 lbs. to the chest occasionally, 15 lbs. over the chest occasionally, and to work only 40 hours per week. The evidence shows that the permanent restrictions conflict with Petitioner's job description as reflected in Respondent's Exhibit 5 which specifies that he must be able to lift 40 lbs., and occasionally lift up to 55 lbs.

Petitioner's district manager placed Petitioner on a leave of absence commencing November 24, 2021, as a consequence to the placement of permanent work restrictions. The district manager cited to Petitioner's inability to perform his work duties. Petitioner testified that he was instructed by his district manager to apply for disability benefits. Thereafter, Respondent paid some disability benefits monthly in addition to workers' compensation maintenance benefits which were also being paid to Petitioner. Respondent paid Petitioner a total of $6,670 in temporary total disability benefits and $23,831.39 in maintenance benefits. Respondent has disputed Petitioner's entitlement to maintenance benefits on the basis of liability i.e. the "accident defense" asserted by Respondent.

Petitioner testified that he was subsequently fired without notice by Respondent in May 2022. The Commission notes that Respondent does not dispute the causal connection to Petitioner's condition of ill-being.

Petitioner testified that he initiated a self-directed job search after he was placed on disability leave by Respondent. No assistance was provided by Respondent in this vocational endeavor. The Arbitrator denied maintenance benefits to Petitioner on the basis that Petitioner intentionally or unintentionally self-sabotaged his job search efforts by requesting information of four potential employers out of the 300 hundred Petitioner contacted concerning accommodations for permanent restrictions. Notably, Respondent never raised any issues with the validity of Petitioner's job search.

The Commission finds that based upon the evidence in its entirety including the Arbitrator's credibility finding that Petitioner testified in an honest and credible manner. It was incumbent upon Respondent to initiate and provide vocational services where, as in this case, an employee is entitled to such services. In the present case Respondent was in violation of Section 9110.10 of the Commission's rules in failing to provide vocational rehabilitation services to Petitioner.

The Commission finds that maintenance benefits should not be denied on the basis of an inadequate job search when Respondent neglected its duty to offer assistance with his job search through vocational rehabilitation services. Based upon the foregoing analysis the Commission

reverses the Arbitrator's denial of maintenance benefits and affirms and adopts all else.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's denial of maintenance benefits to Petitioner is hereby reversed, all else is affirmed and adopted.

IT IS FUTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $686.12 per week commencing April 21, 2021, to June 16, 2021, for a period of 8 1/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $686.12 per week for a period of 150 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused the loss of 30% loss of use of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner all of the medical bills introduced into evidence in Petitioner Exhibit 1 as they are related to Petitioner's left rotator cuff tendon and biceps tendon injuries, are reasonable and were necessitated to treat or cure Petitioner's injuries suffered in the accident. Respondent is entitled to credit for any amounts previously paid. Respondent is also entitled to credit under Section 8(j) of the Act for any portions of these bills paid by its group health insurance carrier.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner maintenance benefits in the amount of $686.12 per week, for a total of 65 5/7 weeks pursuant to Section 8(a) of the Act.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $25,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

**December 23, 2024**

o: 11/6/24
SJM/msb
44

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

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

/s/ *Raychel A. Wesley*
Raychel A. Wesley

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 21WC022517 |
| Case Name | Donald E. Martin Jr. v.<br>Dollar General (Store #4394) |
| Consolidated Cases | |
| Proceeding Type | |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 16 |
| Decision Issued By | Dennis OBrien, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Richard Johnson |
| Respondent Attorney | Peter Sink |

DATE FILED: 6/29/2023

/s/ Dennis OBrien, Arbitrator

Signature

**THE INTEREST RATE FOR THE WEEK OF JUNE 27, 2023 5.21%**

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**

**DONALD MARTIN JR.**
Employee/Petitioner

v.

**DOLLAR GENERAL STORE #4394**
Employer/Respondent

Case # **21** WC **22517**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Dennis O'Brien**, Arbitrator of the Commission, in the city of **Champaign**, on **May 10, 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 **December 22, 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.

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

In the year preceding the injury, Petitioner earned $**53,971.00**; the average weekly wage was $**1,029.18**.

On the date of accident, Petitioner was **59** years of age, ***single*** with **no** dependent children.

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

Respondent shall be given a credit of $**6,670.10** for TTD, $**0.00** for TPD, $**23,831.39** for maintenance, and $**0.00** for other benefits, for a total credit of $**30,501.49**.

Respondent is entitled to a credit of **any amount paid by its group medical plan** under Section 8(j) of the Act.

**ORDER**

**Petitioner suffered an accident on December 22, 2020, which arose out of and in the course of his employment by Respondent.**

**Petitioner provided Respondent with notice of the accident of December 22, 2020 within the time limits stated in the Act.**

**Petitioner was temporarily totally disabled as a result of the accident from April 21, 2021 to June 16, 2021, a period of 8 1/7 weeks.**

**Petitioner has not proven entitlement to maintenance benefits for the claimed period of time.**

**All of the medical bills introduced into evidence in Petitioner Exhibit 1 are related to Petitioner's left rotator cuff tendon and the biceps tendon injuries, are reasonable and were necessitated to treat or cure Petitioner's injuries suffered in this accident. Respondent is entitled to credit for any amounts previously paid. Respondent is also entitled to credit under Section 8(j) of the Act for any portions of these bills paid by its group health insurance carrier.**

**Petitioner sustained permanent partial disability to the extent of 30% loss of use of the person as a whole pursuant to §8(d)(2) of the Act.**

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

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

Signature of Arbitrator

**June 29, 2023**

**FINDINGS OF FACT:**

## TESTIMONY AT ARBITRATION

### Petitioner

Petitioner testified that he began working for Respondent in 2007, first stocking shelves and then as an assistant manager prior to becoming a manager at the end of 2008. He said he had worked at the Danville store for 13 years. He said that on December 22, 2020, he noticed a car parked in front of their exit, where people had previously been hit, so he went and asked the driver if he would park in the parking lot. Petitioner said he then reentered the store and went to the registers to wait on customers. He said the area where the car had been parked was a no parking zone with signs and paint on the asphalt. Petitioner said one of his responsibilities as management was to care for the safety of customers and employees. He said two people in wheelchairs had previously been hit as had people trying to walk around illegally parked cars in front of the store.

Petitioner said that the driver of the vehicle came up to his register two or three minutes after being asked to park in the parking lot, positioned himself between Petitioner and another cashier and began, "raising cain." He said the area where the driver was then standing was for store personnel only. Petitioner said the driver said he was going to "kick (Petitioner's) butt," and the driver's girlfriend managed to get the driver out the door of the store, but he reentered and began arguing again. Petitioner said that as he did so Petitioner was on the phone with the police and Petitioner said he was pointing to the door, trying to get the driver to leave the store.

Petitioner testified that the driver came into the store a third time and came at Petitioner, with Petitioner raising his left arm to block punches. He said their arms got tangled and he demonstrated to the arbitrator that his left arm was up with the elbow at about shoulder height, bent upwards at an angle approximately 35 degrees from the horizontal. He said he felt something in his left shoulder when this happened.

Petitioner said the police came and took a report, and he called his immediate supervisor, the district manager, who came out within a few days and made a copy of what was on the cameras. He said a loss prevention regional manager called him to do her investigation and advised him there was no fault on his part. He said both the police and the district manager viewed the videotape, the district manager doing so within a day or two of the incident. He said he told the district manager that he had hurt his left shoulder in the incident. Petitioner testified that he had not had issues in regard to his left shoulder prior to this incident, though he had surgery on his right shoulder prior to this accident.

Petitioner testified that he was seen by Physician Assistant (PA) Wagner on January 7, 2021, and physical therapy was ordered. An MRI was also recommended, and that was performed at Carle on February 10, 2021. A second MRI had to be performed due to poor imaging with the first one. On the recommendation of a couple of friends and the physical therapist, he then saw Dr. Li on about March 22, 2021. He said Dr. Li recommended he have rotator cuff surgery, and it was performed on April 7, 2021. Petitioner said he worked

light duty up until the time of surgery, at which point he went off work. He said he returned to light duty work in a sling on June 17, 2021, even when taking physical therapy while in a sling.

Petitioner said his doctor had him undergo a functional capacity evaluation on November 5, 2021, again while he was working light duty. He said his superiors then had him come in to discuss with them which of his duties he could and could not perform, and they on November 24, 2021 placed him on leave. He said the district manager told him the company wanted him to take a leave of absence, and he was told to apply for some disability benefits from Matrix Absence Management. He testified that he was paid approximately $240.00 per month to enhance his workers' compensation benefits, and those payments continued for two years, until approximately two months prior to the arbitration hearing.

Petitioner testified that he kept job logs while he was looking for work, which were introduced into evidence as Petitioner's Exhibit 5. He said none of the jobs he had applied for resulted in an offer of employment. He said Respondent did not provide him with vocational rehabilitation of any sort.

Petitioner said that at Respondent's request he was examined by Dr. Alpert on December 14, 2021. He said he gave Dr. Alpert a copy of his functional capacity evaluation and a copy of Dr. Li's restrictions.

Petitioner said that as of the date of arbitration he had not found any work.

Petitioner testified that as of the date of arbitration he could not get a can of beans out of a cabinet with just his left arm, that putting a gallon of milk into the refrigerator or out of the refrigerator took two hands, and that he had difficulty with tasks such as bathing, washing and drying his hair, or getting dressed, that doing anything above his abdomen or chest was almost impossible. He said the issue was pain. He said he did not take anything for the pain, including Ibuprofen or Tylenol. He said the last time he saw Dr. Li was the day he gave him his permanent restrictions. He did perform motion exercises with a rubber band he received from the physical therapist, but he had not regained his strength.

Petitioner said he had not suffered any left shoulder injuries since this December 22, 2020 accident. He said he was right-handed.

On cross-examination Petitioner said that the Danville store was his main store since he became a manager, but he was also a training manager, so he would work in other stores as well. He said his district manager was Adam Saba, and that is who he reported this injury to on the date of the accident.

Petitioner said his store was in a strip mall with several other small businesses and a Big R anchor store. He said there was also a Red Lobster on the other side of the property. While Red Lobster had its own parking lot, the other businesses shared a lot. He said his duties as a manager included keeping the parking lot clean of garbage, and clearing a little snow from the sidewalk at the front and rear doors, but a company cleared the lot of snow. He said the store leased the space from different companies, but he felt it was Rural King who owned it at the time of this accident, and they had the contract for snow removal.

Petitioner testified that his assailant parked his car in front of the store, but not on the sidewalk, so people could exit the store onto the sidewalk. He said the curb was painted yellow, the area was designated a fire lane, with stripes and big letters saying "no parking." He said there were two signs on both sides of the store noting there was to be no parking. Petitioner said three or four customers who had had been hit in the past four

or five years, including an older person who was in a wheelchair and was hit by people parking in the illegal zone.

Petitioner said he could not remember the name of his assailant. He said the police came to the store, but the assailant had already left. He said he did not believe he had ever met this assailant before, but a policeman later told him that Petitioner had barred the person from the store a year earlier. Petitioner said he had banned several people from the store. Petitioner said he did not ask that charges be pressed against the assailant, for fear of retaliation due to gang activity in the area, but he instead asked the police to tell the person to stay away and charges would not be pressed. He said that while he did not press charges in regard to this incident, he had pressed charges in the past for shoplifting, he was required to file police reports for any theft.

When asked what he said to the assailant on the three occasions he entered the store, Petitioner said he said he told him he had to leave or the police would be called, and he pointed to the door and asked him to leave.

Petitioner said he had not been directed by his district manager to keep the fire lane open, it is not on his list of job duties from Respondent. He said the assailant was in the vehicle when it was parked in front of the store. He said he did not call the police to enforce the no parking order, he just asked the driver to move to the parking lot, at which time he returned to the store to wait on customers, as they had a full store.

Petitioner testified that as of the date of arbitration he was continuing to search for work. He said there were additional job search records, he had not had time to turn them in to his attorney. He said in his job search he did not tell people he had an ongoing workers' compensation case or that he had physical disabilities.

Petitioner said he had applied for Social Security disability. He acknowledged a prior right shoulder workers' compensation accident as well as previous bilateral hip replacements seven or eight years prior to arbitration. He said the hip replacements did not cause him problems with lifting or working, and he had not had restrictions from either the hip replacements or the right shoulder injury. He said he had not gotten full capacity use of the right shoulder, he had not gotten his full range of motion back after that surgery.

Petitioner said he had filed quite a few applications for employment, probably over 300, about five per week.

Petitioner said he processed all of his medical bills for this injury through worders' compensation, not through his group health card.

On redirect examination Petitioner marked a photograph, Joint Exhibit 1, noting locations of the "no parking" signs, the locations of the doors to his store, and the location of assailant's car. He said the no parking signs had been put up by the maintenance people for the center after people started parking in front of the store.

Petitioner said he provided job application records to his attorney when they met in March of 2023, and attempted to give him additional records on the morning of arbitration, but was advised by his attorney that exhibits had to be provided two days prior to court.

On recross examination Petitioner said the signs did not say it was a fire lane, they merely said "no parking." He said the police suggested he have the signs put up, so he requested them, and the landlord installed them.

## MEDICAL EVIDENCE

Petitioner was seen by Nurse Practitioner (NP) Wagner of Central Illinois Family Practice on January 7, 2021, complaining of left shoulder pain from a work injury. His history of accident was consistent with his arbitration testimony, although he at that time stated the man entered the store six times, and on the sixth occasion tried to punch Petitioner in the face, Petitioner tried to block the punch, and in so doing his arm went up and rotated backwards, resulting in immediate pain in the left shoulder. He said subsequent work that day increased his left shoulder pain. Following an examination Petitioner was given restrictions of no lifting, pushing, or pulling of more than five pounds with the left shoulder, and prescribed a Medrol dose pack. Physical therapy was also ordered. Petitioner was again seen by NP Wagner on January 21, 2021, and noted physical therapy was being very careful with Petitioner due to pain. On physical examination it was found Petitioner was unable to flex his left shoulder more than 80 degrees, abducted less than 110 degrees, and was unable to resist doing abduction. Physical therapy and work restrictions were to continue. (PX 3, p.42-45,47,48)

On February 8, 2021, Petitioner continued to complain of left shoulder pain, and NP Wagner continued the physical therapy and Petitioner's work restrictions. (PX 3, p.40,41)

On February 15, 2021, an MRI of Petitioner's left shoulder was performed. It revealed a massive rotator cuff tear with moderate atrophy of the supraspinatus and mild atrophy of the infraspinatus. The long head of the biceps tendon also appeared to show at least partial or high-grade tearing. (PX 4, p.34)

When seen on February 17, 2021, by NP Wagner, Petitioner was still working with restrictions and going to physical therapy. It was noted at that time that a referral was made to Dr. Kohlman/Sandercock for a left rotator cuff tear. (PX 3, p.38,40)

Petitioner was noted in multiple office notes with NP Wagner to have other medical problems other than his left shoulder, both past and ongoing. He was, subsequent to this December 22, 2020 accident also seen for regular lab work, rib, thigh, right shoulder, and back complaints, pain and weakness in both knees, obesity, sleep apnea, hypertension, chronic obstructive pulmonary disease, and seizures. (PX 3)

Petitioner was first seen by Dr. Li on March 22, 2021. A consistent history was given to Dr. Li. Petitioner advised him he had not had prior shoulder pain dysfunction or weakness, though he had right shoulder surgery about 25 years earlier. Petitioner complained of left shoulder pain, which he said worsened as his workday progressed. In his physical examination of Petitioner, Dr. Li noted tenderness over the Greater Tuberosity and the AC joint, reduced strength of the supraspinatus and of external rotation, positive Neer and Hawkins impingement signs, positive biceps load, O'Brien's test and crossarm abduction test. His diagnosis was left shoulder large rotator cuff tear and biceps tendon tear. He felt a primary arthroscopic repair of the rotator cuff and subpectoral biceps tenodesis would be best, noting that a superior capsular reconstruction would help with pain, but not with function. (PX 4, p.36,41,42)

Dr. Li performed a left shoulder arthroscopy repairing a rotator cuff tear, a subacromial decompression, an excision of the distal clavicle, debridement of the labrum, and subpectoral biceps tenodesis on April 7, 2021. (PX 4, p.44,45)

Dr. Li saw Petitioner a week after his surgery, on April 14, 2021, and recommended cryo-compression therapy. Petitioner was to continue therapy, and he was restricted from work. (PX 4, p.50-55)

Petitioner received physical therapy at Professional Physical Therapy from April 19, 2021 through August 30, 2021. On that last date it was noted he was doing much better than he had previously, and he had had met two of his three short term goals, but none of his four long term goals. His flexion range of motion had improved from 98 degrees on August 18, 2021, to 155 degrees on August 30, 2021, his abduction from 100 degrees to 160 degrees, and his external rotation from 50 degrees to 75 degrees. (PX 4, p.118-120)

When seen by Dr. Li on May 13, 2021, Petitioner's passive range of motion was deemed normal for that stage of post-surgical recovery, and Petitioner was restricted to no use of the left arm. He was to continue therapy. (PX 4, p.66-70)

On June 14, 2021, Dr. Li noted that Petitioner was doing very well with his passive range of motion, but his active range of motion was very limited due to weakness. It was anticipated that Petitioner would need another six months of physical therapy. Petitioner's restrictions at that time were no lifting/pushing/pulling with the left arm and no over the chest work with the left arm. (PX 4, p.86-90)

Dr. Li saw Petitioner again on July 22, 2021, and was found to have made significant progress in his therapy in terms of active range of motion. Dr. Li noted Petitioner still had significant weakness, but he felt the therapy was progressing well considering the size of Petitioner's tear. Petitioner's restrictions at this time were no lifting/pushing/pulling of more than 5 pounds with the left arm and no over the chest work with the left arm. (PX 4, p.99-103)

On August 19, 2021, Dr. Li was advised by Petitioner that he had been working 48 hours per week and complying with his restrictions in regard to weight, but that the repetitious work was causing him left shoulder discomfort and to worsen in physical therapy. Petitioner was found to have thickening of the distal anterior insertion of the supraspinatus tendon and increased inflammation in the subacromial space during this examination. Dr. Li changed Petitioner's restrictions to no work with the left arm, and limited him to a 40 hour week. (PX 4 p.112-117)

Dr. Li saw Petitioner post-operatively on September 20, 2021. Petitioner was doing well with physical therapy, and it was to continue, as were Petitioner's restrictions. (PX 4, p.3-6)

Petitioner was seen by Dr. Li on October 18, 2021. Petitioner's description of pain was noted as "minimal," he was noted to have continued good range of motion, though his supraspinatus and external rotation strength diminished, and not improving. Dr. Li recommended a functional capacity examination (FCE)to "evaluate his ability to return to his previous job," continuing his therapy and work restrictions in the meantime. (PX 4, p.7-10)

An FCE was performed by Mr. Santillo of Independent WorkSite Solutions on November 5, 2021. During that testing it was felt Petitioner was giving near full levels of physical effort. They were of the opinion that Petitioner's reports of pain and disability were, based on the overall test findings and clinical observations, only suggested minor inconsistencies as to reliability and accuracy. Based on their testing they did not believe Petitioner could perform the static standing, dynamic standing, walking, lifting, carrying, reaching forward or above shoulder work required of a stock clerk, though he could tolerate the sitting, pushing, pulling, climbing,

balancing, stooping, crouching, twisting/spinal rotation, handling and fingering portion of the job. Mr. Santillo also was of the opinion that Petitioner's job duties would be characterized as "heavy," and his physical abilities did not meet that level of work. This FCE did not address any capabilities other than the one job classification of stock clerk. It did not list Petitioner's capabilities in other types of work or give a judgment as to whether he was capable of sedentary, light, or medium physical demand work, it only addressed the stock clerk position, which was deemed to be heavy work. It was noted in this testing that Petitioner had limitations on the left side with several of the left shoulder tests, as well as physical deficiencies in areas other than the left shoulder. His balance testing, for instance, was below average on the left leg and average in the right leg, and he reported problems relating to low back and leg pain with numerous activities, as well as right knee pain with crouching. (PX 4, p.13-29)

Dr. Li saw Petitioner on November 9, 2021 and reviewed the FCE findings with him at that time. He noted the FCE findings had been interpreted as valid. He issued permanent restrictions at that time consistent with the FCE findings, occasional lifting of up to 35 pounds below the waist, up to 20 pounds to the chest, and 15 pounds above the waist, and he further noted that Petitioner was at maximum medical improvement. (PX 4, p.2,30-32)

## DEPOSITION TESTIMONY OF DR. LAWRENCE LI

Dr. Li was called as a witness by Petitioner. He testified that he was a board-certified orthopedic surgeon whose practice focused on the shoulders, hands, and knees surgery, and non-operative care of the spine. He said he began treating Petitioner on March 22, 2021, and took a history from Petitioner of hurting his left shoulder blocking a punch thrown by a customer, having the arm moved backwards, and thereafter developing significant shoulder pain and an inability to raise his arm above his chest. He said he reviewed two MRIs of Petitioner's left shoulder, the second one, of February 15, 2021, being of better quality. He said it showed a massive rotator cuff tear and moderate atrophy of the supraspinatus muscle, moderate AC joint arthrosis, and biceps tendon tearing. (PX 7, p.6-8)

Dr. Li stated he was of the opinion that the blocking of the punch caused Petitioner to injure his left shoulder and caused the tearing of the rotator cuff tendon and the biceps tendon. (PX 7, p.11)

Dr. Li's testimony in regard to his examination findings, Petitioner's complaints, and his recommended treatment of Petitioner following that initial visit was consistent with the medical record summary, above. He testified in regard to the work restrictions he had given Petitioner, including the limitation of 40 hours per week. He testified that his charges for treating Petitioner were reasonable and customary for the area and all of that treatment was for treatment of Petitioner's left shoulder. He said he last saw Petitioner on November 9, 2021. (PX 7 p.11-15)

On cross-examination Dr. Li testified that the MRI showed some AC joint arthritis, which was degenerative, and there was some atrophy of the tendon, with fatty atrophy tissue less than 50 percent. He said after a rotator cuff is torn the muscle can shrink as it is not used as much, and it can develop fat. He said it would take over six months for fatty atrophy to develop, so the fatty atrophy seen in the MRI would not have been related to the accident in December of 2020. He said Petitioner had a preexisting condition but had not

seen a doctor for it, it had not required care. He said the large amount of retraction would have occurred in the three months after the accident, probably most of it occurring immediately after the accident, and slowly increasing thereafter. (PX 7, p.16,17,18,19)

Dr. Li said he found a lot of inflammatory tissue in both the joint and the subacromial bursa during his surgery, which would have been from this injury, caused by trauma. He said he had not reviewed the medical records of Central Illinois Family Medical Care. He said his opinion would not be changed if he were to find out that Petitioner had a preexisting condition in the left shoulder, because the mechanism of injury caused a change in the course of the progression of the rotator cuff tear, accelerating it and leading to the need for surgery. (PX 7, p.19,20)

Dr. Li said his 35 pound restriction for Petitioner was a total lifting limit, not just a left arm lifting limit. (PX 7, p.20,21)

On redirect examination Dr. Li said the work restrictions he gave Petitioner on November 9, 2021 were permanent restrictions for both arms. (PX 7, p.21)

## DOCUMENTARY EVIDENCE

Petitioner introduced a Danville Police Department for December 22, 2020 indicating Petitioner did not want to press charges against a customer but that the customer had been barred from the store. (PX 2)

Petitioner introduced 41 pages of job search records noting all of the businesses where Petitioner had inquired or applied for work from November 3, 2021 through February 29 (sic), 2023. The first four pages indicated telephonic inquiries, and the final 37 pages of contact were almost entirely via the internet. Many of the original telephonic contacts were to employers who were not hiring at the time of the call. Petitioner was interviewed a few times at the beginning of his job search but had almost no interviews as a result of internet inquiries. (PX 5)

Respondent introduced two photographs of the store and the shopping center where it was located, as well as the parking lot, one from overhead and one from ground level. (RX 2 & 3) It also introduced a payment log showing payments for medical providers, prescription medication, medical case management, and temporary total disability payments. (RX 4)

Respondent introduced a job description for Petitioner's position as a store manager, which noted activities which would require standing, walking, bending and crouching, as well as arm intensive work such as shelving and checking items out at the checkout counter. It noted the need to frequently lift up to 40 pounds and occasionally lift up to 55 pounds. (RX 5)

The parties jointly introduced a second copy of a photograph of the shopping center taken from the parking lot in front of the line of stores, with markings identifying the doors to Respondent's store with a circle and the location of the customer's car with the word, "CAR." (JX 1)

## ARBITRATOR CREDIBILITY ASSESSMENT

Petitioner was the only witness to testify at arbitration. He answered all questions asked by both attorneys in a forthright manner with no apparent effort to evade a question or to exaggerate the events or his complaints. The Arbitrator finds Petitioner to have been a credible witness.

## CONCLUSIONS OF LAW:

**In support of the Arbitrator's decision relating to whether an accident occurred which arose out of and in the course of Petitioner's employment by Respondent on December 22, 2020, the Arbitrator makes the following findings:**

The findings of fact, above, are incorporated herein.

The summaries of medical evidence, deposition testimony, and documentary evidence, above, are incorporated herein.

Petitioner's testimony in regard to what occurred on December 22, 2020, the request that the customer move his car due to safety concerns, the posting of "no parking" signs in the area, the customer's coming into the store in an angry state on multiple occasions and ultimately throwing a punch at Petitioner, causing Petitioner's left arm to be pushed backwards while blocking the punch, the immediate onset of pain, the calling of the police, the calling of supervisory personnel of Respondent, and prompt medical care with histories consistent with the arbitration testimony, all indicate that Petitioner was not the physical aggressor in this confrontation, that the customer was, and that the disagreement was not personal but was instead due to Petitioner's concern for the health and safety of Respondent's customers. Petitioner testified that the presence of earlier cars in that area had resulted in accidents which had injured prior customers. Petitioner's testimony in regard to these facts was unrebutted.

Injuries sustained by employees because of assaults are compensable where the claimant can demonstrate a work-related reason for the attack. Schultheis v. Industrial Commission, 96 Ill 2nd 340, 70 Ill.Dec.737, 449 N.E.2nd 1341 (1981). The injured employee has the burden of showing that the assault was work-related to be entitled to benefits under the Act. Greene v. Industrial Commission, 87 Ill.2nd 1, 56 Ill.Dec. 884, 428 N.E.2nd 476 (1981). The Petitioner was not the aggressor here and was merely performing his work duties in a way he believed promoted the safety of his customers and employees. His action to promote safety redounds to the benefit of the employer.

**The Arbitrator finds that Petitioner suffered an accident on December 22, 2020, which arose out of and in the course of his employment by Respondent.** This finding is based upon the unrebutted testimony of Petitioner and the photographs admitted into evidence.

**In support of the Arbitrator's decision relating to whether Respondent was given notice of the accident within the time limits stated in the Act, the Arbitrator makes the following findings:**

The findings of fact, above, are incorporated herein.

The summaries of medical evidence, deposition testimony, and documentary evidence, above, are incorporated herein.

The findings in regard to accident, above, are incorporated herein.

Petitioner testified that he provided his district manager of the assault and the district manager came out within a few days and made a copy of what was on the cameras. He said a loss prevention regional manager for Respondent called him to do her investigation and advised him there was no fault on his part. He said both the police and the district manager viewed the videotape, the district manager doing so within a day or two of the incident. Petitioner testified he told the district manager that he had hurt his left shoulder in the incident. This testimony was unrebutted.

**The Arbitrator finds that Petitioner provided Respondent with notice of the accident of December 22, 2020 within the time limits stated in the Act.** This finding is based upon Petitioner's unrebutted testimony of advising his district manager of the accident and of his having injured his left shoulder, the district managers coming to the store and viewing and copying the video of the altercation and Respondent's loss prevention manager speaking with him while performing an investigation.

**In support of the Arbitrator's decision relating to what temporary benefits Petitioner is entitled to as a result of the accident of December 22, 2020, the Arbitrator makes the following findings:**

The findings of fact, above, are incorporated herein.

The summaries of medical evidence, deposition testimony, and documentary evidence, above, are incorporated herein.

The findings in regard to accident and notice, above, are incorporated herein.

Petitioner testified that he worked light duty up to the date of his surgery, April 7, 2021, at which time he was totally disabled. Petitioner did not claim temporary total disability until April 21, 2021 per the Request for Hearing stipulations, Arbitrator Exhibit 1. Parties are bound by their stipulations on the Request for Hearing form. Walker vs. Industrial Commission, 345 Ill.App.3d, 804 N.E.2d 135, 281 Ill.Dec. 509 (2004) Respondent at the arbitration hearing stated that its objection to temporary total disability was not in regard to the period claimed, but on the basis of liability itself. Dr. Li on April 14, 2021 noted Petitioner was restricted from work. At later visits Dr. Li gave Petitioner restrictions in regard to use of the left arm, and lifting limits for the left arm. No evidence was introduced to indicate when accommodated work was offered by Respondent or accepted by Petitioner, but on August 19, 2021, Dr. Li was advised by Petitioner that he had been working 48 per week and complying with his restrictions in regards to weight, but that the repetitious work was causing him left shoulder discomfort and worsen in physical therapy. Dr. Li at that time changed Petitioner's restrictions to no work with the left arm, and limited him to a 40 hour week, but it is apparent that at some point Petitioner had returned to work.

Respondent had Petitioner undergo a functional capacity evaluation on November 5, 2021, at a time when Petitioner testified he was working light duty. He said his superiors then had him come in to discuss with

them which of his duties he could and could not perform, and on November 24, 2021 they placed him on leave. He said the district manager told him the company wanted him to take a leave of absence, and was told to apply for some disability benefits from Matrix Absence Management. He testified that he was paid approximately $240.00 per month to enhance his workers' compensation benefits, and those payments continued for two years, until approximately two months prior to the arbitration hearing.

Petitioner claimed entitlement to maintenance benefits from November 26, 2021 through March 1, 2023, a period of 65 5/7 weeks. On Arbitrator Exhibit 1, Respondent claims, and Petitioner agrees, that maintenance was paid to him in the amount of $23,831.39. There is no explanation either on the Request for Hearing form or in testimony or documentary evidence as to the rate being paid or the dates being paid. It is noted that Petitioner received a supplemental payment from Respondent as well, for a period of two years. Petitioner introduced job search records showing he was looking for work beginning on November 30, 2021, and continuing through February 29 (sic) of 2023, which would in actuality be the claimed date for ending of maintenance, March 1, 2023. Respondent at the arbitration hearing stated that its objection to payment of maintenance was not in regard to the period claimed, but on the basis of liability itself.

It is noted that on the first four pages of job search records Petitioner noted for each prospective employer whether they could accommodate permanent restrictions, and each and every entry states they cannot. A new form was used beginning on page five of the job search records. It is unknown whether Petitioner continued to ask that question to prospective employers, as the new form did not include a space for that information. The Americans with Disabilities Act does not allow employers to inquire about health issues until it makes a job offer, at which time it can have a physical examination conducted and it can then determine if accommodations are needed and if Petitioner can perform the essential duties of the job with reasonable accommodations. Petitioner's asking the question whether permanent restrictions can be accommodated when inquiring of employment would immediately make him a less attractive employee candidate and would constitute a large impediment to his hiring capability. There is no evidence that Respondent offered assistance in Petitioner's job search, but there is also no evidence that Petitioner ever asked for job search of vocational rehabilitation assistance.

Respondent did not claim credit for overpaid temporary total disability or maintenance payments.

**The Arbitrator finds that Petitioner was temporarily totally disabled as a result of the accident from April 21, 2021 to June 16, 2021, a period of 8 1/7 weeks.** This finding is based upon the stipulations made at arbitration and on the Request for Hearing form, Petitioner's testimony, and Dr. Li's medical records.

**The Arbitrator further finds that Petitioner has not proven entitlement to maintenance benefits for the claimed period of time.** This finding is based upon Petitioner's testimony and the job search records which indicate he intentionally or unintentionally sabotaged his job search efforts by requesting information about accommodations for permanent restrictions.

**In support of the Arbitrator's decision relating to whether the medical services that were provided to Petitioner were reasonable and necessary as a result of the Accident of December 22, 2020, the Arbitrator makes the following findings:**

The findings of fact, above, are incorporated herein.

The summaries of medical evidence, deposition testimony, and documentary evidence, above, are incorporated herein.

The findings in regard to accident, notice, and temporary benefits, above, are incorporated herein.

Petitioner introduced medical bills from the following medical providers:

- Central Illinois Family Practice - $780.00
- East Central Radiology - $46.00
- Prescription Partners - $7,452.62
- Professional PT/Fyzical - $3,450.00
- Orthopedic and Shoulder Center - $18,834.93
- Carle Hospital & Physician - $1,190.00
- Carle Hospital - $4,540.00

All of the medical services contained in said bills are for medical treatment of Petitioner's left shoulder,

**The Arbitrator finds that all of the medical bills introduced into evidence in Petitioner Exhibit 1 are related to Petitioner's left rotator cuff tendon and the biceps tendon injuries, are reasonable and were necessitated to treat or cure Petitioner's injuries suffered in this accident. Respondent is entitled to credit for any amounts previously paid. Respondent is also entitled to credit under Section 8(j) of the Act for any portions of these bills paid by its group health insurance carrier.** Payment of said bills is to be made pursuant to the medical fee schedule or the negotiated rate, whichever is lower. This finding is based upon the findings above, the medical records summarized above, the testimony of Dr. Li, and the testimony of Petitioner.

**In support of the Arbitrator's decision relating to the nature and extent of the injury the Arbitrator makes the following findings:**

The findings of fact, above, are incorporated herein.

The summaries of medical evidence, deposition testimony, and documentary evidence, above, are incorporated herein.

The findings in regard to accident, notice, temporary benefits, and medical bills, above, are incorporated herein.

As the accident occurred after September 1, 2011, the nature and extent of the injury must be determined through the five-factor test set out in §8.1b(b) of the Act.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a store manager at the time of the accident and that he *is* not able to return to work in his prior capacity as a result of said injury. The Arbitrator notes Petitioner can perform some lifting and has past managerial experience. Because of his inability to return to his prior work and his termination of employment due to his inability to perform the work, the Arbitrator therefore gives *greater* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 59 years old at the time of the accident. Because of the limited number of future years of earning capability, the Arbitrator therefore gives *lesser* weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes Petitioner was earning $1,029.18 per week at the time of this accident. Because of his lifting limitations Petitioner is expected to have difficulty finding work at the earnings level he previously experienced, and his previous work history in a job the functional capacity evaluation found he was not capable of performing, the Arbitrator therefore gives *greater* weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes the functional capacity evaluation found Petitioner could not perform the static standing, dynamic standing, walking, lifting, carrying, reaching forward or above shoulder work required of a stock clerk, though he could tolerate the sitting, pushing, pulling, climbing, balancing, stooping, crouching, twisting/spinal rotation, handling and fingering portion of the job. Petitioner's job duties would be characterized as "heavy," and his physical abilities did not meet that level of work. This FCE did not address any capabilities other than the one job classification of stock clerk. It did not list Petitioner's capabilities in other types of work or give a judgment as to whether he was capable of sedentary, light, or medium physical demand work, it only addressed the stock clerk position, which was deemed to be heavy work. It was noted in this testing that Petitioner had limitations on the left side with several of the left shoulder tests, as well as physical deficiencies in areas other than the left shoulder. His balance testing was below average on the left leg and average in the right leg, and he reported problems relating to low back and leg pain with numerous activities, as well as right knee pain with crouching. The Arbitrator therefore gives *greater* weight to this factor.

**Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 30% loss of use of the person as a whole pursuant to §8(d)(2) of the Act.**

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 21WC032308 |
| Case Name | Jennifer Cook v.<br>State of Illinois –<br>Edwardsville Secretary of State Facility |
| Consolidated Cases | |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 24IWCC0613 |
| Number of Pages of Decision | 16 |
| Decision Issued By | Kathryn Doerries, Commissioner,<br>Amylee Simonovich, Commissioner |

| | |
|---|---|
| Petitioner Attorney | David Galanti |
| Respondent Attorney | Aaron Wright,<br>Caitlin Fiello |

DATE FILED: 12/24/2024

/s/Kathryn Doerries,Commissioner
Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JENNIFER COOK,

Petitioner,

vs. NO: 21 WC 032308

EDWARDSVILLE SECRETARY OF STATE FACILITY,

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, casual connection, medical expenses and prospective medical, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n, 78 Ill.2d 327 (1980).*

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 18, 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, this decision is not subject to judicial review. *820 ILCS 305/19(f)(1).*

**December 24, 2024**

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

O102924
KAD/as
42

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

Dissent

I respectfully dissent from the opinion of the majority and would reverse the Decision of the Arbitrator. After carefully considering the totality of the evidence, I believe Petitioner met her burden of proving a causal relation between her carpal tunnel syndrome and her work duties. Petitioner provided both credible testimony regarding her repetitive duties at work, as well as a credible medical opinion of Dr. Bell to support a diagnosis of carpal tunnel syndrome causally related to her work activities.

The Arbitration Decision suggests that the Arbitrator did not adopt the opinions of Dr. Bell, as he, like Dr. Feinstein, did not have details regarding the ergonomics of Petitioner's workstation. I do not believe this is a basis to reject his medical opinion as to causation. Dr. Bell's 28 years of experience as an orthopedic surgeon, specializing in hand and upper extremity problems, provided him with more than sufficient expertise to assess the cause of Petitioner's condition. Petitioner had advised him that she typed for a living and that typing had aggravated her numbness and tingling. RX5, p.10. She denied having numbness or tingling prior to her job with Respondent. *Id*. Dr. Bell noted Petitioner's only underlying risk factor was her BMI. *Id*., at 13. Dr. Bell found the cause of Petitioner's condition was likely multifactorial, but opined her condition was aggravated by her work. *Id*., at 14. He based his opinion on the Petitioner's report of symptoms when typing, the time of the onset in relation to her employment and the guidelines from the American Academy of Orthopedic Surgeons, which showed moderate evidence to support repetitious computer work could lead to carpal tunnel syndrome. *Id*., at 7,14. As his opinion was based upon a myriad of factors, I find it is entirely reasonable for him to have found that Petitioner's keyboarding at work was causing her symptoms to worsen, thereby necessitating the recommended bilateral surgeries.

Dr. Feinstein provided an alternate opinion to Dr. Bell, finding Petitioner's condition of carpal tunnel was not related to her work activities. However, Dr. Feinstein admitted upon cross examination that his opinions with regard to causation could be affected if Petitioner's wrists were in a very unusual position of flexion or extension due to either her posture or her wrist position. RX5, p.25. This is particularly noteworthy, as Petitioner testified that her computer was at counter height, that her keyboard was flat and that she had no wrist pads to rest her wrists on. T.12. She testified that her wrist pads were taken away and her keyboard had been changed four years prior. *Id*. She further testified that her prior keyboard was tilted up more and was easier to type on. T.13. She reported no problems with her hands when she used the old keyboard. *Id*. Based upon Dr. Feinstein's admission that his opinion could potentially change if certain conditions were present and the Petitioner's testimony showing those conditions were, in fact, present, I did not find Dr. Feinstein's opinions on the issue of causation to be persuasive.

Further, even if Petitioner did have complaints related to her painting of rooms at home, she also had complaints to her treating physician that her typing aggravated her symptoms, as well as her testimony to her poor ergonomic station and her resulting symptoms. The Commission has consistently found that a claimant alleging repetitive trauma must show that the work activities are a cause of their condition, but they do not have to establish the work activities are the sole or even the primary cause of that condition. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill.2d 193, 205 (Ill. 2003).

I also disagree with the Arbitrator's analysis with regard to the manifestation date of Petitioner's condition. Given the unique nature of a repetitive trauma injury, the date of accident is harder to specify than when dealing with a specific trauma. The Supreme Court recognizes that the numerous court opinions in this area focus on a fair and flexible standard for manifestation dates. *Durand v. Ill. Indus. Comm'n*, 224 Ill. 2d 53, 71 (Ill. 2007). The date on which the employee first becomes aware that he has a condition related to work is one method for determining the manifestation date, however, it is not the only permissible method for proving manifestation. The manifestation date can also be set as: (a) the date the employee actually became aware of the physical condition and its relation to work through medical consultation, (b) the date the employee requires medical treatment, (c) the date on which the employee can no longer perform work activities, or (d) when a reasonable person would have plainly recognized the injury and its relation to work. *Durand, supra*, see also *Peoria County Belwood Nursing Home v. Ill. Indus. Comm'n*, 115 Ill.2d 524 (Ill. 1987); *Oscar Mayer & Co. v. Ill. Indus. Comm'n*, 176 Ill.App.3d 607 (3rd Dist. 1988); *Three "D" Discount Store v. Ill. Indus. Comm'n*, 198 Ill. App. 3d 43 (1989).

In this case, the manifestation date alleged was October 19, 2021, the date Petitioner was first diagnosed with carpal tunnel syndrome. Petitioner initially attributed her symptoms to painting rooms in her house, but at that time she did not have a diagnosis to assist her in identifying the true onset of her symptoms. She was initially seen for "acute discomfort" after painting rooms in July of 2021, but Petitioner testified at hearing, that she had been having symptoms of numbness, stiffness and tingling for approximately two and a half to three years. T.9. It wasn't until after she received confirmation that her symptoms were carpal tunnel syndrome on October 19, 2021, that she was able to complete the connection between her symptoms and the typing she was performing at work. This typing was present well prior to her initial office visit on July 30, 2021, as were her symptoms. Although a claimant is aware of symptoms and may carry a suspicion as to the cause, the Supreme Court in *Durand* stated, "the fact of injury is not synonymous with the

fact of discovery"; in short, claimants are not charged with filing a claim as soon as they believe they may have a work related condition, nor are they penalized for failing to realize a condition is work related when the employer feels he or she should have. *Durand*, Ill.2d at 69. In fact, the Supreme Court in *Durand* stated that to rely solely on a claimant's testimony concerning symptoms, without accurate knowledge of the cause of those symptoms, would essentially be asking the Commission to rely on expert medical testimony from a layperson. *Durand*, Ill.2d at 73.

It is clear from the various accepted methods of determining a manifestation date that the rule to be applied is flexible. The Workers' Compensation Act is a humane law of a remedial nature that should be liberally construed to achieve its purpose. *Hagne v. Derek Polling Const*., 388 Ill. App. 3d 380 (2009). I find Petitioner had an adequate basis to show a reasonable person would have plainly recognized the injury and its relation to work on the date Petitioner was first provided with a diagnosis of carpal tunnel syndrome, on October 19, 2021.

For the foregoing reasons, I would reverse the Decision of the Arbitrator and find causal connection for Petitioner's bilateral carpal tunnel condition of ill-being.

o: 10/29/2024
AHS/kjj
51

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

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 21WC032308 |
| Case Name | Jennifer Cook, v. Edwardsville Secretary of State Facility, |
| Consolidated Cases | |
| Proceeding Type | 19(b) Petition |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 11 |
| Decision Issued By | Maureen Pulia, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | David Galanti |
| Respondent Attorney | Caitlin Fiello |

DATE FILED: 9/18/2023

**THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 12, 2023 5.30%**

/s/ Maureen Pulia, Arbitrator
Signature

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

September 18, 2023

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation

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)**

**JENNIFER COOK,**
Employee/Petitioner

v.

**EDWARDSVILLE SECRETARY OF STATE FACILITY,**
Employer/Respondent

Case # **21** WC **32308**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen Pulia**, Arbitrator of the Commission, in the city of **Collinsville**, on **8/31/23**. 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, **10/19/21**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

In the year preceding the injury, Petitioner earned $**40,068.08**; the average weekly wage was $**770.54**.

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

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

Respondent shall be given a credit of $**00.00** for TTD, $**00.00** for TPD, $**00.00** for maintenance, and $**00.00** for other benefits, for a total credit of $**00.00**.

Respondent is entitled to a credit of $**00.00** under Section 8(j) of the Act.

**ORDER**

The petitioner has failed to prove by a preponderance of the credible evidence that she sustained injuries to her bilateral hands due to repetitive work activities that manifested itself on 10/19/21. The petitioner's claim for compensation is denied and any remaining issues are moot.

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

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

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

**SEPTEMBER 18, 2023**

Signature of Arbitrator

ICArbDec19(b)

**THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:**

Petitioner, a 41year old Public Service Representative, alleges she sustained an accidental injury to her bilateral hands that arose out of and in the course of her employment by respondent, and manifested itself on 10/19/21. Petitioner has been a Public Service Representative for the past 10 years. Petitioner testified that she does not have diabetes, gout, or hyperthyroidism, and was not pregnant on 10/19/21.

Petitioner testified that she has had numbness, stiffness, and tingling in all her fingers for the past 2-1/2 to 3 years, that is getting worse.

On 7/30/21 petitioner presented to PA Natalie Menossi at AHS Gateway Medical Group. Petitioner reported acute discomfort after painting several rooms in her home. She reported numbness in her bilateral arms. She reported the quality of it to include tingling, a funny feeling, pain, weakness, and pins and needles. She rated the severity as 7/10, and reported that it occurs many times in intermittent groups or clusters. She reported improvement in her numbness when putting her hands down. Aggravating factors were identified as sleeping, driving, and using hands or arms raised above the head. Petitioner also reported myalgia, but reported no joint swelling, aching in her forearms and hands at times, numbness and tingling, and, no weakness, headaches, dizziness, fever, rash, or loss of consciousness. An examination revealed tenderness in petitioner's bilateral forearms, as well as mild carpal tunnel tenderness. It also revealed positive Tinel signs bilaterally. PA Menossi assessed paresthesia of the upper extremity. She prescribed carpal tunnel splints to wear at night, ordered an NCS of the upper extremities, and prescribed a Medrol Dosepak to help with the acute discomfort after painting several rooms in her house.

On 10/19/21 petitioner underwent an NCS of her upper extremities. The impression was bilateral carpal tunnel syndrome, ulnar to median cross innervation, and no ulnar neuropathy.

On 11/12/21 petitioner completed her Employee Notice of Injury. She identified her date of injury as 10/19/21. She reported that she was keyboard/typing at the time of injury. She reported that her injury was to both wrists/hands.

On 11/16/21 the Supervisor's Report of Injury was completed. The date of injury was 10/19/21. The description of injury was "carpal tunnel syndrome – caused by repetitive typing, Almost every customer we deal with requires something typed."

On 11/16/21 petitioner presented to Dr. Bell at Heartland Gateway Healthcare. Petitioner reported bilateral hand numbness and tingling that had been going on for several months. She reported that her right side was worse than the left. She stated that she types for a living, which aggravates her numbness

and tingling. She reported that she did not have numbness and tingling prior to working at her current job. She reported numbness and tingling throughout the day, and at night despite conservative treatment. She stated that she had done some bracing, anti-inflammatories, and rest, but still has numbness and tingling. Petitioner reported sleep disturbances. Dr. Bell reviewed the NCS, examined petitioner, and assessed bilateral carpal tunnel syndrome, worse on the right, made worse by her job which is typing at the DMV. Petitioner indicated that she was interested in bilateral carpal tunnel releases. Dr. Bell released petitioner on an as needed basis.

On 9/13/22 petitioner presented to Dr. William Feinstein for a Section 12 examination, at the request of the respondent. Petitioner reported that she worked for respondent in the same capacity for 9 years. She described her job as typing all day long. She stated that she waits on customers and types on a computer. She also reported that she does occasional lifting of boxes of license plates (a small part of her job,). Petitioner stated that she was a paralegal for a short period of time, and prior to that she was in school, and prior to that worked as a manager in an assisted living facility for about 10 years. Petitioner reported that she developed pain, numbness, and tingling in both hands about 2-3 years ago, which and worsened over time. Petitioner reported that she works 37-1/2 hours a week.

Following an examination, review of medical records and petitioner's job description, Dr. Feinstein assessed bilateral carpal tunnel syndrome. He opined that there is no causal relationship between the petitioner's current objective findings and the claimed reported accident. Dr. Feinstein did not believe that the petitioner's job requirements were intensive or repetitive enough to be the primary cause of her symptoms. He believed the cause was idiopathic, or perhaps related to her prior history of cat scratch fever, which causes an infection of the lymph nodes, and led to petitioner having her lymph nodes removed from under her arm. Dr. Feinstein recommended carpal tunnel releases but opined that they were not causally related to her alleged injury. Dr. Feinstein was of the opinion that petitioner did not need any work restrictions.

On 3/9/23 the evidence deposition of Dr. Feinsten, an orthopedic surgeon, was taken on behalf of respondent. Dr. Feinstein specializes in hand and upper extremity surgery. Dr. Feinstein was of the opinion that if there was a blockage of lymph fluid because the lymph nodes are scarred or had surgery, that could cause a backup of fluid and increased swelling within the carpal tunnel that could lead to carpal tunnel syndrome. Dr. Feinstein opined that petitioner's carpal tunnel syndrome was not related to her job duties. He was of the opinion that the old thinking that typing or repetitive data entry is a strong risk factor for carpal tunnel syndrome has been considered not be true. Dr. Feinstein could not specifically say what petitioner's carpal tunnel syndrome was related to.

On cross examination, Dr. Feinstein was of the opinion that keyboarding is not really a strong contributor to the development of carpal tunnel syndrome. He was further of the opinion that if someone has a very poor ergonomic setup or has a very high demanding keyboard requirement without breaks, that could aggravate the symptoms. Dr. Feinstein testified that the job description he was provided did not really go into any detail whatsoever in terms of the workstation ergonomics. He was unaware if she stands or sits, or what her wrist positions are when she is keyboarding. He was of the opinion that if petitioner's wrists were in a very unusual position of flexion or extension due to either her posture or her wrist position, his causation opinions could be affected. Dr. Feinstein did not know what side petitioner's lymph nodes were removed from.

On 5/16/23 the evidence deposition of Dr. Robert Bell, an orthopedic surgeon, was taken on behalf of petitioner. Dr. Bell testified that he predominantly sees hand and upper extremity problems. Dr. Bell testified that he treats carpal tunnel syndrome and performs surgery when necessary to address that condition. Dr. Bell opined that occupational work activities that can be related to carpal tunnel include assembly line work, computer work, repetitive and forceful grip, and use of vibrational tools. He opined that there is no consensus on how long one would need to do these activities in order to develop carpal tunnel syndrome.

Dr. Bell testified that petitioner was seen in his office on 11/16/21. Dr. Bell was of the opinion that given petitioner's failed conservative treatment, bilateral carpal tunnel releases would be the next step. He testified that these surgeries had not been authorized. Dr. Bell was of the opinion that petitioner does not have any underlying health issues that could be a contributing factor to the development of carpal tunnel syndrome other than a BMI over 30. Dr. Bell opined that petitioner's keyboarding at work aggravated her bilateral carpal tunnel syndrome. He was of the opinion that her carpal tunnel syndrome was multifactorial, and had idiopathic causes. He noted that she had a high BMI, and did not start having the symptoms until she started doing what she felt was a highly repetitious job. He was of the opinion that the guidelines from the Academy show moderate evidence would support that repetitions and computer work can lead to carpal tunnel syndrome. Dr. Bell had no reason to doubt petitioner when she said that typing aggravates the numbness and tingling in her hands. He was of the opinion that petitioner's keyboard typing activity causes her carpal tunnel to become symptomatic, namely the numbness and tingling in her hands and fingers.

Dr. Bell opined that her treatment through 11/16/21 was reasonable and necessary to cure or relieve petitioner from the effects of her work-related conditions. He further opined that the recommended

bilateral carpal tunnel releases are reasonable and necessary to cure or relieve petitioner from the effects of her carpal tunnel syndrome.

On cross-examination Dr. Bell testified that he received a report about petitioner's position and job duties. He testified that it did not go into the ergonomics of the situation. Dr. Bell did not know if petitioner sits or stands at her job while keyboarding, and did not know how petitioner's wrists positioned while she is keyboarding during a normal workday. Dr. Bell was under the impression, based on petitioner's job description, that in addition to keyboarding during the day, petitioner would operate photographic equipment and do a little cashier work. He testified that most of her keyboarding involved entering data on the computer, entering applications for driver's licenses, administering tests over the computer, and completing applications on the computer. He was of the opinion that in addition to her manipulation of the computer, manipulation of the photographic equipment, the rest of her job entailed reviewing, reading forms, and reading things off the computer. He was of the opinion that petitioner spent 25% or more of her day entering data, or a few hours each day at a minimum.

Petitioner testified that she types 60% of the day, and sits and stands while typing. She further testified that the remainder of her day is spent talking with the public. Petitioner testified that her computer is at counter height, the keyboard is flat, and she has no wrist pads to rest her wrists on. She testified that the wrist pads were taken away, and her keyboard was changed 4 years ago. She testified that her prior keyboard was titled up more. She testified that the older keyboard was easier to type on. She complained of no problems with her hands when she used the old keyboard.

Petitioner testified that she works from Tuesday to Saturday, 7.5 hours a day. She testified that she gets 2 fifteen minute breaks a day, as well as an hour lunch. Petitioner testified that on average she handles 40 customers a day, and types with most of them. Petitioner types 45 words a minute. Twice a week petitioner has to lift over 5 pounds. She does not use any vibratory equipment. Petitioner testified that she has been in the same position her entire tenure with the Secretary of State. She has been in the Edwardsville office for 6 years.

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

Petitioner is alleging injuries to her bilateral hands due to repetitive work activities that arose out of and in the course of her employment by respondent and manifested itself on 10/19/21.

As a general rule, repetitive trauma cases are compensable as accidental injuries under the Illinois Worker's Compensation Act. In Peoria County Belwood Nursing Home v. Industrial Commission (1987) 115 111.2d 524, 106 Ill.Dec 235, 505 N.E.2d 1026, the Supreme Court held that "the purpose behind the Workers'

Compensation Act is best serviced by allowing compensation in a case … where an injury has been shown to be caused by the performance of the claimant's job and has developed gradually over a period of time, without requiring complete dysfunction.." However, it is imperative that the claimant place into evidence specific and detailed information concerning the petitioner's work activities, including the frequency, duration, manner of performing, etc. It is also equally important that the medical experts have a detailed and accurate understanding of the petitioner's work activities.

Since petitioner is claiming injuries to her bilateral hands, in Illinois, recovery under the Workers' Compensation Act is allowed, even though the injury is not traceable to a specific traumatic event, where the performance of the employee's work involves constant or repetitive activity that *gradually* causes deterioration of or injury to a body part, assuming it can be medically established that the origin of the injury was the repetitive stressful activity. In any particular case, there could be more than one date on which the injury "manifested itself". These dates could be based on one or more of the following, depending on the facts of the case:

1. The date the petitioner first seeks medical attention for the condition;
2. The date the petitioner is first informed by a physician that the condition is work related;
3. The date the petitioner is first unable to work as a result of the condition;
4. The date when the symptoms became more acute at work;
5. The date that the petitioner first noticed the symptoms of the condition.

In the case at bar, the petitioner selected 10/19/21 as her manifestation date. This is 1) not the date the petitioner first sought medical attention for the condition, that would have been on 7/30/21 after painting several rooms in her home; 2) not the date she was first informed by a physician that the condition was work related, that would have been on 11/16/21 when she saw Dr. Bell; 3) not the date she was first unable to work as a result of the condition, that date is unknown; 4) not the date when her symptoms became more acute at work, that date is also unknown; and 5) not the date petitioner first noticed symptoms of the condition, as that would have been at least by 7/30/21. Petitioner selected her manifestation date as the date of the NCS of her upper extremities. This was on 10/19/21. The impression of the NCS was bilateral carpal tunnel syndrome. However, the arbitrator finds it significant that as of that date there is no credible evidence to support a finding that petitioner had related her bilateral hand symptoms to her work activities. Rather, the only medical visit before that was related to her bilateral hand complaints after painting rooms in her house. The arbitrator further notes that between 7/30/21 and when petitioner reported her injury to respondent on 11/12/21 there is no credible evidence

to support a finding that petitioner reported to any healthcare provider that her bilateral hand complaints were related to her work activities. The first mention to any healthcare provider that her bilateral hand symptoms were related to her work activities was on 11/16/21, 4 days after she reported the same to respondent.

In addition to selecting a date on which the symptoms "manifested itself", it is imperative that the petitioner place into evidence specific and detailed information concerning her work activities, including the frequency, duration, manner of performing, etc., and that the medical experts have a detailed and accurate understanding of the petitioner's work activities. In the case at bar, it appears both Dr. Bell, and Dr. Feinstein had a copy of petitioner's job description to review. Unfortunately, neither party saw fit to enter this document into evidence.

When petitioner presented to Dr. Feinstein she reported that she typed all day long, with an occasional lifting of boxes of license plates. She reported that she developed pain, numbness and tingling in her hands 2-3 years ago, and it worsened over time. Although Dr. Feinstein assessed bilateral carpal tunnel syndrome, he opined that it was not related to her work activities. He believed the cause of her carpal tunnel syndrome was idiopathic, or related to her prior history of cat scratch fever, where she sustained an infection of her lymph nodes and had to have them removed from under her arm. Dr. Feinstein was of the opinion that this could result in a blockage of lymph fluid that could cause a backup of fluid and increased swelling within the carpal tunnel that could lead to carpal tunnel syndrome. He was of the opinion that typing or repetitive data entry as a strong risk factor for carpal tunnel syndrome has been considered not to be true. Dr. Feinstein testified that the job description he was provided did not go into any detail whatsoever in terms of her workstation ergonomics. He was unaware if petitioner stands or sits, or what position her wrists are in when she is keyboarding.

On the other hand, Dr. Bell was of the opinion that occupational work activities such as computer work can be related to carpal tunnel syndrome, and that there is no consensus on how long one would need to do these activities in order to develop carpal tunnel syndrome. He identified petitioner's only contributing factor to carpal tunnel syndrome as her BMI over 30. Dr. Bell opined that petitioner's keyboarding at work aggravated her bilateral carpal tunnel syndrome. He believed petitioner did not start having symptoms until she started doing what she felt was highly repetitious work. However, the arbitrator notes that petitioner testified that she had been doing the same job for over 9 years.

Dr. Bell was of the opinion that petitioner's typing activities caused her carpal tunnel syndrome to become symptomatic. However, the arbitrator finds it significant that Dr. Bell was unaware that there existed a medical report from 7/30/21 when petitioner presented for care of her bilateral hands after

painting several rooms in her home, and made absolutely no mention at that time that her work activities also caused the same symptoms, even though she mentioned other no-work activities that did.

Dr. Bell reviewed petitioner's job description, but the description did not go into the ergonomics of her station. Dr. Bell did not know if petitioner sits or stands while keyboarding, and did not know how her wrists were positioned while she was keyboarding during her normal work day. Dr. Bell was under the impression that in addition to keyboarding during the day, petitioner would operate photographic equipment and do a little cashier work. He believed that most of her keyboarding involved data entry that included entering applications for driver's licenses, administering tests over the computer, and completing applications on the computer. He was of the opinion that in addition to her manipulation of the computer and photographic equipment, the rest of her job entailed reviewing and reading forms, and reading things off the computer. He was of the opinion that petitioner spent 25% of her day, or a few hours each day, at a minimum, entering data. The arbitrator finds this is in stark contrast to the 60% of the day petitioner testified she types at work. This deviation in the time supports a finding that Dr. Bell did not have had a detailed and accurate understanding of the petitioner's work activities.

The arbitrator finds the detailed job duties petitioner testified to at trial as it relates to the frequency, duration and manner of performing her daily activities were vague. Additionally, given that both Dr. Bell and Dr. Feinstein came up with different understandings of petitioner's work activities even though they both reviewed the same job description, the arbitrator finds it unlikely that either truly had an accurate understanding of the petitioner's work activities, especially as it relates to the ergonomics of her work station. Even if the arbitrator was to adopt Dr. Bell's understanding of petitioner's work activities, the arbitrator does not find keyboarding about 25% of the day at a minimum, interspersed among other job duties, to be sufficiently repetitive to have caused, or aggravated her bilateral carpal tunnel syndrome.

Lastly, the arbitrator does not give much weight to petitioner's claim that her symptoms arose from the work activities she had been performing for years, given that just 3 months prior to her report of injury, petitioner was treated on 7/30/21 for acute discomfort after painting several rooms in her home. At that time, she reported numbness in her bilateral arms. She listed her aggravating factors as sleeping, driving, and using her hands or arms raised above the head, but never mentioned any work activities as an aggravating factor. Following an examination, petitioner was assessed with paresthesia of the upper extremity; given splints to wear at night, and an order for an NCS of the upper extremities. The arbitrator finds it significant that this was the earliest medical record petitioner offered into evidence as it relates to her bilateral hand complaints, and it did not make any reference to the work activities she claimed had been causing her hand symptoms for years.

The arbitrator finds it significant that petitioner's injury report on 11/12/21 came only after her medical visit on 7/30/21 and NCS on 10/19/21 confirmed bilateral carpal tunnel syndrome. The arbitrator finds that at no time prior to 11/12/21, including her office visit on 7/30/21 and NCS on 10/19/21, did petitioner ever mention that her bilateral hand complaints were in anyway related to her work activities. The arbitrator questions how petitioner did not mention her work activities were an aggravating factor of her bilateral hand complaints on 7/30/21given that she testified that she has had bilateral hand complaints since she started doing her job, which was at least 6-9 years ago. The arbitrator further questions the timing of her reported injury, given that it came only after she was diagnosed with bilateral carpal tunnel syndrome after painting rooms in her home.

Therefore, based on the above, as well as the credible evidence, the arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence that she sustained injuries to her bilateral hands due to repetitive work activities that manifested itself on 10/19/21.

**F. IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?**
**K. IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE?**

Having found the petitioner has failed to prove by a preponderance of the credible evidence that she sustained injuries to her bilateral hands due to repetitive work activities that manifested itself on 10/19/21, the arbitrator finds these remaining issues moot.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 23WC008238 |
| Case Name | Jason Stahnke v.<br>Schenker Logistics |
| Consolidated Cases | |
| Proceeding Type | Petition for Review under 19(b)<br>Remand Arbitration |
| Decision Type | Commission Decision |
| Commission Decision Number | 24IWCC0614 |
| Number of Pages of Decision | 32 |
| Decision Issued By | Kathryn Doerries, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Matthew Chapman,<br>Mary Massa |
| Respondent Attorney | Donald Murphy |

DATE FILED: 12/27/2024

/s/Kathryn Doerries,Commissioner
Signature

DISSENT: /s/Kathryn Doerries,Commissioner
Signature

STATE OF ILLINOIS )
) SS.
COUNTY OF MADISON )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JASON STAHNKE,

Petitioner,

vs. NO: 23 WC 008238

SCHENKER LOGISTICS,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 16, 2024, 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 $19,400.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

**December 27, 2024**

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

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KAD/bsd
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/s/*Amylee H. Simonovich*
Amylee H. Simonovich

DISSENT

I respectfully disagree with the majority's award of prospective medical and temporary total disability benefits (TTD) after December 12, 2023, and medical benefits after December 6, 2023. Instead, I would find Dr. Chabot's opinion more credible than Dr. Taylor's and Dr. Hurford's opinions regarding prospective medical. I would find that Petitioner reached maximum medical improvement on November 3, 2023, based upon Dr. Chabot's testimony. Therefore, I would vacate the Arbitrator's award of TTD after December 12, 2023, vacate the award of medical expenses after December 6, 2023, and vacate the award of prospective medical based on the following.

Petitioner consulted Dr. Taylor, an orthopedic spine surgeon, on only two occasions and more than seven months apart. At the first consult, on May 11, 2023, Dr. Taylor found on examination that Petitioner's spine exam was "basically nonfocal, meaning there was no motor weakness and no sensation abnormality that is consistent with a spinal nerve root injury." (PX15, 7; PX10) Further, Dr. Taylor noted that there was no evidence of neuroforaminal compression on Petitioner's April 13, 2023, cervical MRI and no evidence of neuroforaminal compression on Petitioner's April 28, 2023, thoracic MRI. (PX15, 7-8; PX10) Dr. Taylor opined that there were some degenerative changes on the April 28, 2023, lumbar MRI at L4-5 and L5-S1, but the examination was nonfocal in both the cervical and lumbar spine. *Id*.

In his first office notes, Dr. Taylor documented that he reviewed multiple records received from Petitioner's attorney's office including those from Regenerative Health and Chiropractic. In those records from March 28, 2023, Dr. Taylor specifically noted the results of Petitioner's cervical x-rays, which, according to Dr. Taylor "reveal loss of lordosis and possible mild right foraminal narrowing at C3-5." (PX10, 6) Review of the Regenerative Health and Chiropractic records in evidence document the same findings in all of the office visits beginning on March 29, 2023, through October 12, 2023. (PX3, 4-51) In fact, the March 28, 2023, cervical spine x-ray report in the Regenerative Health and Chiropractic records documents that Petitioner has hyperlordosis, but with no mention of hypermobility or any other abnormality. (PX3, 52) Dr. Taylor also documents in his review of the chiropractic note from March 28, 2023, that Petitioner reported pain in his left shoulder and left arm pain and that Petitioner had a left shoulder MRI two years prior after dislocating it. (PX10, 6) The April 4, 2023, AHS GMG Family Practice records confirm Petitioner's history of left shoulder dislocation in December 2017, and a sprain of the acromioclavicular ligament/instability of the left shoulder joint, both onset July 26, 2022. (PX8, 2) The Physical Exam section notes that Petitioner was ambulating normally. *Id.* Petitioner reported working light duty. *Id.*at 5

Dr. Taylor's office notes document that on May 11, 2023, Petitioner's BMI was 44.8. Dr. Taylor testified regarding his Plan at the time of the May 11, 2023, office visit and that Petitioner's symptoms were consistent with cervicogenic neck pain and axial back pain coming from the disc or the facet. (PX15, 9) Dr. Taylor recommended "three months of exhaustive nonoperative treatment by a pain management specialist to include fluoroscopic guided injections, physical therapy, and nonnarcotic medications." (PX10, 8-9) Dr. Taylor documented that prior to determining a surgical plan, additional imaging will be obtained including dynamic x-rays of Petitioner's cervical and lumbar spine calibrated for magnification to rule out segmental instability and up to date 3T cervical and lumbar MRIs with foraminal views. (PX10, 9) Dr. Taylor referred Petitioner to pain management specialist, Dr. Patricia Hurford. *Id.* Dr. Taylor did not see Petitioner again for seven months.

Dr. Hurford did not testify, nonetheless, her records confirm Petitioner's first encounter was on June 6, 2023, when he was evaluated by her physician assistant, Jeffrey Todd. PA-C Todd noted a morbidly obese male in no apparent distress. (PX12, 2; T. 170) After review of the imaging studies including MRIs of the cervical, thoracic and lumbar spine, the Assessment was: 1) Radicular pain to the upper cervical or in a cervical distribution and 2) Lumbar, probable facetogenic, pain. (Px12, 3) An EMG/NCS and lumbar medial branch blocks were ordered. *Id.*

Dr. Hurford saw Petitioner on July 24, 2023, and documented that the EMG/NCS studies were unremarkable. (PX12, 4) Dr. Hurford noted Petitioner was ambulating with a cane. *Id.* She also reviewed the MRIs, and commented that they are "relatively unremarkable given the significance of his pain." (PX12, 5) In the Assessment, Dr. Hurford noted, "His examination fails to identify any radicular or myelopathic findings." *Id.* Dr. Hurford's Plan was for Petitioner to begin functional activities beyond his tolerance, which, she noted, he seemed "relatively adverse

to." *Id.* Dr. Hurford's Plan included avoiding the use of a cane and beginning a more regular and consistent exercise program. Dr. Hurford also prescribed medication and aquatic physical therapy. Diagnostic facet injections in the lower lumbar region were recommended. (PX12, 5-6) Dr. Hurford noted that Petitioner "did not appear comfortable with the recommendations." She encouraged him to follow up with his primary care physician to seek any outside alternative diagnosis which could explain the significance and intensity of his current pain." (PX12, 6)

Dr. Hurford saw Petitioner again on September 14, 2023, after administering medial branch blocks at L3, L4, and L5 on August 1, 2023. (PX12, 7-8) Dr. Hurford's Plan in September was for Petitioner to under an epidural steroid injection (ESI) in the cervical region, noting "vague myelopathic findings." Further, a lumbar medial branch block, confirmatory testing, and "Possible RFA procedure" was recommended as well. (PX12, 9) On October 10, 2023, Dr. Hurford administered a second, left, L3, L4, and L5 dorsal ramus diagnostic block. (PX12, 11)

Several weeks later, on November 3, 2023, Dr. Chabot examined Petitioner pursuant to Section 12 of the Act and found that Petitioner was at maximum medical improvement (MMI). Dr. Chabot agreed with Dr. Taylor's opinions that there were no structural lesions on the cervical or lumbar MRI that would cause neural compression or could structurally account for Petitioner's pain complaints. Dr. Chabot opined that Petitioner had cervical, thoracic and lumbar strains as a result of his work injury. (RX1) Further, Dr. Chabot thought Petitioner's treatment until Dr. Hurford's recommendation for a radiofrequency ablation (RFA) was reasonable and necessary. (RX1) Dr. Chabot opined, given Petitioner's psychological profile, diffuse symptoms, lack of significant functional deficits that would prevent him from performing his work duties, that Petitioner was at MMI as it related to the work accident. *Id.* Dr. Chabot testified credibly regarding the reasons he came to those conclusions.

Dr. Chabot testified that he compared Petitioner's pain diagrams from shortly after the accident, and a second one describing Petitioner's pain level on the day Dr. Chabot saw him. (RX1, 14-15) Dr. Chabot explained that when comparing the two documents completed by Petitioner, in the first one, (RX1, DepXC), which was from the day of the accident, his pattern is very diffuse, but that would not be uncommon after a contusion or jarring injury. (RX1, 15) Dr. Chabot testified that Petitioner's description of his current complaints on the second form, (RX1, DepXD) which is the pain level described on the day of the examination, is more pronounced than Petitioner's prior diagram, which is wholly inconsistent. *Id.* Dr. Chabot explained that the pattern is a non-physiological pattern, which is global, involving all extremities. *Id.* The second diagram is usually considered what they refer to as a non-physiologic pattern with strong suggestions of a psychosocial overlay. (RX1, 15-16) Dr. Chabot confirmed that the distribution of complaints shown in the form marked as "Exhibit D" are consistent with the complaints Petitioner made to Dr. Chabot when he saw him on November 3, 2023. *Id.* Dr. Chabot noted Petitioner talks about weakness and numbness in his shoulders, thighs and the pattern actually extends all the way down to both feet, all the way down to both hands, and up into the occipital region of the head. Dr. Chabot opined that the diagram is even more diffuse than Petitioner's description. *Id.*

Dr. Chabot testified that he reviewed Petitioner's medical records and on the date of his evaluation, Dr. Chabot ordered a series of x-rays which revealed no fractures and only minimal degeneration at C5-6 (RX1, 18). The flexion and extension films revealed no signs of any instability in the cervical spine. *Id.* X-rays of the lumbar spine revealed well preserved disc height with only mild facet sclerosis (degenerative changes) noted from L3-S1. *Id.* Dr. Chabot opined that for Petitioner's age, he had relatively normal-looking x-rays. *Id.*

Dr. Chabot testified that when he reviewed the MRI films of the cervical spine, the images revealed well preserved disk space height throughout the cervical spine, normal alignment, no evidence of fracture, perched facet or facet fracture and no evidence of focal disc herniation of the cervical spine or central foraminal stenosis. Dr. Chabot testified that Petitioner had a relatively normal MRI through the cervical spine. (RX1, 18-19) Dr. Chabot opined that there was nothing on that MRI that would explain Petitioner's complaints of head, neck and arm pain. (RX1, 19)

Dr. Chabot's review of the Petitioner's April 28, 2023, thoracic spine MRI revealed evidence of irregularity of the endplates with some degree of degeneration through the mid and lower thoracic region, no evidence of focal herniation or neural compression of the thoracic spine. There was no evidence of fracture to the thoracic spine and nothing on those films that would explain his complaints. *Id.* Dr. Chabot further opined that there is no evidence of cord compression that could possibly explain Petitioner's diffuse complaints involving both lower extremities as well as bowel and bladder dysfunction. *Id.*

Dr. Chabot further opined that the MRI of the lumbar spine performed on April 28, 2023, revealed well preserved disk space height, good disk signal meaning, the disc looks bright on T2 images, which is a sign they are still hydrated, which would suggest minimal degeneration. There was no evidence of fracture, spondylolysis or spondylolisthesis. (RX1, 20) Dr. Chabot confirmed that there was no evidence of disc herniation or neural compression. There was some degree of dorsal lipomatosis or excessive fat collection in the dorsal or most posterior part of the spine. Dr. Chabot explained that normally it should not exceed 6 millimeters in diameter or it could be compressive. Dr. Chabot opined that there was mild facet and ligamentum flavum hypertrophy at the L3-4 level resulting in minimal canal narrowing. The same was noted at L4-5. There was no evidence of disc herniation, focal neural compression, or fracture of the lumbar spine. *Id.*

Dr. Chabot further confirmed that there was nothing in the MRI and the MRI films from April 28, 2023, that would explain Petitioner's complaints of low back pain radiating down his legs into his feet. There were really only mild changes in the canal area at L3-4 and L3-5, nothing that was resulting in significant neural compression. (RX1, 20-21) Dr. Chabot also reviewed Petitioner's April 10, 2023 CT scan. (RX1, 21) Dr. Chabot testified that study again revealed well preserved space height through the cervical spine and no fracture. *Id.* Dr. Chabot testified that there was no focal disc herniation and no neural compression noted, no evidence of facet pathology. Dr. Chabot opined that really there was no neural compression on the study or anything that would

explain Petitioner's complaints when Dr. Chabot saw him, including pain in his head, neck and radiating through both of his arms into both of his hands. (RX1, 21)

Dr. Chabot testified that he reviewed the record from Dr. Taylor dated May 11, 2023. Dr. Chabot disagreed with Dr. Taylor's diagnosis of axial back pain, explaining that when he saw Petitioner he was complaining of symptoms into both legs, so those complaints are more diffuse than axial. Dr. Taylor opined that Petitioner's complaints evolved overtime. Initially when he was seen, they may have been more focal, but definitely at the time of Dr. Chabot's exam, Petitioner's pain diagram indicated his complaints were much more diffuse. (RX1, 22)

Dr. Chabot explained that Dr. Taylor's diagnosis of cervicogenic neck pain suggested some kind of disc pathology was related, however, in Dr. Chabot's opinion there was no indication of disc pathology on the MRI and CT studies. (RX1, 22) Dr. Chabot noted that Dr. Taylor's treatment plan as of May 11, 2023, and interpretation of the studies, indicated no evidence of neural compression or disc pathology, so he recommended referral to pain management. Dr. Chabot thought the referral to Dr. Hurford was reasonable because of the diffuse complaints. Dr. Chabot also testified that he thought Dr. Hurford's recommendation of a nerve conduction test (NCS) was reasonable and necessary due to Petitioner's diffuse complaints. Dr. Chabot testified the NCS test checks for cervical radiculopathy, root injury, brachial plexopathy, peripheral nerve entrapment, peripheral polyneuropathy, or some other unknown condition like ALS or a neuromuscular disorder that has not been previously diagnosed. (RX1, 22-23)

Dr. Chabot reviewed the results of the EMG nerve conduction study. It only dealt with the upper extremities and it revealed no abnormality. There was no evidence of cervical radiculopathy. Dr. Chabot agreed with Dr. Hurford's administering facet joint injection at L4-5 and L5-S1 and opined that treatment was reasonable. *Id.* Dr. Chabot opined that the August 1, 2023, medial branch blocks at L3, L4, and L5 Dr. Hurford administered were reasonable, as well.

Dr. Chabot did not agree with the recommendation that Petitioner undergo an RFA as recommended by Dr. Hurford on September 14, 2023. Dr. Chabot opined that he did not believe that RFA was really going to have any benefit. Dr. Chabot testified that RFA is not reasonable and necessary treatment because Petitioner's complaints are too diffuse, and his pain levels are too high to suggest RFA has a predictable, possible long term benefit for him. (RX1, 25) Dr. Chabot testified that although he would agree with Dr. Hurford's initial treatment, he would draw the line at the RFA because of the Petitioner's pain diagram which shows profound 9 out of 10 symptoms diffusely involving the posterior neck, occiput, both shoulders, both arms, the entire back, and both legs. Dr. Chabot explained that an ablation procedure is relatively localized involving the lower lumbar region and Petitioner's complaints are diffuse. (RX1, 25-26)

Dr. Chabot further opined that a doctor must consider the whole person and look at his prior treatment to determine future treatment. In this case, Petitioner treated with the chiropractor for a period of four months, if not longer, and he continued to report pain levels in the severe to excruciating range, yet he was still able to go for treatment, when those levels of complaints usually

are totally incapacitating. (RX1, 25-26) So there was really no support for his high level of subjective complaints, in either his physical examination and diagnostically. Dr. Chabot opined that treatment could go on indefinitely when, as in this case, the patient has not responded to eight months of treatment. In fact, Petitioner reports pain levels that are higher than they were at the time of the initial injury or near the same. There is no reason to continue treatment when there's no predictable likelihood of changing his level of complaint. (RX1, 26)

When Dr. Chabot examined him, Petitioner was six foot tall and he weighed 325 pounds. Dr. Chabot testified that Petitioner's weight could have played a role in his symptoms.(RX1, 27) It would suggest that he has a poorly-controlled diet, that he is probably deconditioned. Dr. Chabot opined that kind of weight limits one's ability to participate in exercise activity and obesity in itself is an illness, noting that it complicates your entire physical wellbeing, complicates your ability to perform even simple tasks sometimes and activities of daily living. *Id.*

The results of his physical exam of Petitioner revealed that his motion for a person who is describing severe pain was not profoundly restricted. (RX1, 28) He could forward flex to 90°, but he also had a large pendulous abdomen, thus impacting his flexibility. His neurologic exam strongly suggested, again, evidence of psychosocial overlay. He had decreasing sensation involved in the left arm diffusely except for normal sensation in the middle finger, ring finger, first web space, and little finger which is not a physiological pattern of any neurologic or specific physiologic origin, especially in light of the findings of the MRI and CT study. *Id.* The muscle stretching, and his reflexes were normal. The Hoffman sign, which is an indication of spinal cord injury, was negative. The pattern also was different than the pattern noted by Dr. Taylor shortly after the accident. *Id.*

Dr. Chabot further testified regarding the lower extremity neurologic exam, which, again, revealed sensory patterns that did not fit a physiologic pattern. The lower extremity neurologic exam revealed decreased sensation involving the left thigh diffusely, involving both the medial and lateral calves which, does not fit any physiologic pattern. (RX1, 28-29) Petitioner reported normal sensation involving the foot while he reported diffuse sensory changes above the foot. (RX1, 29) The muscle strength testing and reflexes were again, normal. Extremities testing was negative in both the seated and supine positions. Long tract signs, which are evaluations of spinal cord related conditions, were both negative. Petitioner showed no issues with ambulating during the physical exam. He did not have a cane or walker to assist in ambulating nor did Dr. Chabot document that Petitioner reported using a cane to ambulate. *Id*. In fact, on page three of Dr. Chabot's questionnaire, Petitioner denied using a cane, walker or wheelchair. (RX1, 29-30)

Dr. Chabot diagnosed Petitioner with cervical, thoracic and lumbar strains associated with the work injury of March 18, 2023. (RX1, 30) Dr. Chabot did not believe that Petitioner required any additional treatment for his cervical, thoracic or lumbar spine regardless of cause. Dr. Chabot testified that he did not believe Petitioner requires any restrictions to his work relating to the cervical, thoracic or lumbar spine regardless of cause. *Id*. Dr. Chabot opined that aside from

Petitioner's nonphysiologic pattern of sensory changes, he did not exhibit any significant functional deficits. *Id.* His strength was 5+ in the upper and lower extremities. His mobility was very good for a very large man. He did not walk with a list or limp or, exhibit a significant functional deficit that would prevent him from performing his prior work duties. (RX1, 30-31) Dr. Chabot opined that when he saw Petitioner on November 3, 2023, he had reached MMI as it relates to his work accident of March 18, 2023. (RX1, 31)

On cross-examination Dr. Chabot testified that Petitioner's pain levels were excessive throughout his treatment. (RX1, 35) Dr. Chabot further testified that, he was offering a psychiatric opinion to the extent that Petitioner is an individual with extremely high levels of subjective complaints with really no evidence of objective findings to support those complaints. Dr. Chabot explained when you have that situation over many months and a person who lacks a typical response to conservative measures, you have to start entertaining the possibility that other issues are playing a significant role in his persistent complaints. And that is more significant in an individual such as Petitioner who already has a history of depression, anxiety, and bipolar disorder. (RX1, 38-39)

Dr. Chabot testified that Petitioner's complaints are essentially global, diffuse, all encompassing. The symptoms progressed over time rather than diminished over time. Petitioner is now including other complaints that never existed at the time of his initial injury. Thus, Dr. Chabot opined, it is highly unlikely that additional treatment with RFA is going to offer him lasting improvement of his complaints. (RX1, 45) Dr. Chabot further opined that Petitioner's complaints are all-encompassing, except for the top of his head or his head, above his ears and maybe the anterior chest area. Those are the only regions he does not indicate that he's experienced either pain, burning, aching, or some other complaint. Thus, Dr. Chabot opined that performing the RFA, is unlikely in the totality to offer Petitioner any substantial long-term improvement. (RX1, 48-49) I agree with Dr. Chabot.

The majority finds that the medical treatment provided thus far has not returned Petitioner to his pre-accident condition, and further treatment is necessary to diagnose, relieve or cure the effects of his injury. In so finding, and awarding prospective medical, the majority is overlooking the plethora of objective tests that Dr. Taylor, Dr. Hurford and Dr. Chabot interpreted as normal and unanimously confirmed showed no structural abnormalities including the results of an April 10, 2023, cervical spine CT, an April 13, 2023, cervical spine MRI and two prior x-rays. The chiropractor records refer to a cervical spine x-ray result from March 18, 2023, which had no mention of hypermobility. (PX3, 52, 4-50) Dr. Taylor reviewed the chiropractic records and reported on the x-ray findings. (PX10, 6)

Dr. Chabot took cervical x-rays on November 3, 2023, and testified that there was minimal degeneration at C5-6 and further, the flexion and extension films revealed no signs of any instability in the cervical spine. (RX1, 17-18)

Dr. Taylor saw Petitioner on one additional occasion on December 28, 2023, after he had reviewed Dr. Hurford's chart. (PX15, 10) His office note confirms he reviewed and scanned Dr. Chabot's report into Petitioner's electronic medical record. (PX10, 11) Petitioner's BMI was noted to be 45.1 and Dr. Taylor noted him to be "morbidly obese appearing stated age in no distress." *Id.* Dr. Taylor noted that Petitioner "presented to the office ambulating with a cane but is able to ambulate slowly without assistive device during the exam." *Id.*

Dr. Taylor did not see Petitioner in the seven months between May 11, 2023, and December 28, 2023. (PX10) In his Plan, Dr. Taylor noted, in pertinent part, the results of certain psychological tests administered to Petitioner and concluded the tests were consistent with evidence of psychological/mood disorder. Dr. Taylor was sending the test results to Petitioner's psychologist, assuming Petitioner would follow through with treatment. (PX10, 14, 15) Prior to any surgical intervention, Dr. Taylor documented that he would require clearance by his psychologist. (PX10, 15) Dr. Taylor's plan was to have Petitioner return to Dr. Hurford to undergo additional nonoperative treatment for his ongoing spine symptomatology. Should he fail additional nonoperative treatment, he would require additional diagnostic testing prior to returning for preoperative surgical evaluation. *Id.*

Dr. Taylor's December Plan states that for his cervical spine, Petitioner's pain is likely related to C5-6 hypermobility, but he would require further diagnostic and therapeutic fluoroscopic guided injections to identify concordant pain generators. Regarding his lumbar spine, he would require diagnostic/provocative lumbar discography and lumbar dynamic films calibrated for magnification to rule out segmental instability. *Id.*

Dr. Taylor testified that he administered the psychometric testing to Petitioner, and he does to individuals, who have axial back pain as their primary diagnosis. (PX15, 29) Dr. Taylor explained axial back pain can be associated with certain other psychological conditions and it is best, if one is considering surgery, to rule out psychological conditions that might confound one's ability to make an accurate diagnosis. *Id.* Dr. Taylor opined that patients like Petitioner, with psychological disorders, report higher rates of acute pain and are more likely to develop chronic pain than the general population. (PX15, 32)

Dr. Taylor also spelled out another plan regarding Petitioner's habitus. Dr. Taylor's office note documents that Petitioner "is morbidly obese based on his body mass index." Dr. Taylor noted that "morbid obesity, characterized by a BMI exceeding 40, is associated with additional medical comorbidities" moreover, obesity is associated in some literature with higher incidence of disc degeneration in the cervical and lumbar spine. Dr. Taylor's last plan was that Petitioner would require additional nonoperative treatment with pain management specialist, Dr. Hurford, for his ongoing spinal complaints and that his care will be transferred to Dr. Hurford. Dr. Taylor discharged Petitioner from care and recommended that he also pursue with his primary care physician other treatments to facilitate weight loss to include nutritional consultation and possibly

prescription medications including the more recently developed weekly injectables. Optimally, prior to surgery, his body mass index should be below 39 to pursue a surgical intervention.

He then dictated an addendum and discharged Petitioner from his care. (PX15, 35) The addendum assigns Petitioner work restrictions of no lifting greater than 25 pounds, however, future work statuses would be at the discretion of Dr. Hurford.

Dr. Taylor testified consistent with his second and last office note, however, he also testified he could not say that Petitioner's representation on paper of pain and his presentation physically were due to the Petitioner's psychological baseline condition, but in Dr. Taylor's opinion there was clearly "a bit of discrepancy." *Id.* Dr. Taylor went on to testify that there was a disconnect between what Petitioner was reporting and what Dr. Taylor observed. *Id.*

Dr. Taylor confirmed that during the first examination, he had Petitioner ambulate in the examination room and "he walked normally." (PX15, 24) Petitioner was not using a cane on May 11, 2023, and Dr. Taylor did not prescribe him a cane when he saw him on that date. Petitioner did have a cane with him when Dr. Taylor saw him a second time but he did not inquire who prescribed the cane for him. *Id.*

On May 11, 2023, just like the other tests Dr. Taylor performed on physical examination, both the straight leg raise and the Babinski tests were normal. (PX15, 25)

In awarding prospective medical, the majority finds, "[a]s to the cervical injections, Dr. Chabot did not address them in his report, stating later that the lack of necessity of such treatment should be implied because he found that the Petitioner had reached maximum medical improvement. However, Dr. Chabot did not address the findings on the December 28, 2023, X-rays showing hypermobility and stenosis." The majority ignores the fact that the March 18, 2023, cervical x-ray, the cervical spine CT and a cervical spine MRI taken shortly after the accident were considered normal. The majority's position also ignores the x-rays taken by Dr. Chabot in November, and his report that the November 2023 x-ray result was normal. Instead the majority based its award in large part, on an x-ray taken one month later than the Section 12 evaluation, and nine months after the date of accident. The x-ray report is not in in evidence, but only reported by Dr. Taylor. (PX10) Dr. Taylor never compared these x-rays, taken nine months after the accident, with the x-rays taken shortly after the accident at Regenerative Health and Chiropractic or to those Dr. Chabot took one month prior. There is no evidence in Dr. Taylor's or Dr. Hurford's initial records, of a finding of any structural abnormality, nor in the physical exam, to warrant further testing.

Further, in his May 11, 2023, Plan, Dr. Taylor documented that "prior to determining a surgical plan, additional imaging will be obtained including dynamic x-rays of Petitioner's cervical and lumbar spine calibrated for magnification to rule out segmental instability and up to date 3T cervical and lumbar MRIs with foraminal views." (PX10, 9) However, there was no surgical plan in December 28, 2023, when Dr. Taylor took the third cervical x-ray. Notably, Dr. Taylor felt

compelled to administer psychological testing and sent the results to Petitioner's psychologist. Dr. Taylor noted that patients like Petitioner, "with psychological disorders report higher rates of acute pain and are more likely to develop chronic pain than the general population. The mechanism underlying the correlation between increased rates and psychological disease is most likely multifactorial." (PX10, 14) Dr. Taylor also wrote in his December Plan that "[p]rior to any surgical intervention, Dr. Taylor would require clearance by his psychologist." (PX10, 15) This was further evidence that the need for additional diagnostic testing is not warranted. Coupled with Dr. Taylor's opinion that optimally Petitioner's BMI should be below 39 to pursue surgical intervention, the additional cervical x-ray was not even justified since there was no basis for surgery and no surgery was ever contemplated.

Dr. Taylor had not seen Petitioner for seven months, and discharged him to Dr. Hurford for work status and for a fishing expedition of further diagnostic tests under the guise of Petitioner having a favorable response to the medial branch blocks and because he speculated Petitioner might have a new diagnosis based upon a third x-ray of the cervical spine that he took at the December visit. Notably, Petitioner underwent an x-ray which showed no instability shortly after the accident at Regenerative Health and Chiropractic-the results of which were mentioned throughout his treatment there and reviewed by Dr. Taylor. Further, one month prior to Dr. Taylor's December visit, Dr. Chabot took his own x-ray and opined that there was no instability.

Now, nine months after the accident, Dr. Taylor's December Plan stated, "for his cervical spine, Petitioner's pain is *likely* related to C5-6 hypermobility, but he would require further diagnostic and therapeutic fluoroscopic guided injections to identify concordant pain generators." (Emphasis added) *Id.* "Likely" is not the same as "more probable than not" and clearly Dr. Taylor is speculating. "If the basis of an expert's opinion is grounded in guess or surmise, it is too speculative to be reliable." (Citation) *Gross v. Ill. Workers' Comp. Comm'n*, 2011 IL App (4th) 100615WC, 24, 960 N.E.2d 587, 594, (2011).

Dr. Taylor saw Petitioner only one time before Dr. Chabot examined him and the second examination, more than seven months later, was obviously authored to rebut Dr. Chabot's opinion report. I submit that Dr. Taylor's December 28, 2023, office "note" was a report obtained in anticipation of litigation, clearly offering a variety of red herrings and 15 References at the end of the office note supporting a variety of unrelated reasons that forklift drivers have back problems, the effects of obesity on spine surgery and psychological comorbidities. (PX15, 81)

No prospective medical suggested by Dr. Taylor, including cervical ESIs or an RFA, much less, "further diagnostic and therapeutic fluoroscopic guided injections to identify concordant pain generators" or a "diagnostic/provocative lumbar discography and lumbar dynamic films calibrated for magnification to rule out segmental instability" is reasonable or necessary treatment for this Petitioner as it relates to the work accident.

Petitioner's diffuse and continuing complaints, which are unsupported by objective tests and affected by his psychological profile, and morbid obesity as noted by his own treating doctor,

supports the long term failure of those medial branch blocks. There is no reasonable basis to conclude that cervical injections or an RFA or any other diagnostic tests would be beneficial. Dr. Chabot credibly testified that RFA would offer no substantial long term affect. Dr. Chabot opined that Petitioner did not exhibit any significant functional deficits. Petitioner's strength was 5+ in the upper and lower extremities and his mobility was very good for a very large man. Further, Dr. Chabot opined that Petitioner did not exhibit a significant functional deficit that would prevent him from performing his prior work duties. (RX1, 30-31) I note that when Dr. Hurford saw Petitioner on July 24, 2023, and documented that the EMG/NCS studies were unremarkable, she noted Petitioner was ambulating with a cane.

Dr. Hurford reviewed the MRIs, and commented that they are "relatively unremarkable given the significance of his pain." (PX12, 5) In the Assessment, Dr. Hurford noted, "His examination fails to identify any radicular or myelopathic findings." *Id*. Dr. Hurford's Plan was for Petitioner to begin functional activities beyond his tolerance, which, she noted, he seemed "relatively adverse to." *Id.* Dr. Hurford's Plan included avoiding the use of a cane and beginning a more regular and consistent exercise program. Dr. Hurford also prescribed aquatic physical therapy. Despite her recommendation to avoid the cane that no doctor prescribed, Petitioner had the cane at the December consult with Dr. Taylor, however, did not have it for his visit to Dr. Chabot. There is no evidence Petitioner tried any therapy outside of chiropractic treatment or that Petitioner tried to increase his functional activities despite the many repeated instructions in the chiropractic records to perform exercises at least daily and despite Dr. Taylor's order for physical therapy. Exercise and aquatic therapy, available at local community centers, were recommended but not done. In this case, surgery is not contemplated based on the objective findings and because Petitioner has been instructed to follow up for psychological treatment and to obtain aggressive weight management assistance from his primary care provider.

Dr. Chabot opined that when he saw Petitioner on November 3, 2023, he had reached MMI as it relates to his work accident of March 18, 2023. (RX1, 31) Dr. Chabot, who had noted that Petitioner's previous objective tests had normal results, and the x-rays he administered showed no instability, agreed with the conservative treatment that had been done up to the point when he examined Petitioner. However, Dr. Chabot noted that typically there should have been improvement in the Petitioner's subjective complaints. After eight months with no response to conservative measures, Dr. Chabot opined that it is apparent that other issues are playing a significant role in Petitioner's persistent complaints. Dr. Chabot explained that the lack of response is typically more significant in an individual such as Petitioner, who already has a history of depression, anxiety, and bipolar disorder.

Thus, based upon all of the above, the evidence is clear regarding the lack of objective findings to support Petitioner's ongoing subjective complaints. Therefore, I dissent from the majority. I would find Dr. Chabot's opinions regarding Petitioner's need for additional treatment more credible than the opinions of Dr. Taylor or Dr. Hurford and I would vacate the awards of

TTD after December 12, 2023, medical benefits after December 6, 2023, and vacate the award of prospective medical.

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

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 23WC008238 |
| Case Name | Jason Stahnke v. Schenker Logistics |
| Consolidated Cases | |
| Proceeding Type | 19(b) Petition |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 18 |
| Decision Issued By | Jeanne AuBuchon, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Matthew Chapman |
| Respondent Attorney | Donald Murphy |

DATE FILED: 5/16/2024

/s/ Jeanne AuBuchon, Arbitrator

Signature

**INTEREST RATE WEEK OF MAY 14, 2024 5.165%**

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)**

**Jason Stahnke**
Employee/Petitioner

v.

**Schenker Logistics**
Employer/Respondent

Case # **23** WC **008238**

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 **April 26, 2024**. 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, 2023**, 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**; the average weekly wage was $**800.00**.

On the date of accident, Petitioner was **23** 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 $ for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $ .

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

**ORDER**

**Respondent shall pay Petitioner temporary total disability benefits of $532.80 per week for 58 weeks, from March 18, 2023, through April 26, 2024, as provided in Section 8(b) of the Act. The Respondent shall receive credit for TTD paid in the amount of $12,829.35.**

**Respondent shall pay reasonable and necessary medical expenses pursuant to Sections 8(a) and 8.2 of the Act) as follows: $1221.00 to Town & Country Orthopedics (Dr. Brett Taylor).**

**Respondent shall approve and pay for the pain management procedures recommended by Dr. Hurford, namely the cervical spine epidural steroid injections and the radio-frequency ablation to the lumbar spine and follow-up visits to Dr. Hurford and Dr. Taylor to determine whether additional care is needed.**

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

**MAY 16, 2024**

## PROCEDURAL HISTORY

This matter proceeded to trial on April 26, 2024, 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 and lumbar spine conditions after December 12, 2023; 2) payment of medical expenses after December 6, 2023; 3) entitlement to temporary total disability (TTD) benefits after December 12, 2023; and 4) entitlement to prospective medical care, specifically cervical spine epidural steroid injections and lumbar radiofrequency ablation.

## FINDINGS OF FACT

At the time of the accident, the Petitioner was 23 years old and employed with Respondent as a warehouse associate. (AX1, T. 9) On March 18, 2023, he was loading a trailer when the passenger side landing gear foot fell and buckled while he was on a stand-up forklift inside, causing the trailer to fall. (T. 11-13) He said he immediately had pain mainly in his back and left butt cheek. (T. 13) He said the pain worsened. (T. 14) He denied having any back or neck pain or treatment prior to the accident. (T. 15)

That afternoon, he sought treatment at the Gateway Regional Medical Center emergency room. (T. 14-15, PX1) He was taken off work until March 21, 2023. (PX1) He returned to the emergency room on March 24, 2023, and was excused from work until he would be seen by occupational health on March 28, 2023. (PX2)

On March 27, 2023, the Petitioner saw Dr. Christina Darin, a chiropractor at Regenerative Health Chiropractic, who performed an orthopedic examination. (PX3) On March 28, 2023, the Petitioner complained to her of neck problems localized to the left side and radiating into his left arm that he described as sharp with motion and dull. (Id.) He reported problems with his left

shoulder that he described as tingly, electric-like with motion, shooting and sharp, and mid-back problems localized to his left mid spine that he described as tingly, stiff and sharp. (Id.) He also reported lower back problems localized to his left lower back into his left leg that he described as tingly, achy, stiff and dull. (Id.) He said his problems appeared to be getting worse over time. (Id.) Nurse Practitioner Brandy Byrd prescribed an oral steroid and ordered an MRI. (Id.) The Petitioner was diagnosed with cervical radiculopathy, thoracic back pain and low back pain. (Id.) Treatment included decompression manipulation, electrical therapy, adjustments and exercises. (Id.)

The Petitioner underwent a cervical CT scan on April 10, 2023, at Gateway Regional Medical Center that showed mild degenerative changes of the cervical spine. (PX4) On April 13, 2023, the Petitioner underwent a cervical spine MRI at Professional Imaging that showed a broad-based right paracentral-foraminal disc herniation/protrusion at C4-5, disc bulging at C5-6 and C6-7 and straightening of normal cervical lordosis. (PX5)

On April 18, 2023, the Petitioner reported to NP Byrd that he also was having pain going down the right arm. (PX3) He complained of pain and tingling radiating down bilateral arms and into all fingers, pain in the middle of the back radiating out to both sides, sometimes wrapping around the front, and low back pain that worsened with walking and sometimes affected the left leg with pain in the front and back of the thigh and tingling. (Id.) He felt that the leg would give out. (Id.) NP Byrd read the cervical MRI and diagnosed cervical, thoracic and lumbar radiculopathy, recommended continued chiropractic care, ordered thoracic and lumbar MRIs and referred the Petitioner to Dr. Brett Taylor, an orthopedic surgeon at Town & Country Crossing Orthopedics. (Id.) On May 2, 2023, NP Byrd interpreted the thoracic and lumbar MRIs performed on April 28, 2023, as normal. (Id.) On May 11, 2023, Dr. Darin gave work restrictions of no

bending or lifting over 10 pounds, no twisting motions while carrying over 10 pounds, no pulling or pushing of object over 10 pounds and no repetitive motions. (Id.)

The Petitioner testified that chiropractic care helped, but he was still having the same levels of pain the next days after treatment. (T. 17)

Also on May 11, 2023, the Petitioner saw Dr. Taylor and reported: neck pain; arm pain, left worse than right, in the bilateral upper back, shoulders, upper arms, forearms, hands and fingers; numbness in the left forearm, thumb and index and long fingers; difficulty picking up small objects; problem with balance or tripping; and frequent headaches in the back of the head. (PX10) As to the low back, the Petitioner reported: pain greater in the back than leg; left-sided leg pain; pain in the left buttock and front and back of the left thigh; weakness in the left thigh and ankle; and numbness in the left thigh. (Id.) Dr. Taylor performed an examination and reviewed the MRI and the Petitioner's medical records. (Id.) He diagnosed cervicogenic neck pain, axial back pain and possible left carpal tunnel syndrome and opined that the work injury resulted in the Petitioner's symptomatic cervical and lumbar condition and was causally connected to his spine complaints. (Id.) He recommended three months of exhaustive nonoperative treatment by pain management – including injections, physical therapy and nonnarcotic medications. (Id.) He referred the Petitioner to Dr. Patricia Hurford, a physiatrist and pain management specialist at Hurford Interventional Pain, Orthopedics, Rehabilitation. (Id.)

Dr. Darin continued work restrictions on May 25, 2023, and July 11, 2023. (PX3)

On June 6, 2023, the Petitioner saw Dr. Hurford's physician assistant, Jeffrey Todd, and reported: neck pain centered in the midpoint of his neck radiating into the bilateral arms greater left than right; numbness and tingling radiating into the left upper extremity; numbness and tingling radiating into the left hand; some numbness and tingling into the right hand; numbness

and tingling into the mid back, mid thoracic parascapular region radiating along the bilateral parascapular border; pain in the low back focused in the center of the low back with some radiation into the left lower extremity; and numbness and tingling radiating into the left buttock and into the level of the knee. (PX12) He denied changes to his bowel or bladder habits. (Id.)

After an examination and review of the MRIs, PA Todd diagnosed radicular pain to the upper cervical or in a cervical distribution and lumbar probable facetogenic pain. (Id.) He recommended a nerve conduction study, and medial branch blocks for diagnostic and therapeutic purposes. (Id.)

The Petitioner underwent electromyographic and nerve conduction (EMG/NCS) procedures performed on July 24, 2023, by Dr. Daniel Phillips, a neurologist at Neurological & Electrodiagnostic Institute. (PX11) Dr. Phillips reported that the Petitioner's upper extremity nerves and muscles studied fell within the range of normal, and the tests did not disclose evidence for right C-5 radiculopathy or distal entrapment neuropathies. (Id.)

Also on July 24, 2023, the Petitioner saw Dr. Hurford, who performed an examination and reviewed the MRIs. (PX12) She noted that the MRIs were relatively unremarkable given the significance of the Petitioner's pain, specifically stating that the thoracic spine MRI was unremarkable, the lumbar spine MRI demonstrating minimal spondylosis and the cervical spine MRI being unremarkable for any disc herniations. (Id.) She said her examination failed to identify any radicular or myelopathic findings. (Id.) She encouraged the Petitioner to begin functional activities beyond his tolerance – including avoiding the use of a cane and beginning a more regular and consistent exercise program – to which he seemed relatively adverse. (Id.) Dr. Hurford recommended medications, aquatic physical therapy and diagnostic facet injections in the lower lumbar region. (Id.)

Dr. Hurford performed left L3, L4 and L5 medial branch block/dorsal ramus blocks on August 1, 2023. (Id.) The Petitioner testified that before the medial branch blocks, he was in quite a lot of pain, and it was difficult to stand or walk for even short amounts of time. (T. 18-19) He said that within 30 minutes of the blocks, he was almost pain free and able to move around more freely for the first time in months. (T. 19)

On September 14, 2023, Dr. Hurford saw the Petitioner and reported that he had an excellent response to the blocks but at that time had continued symptoms across the low back that led to weakness and buckling of the leg, ongoing neck pain and a vibration/tingling sensation. (PX12) The Petitioner also indicated that bowel or bladder symptoms were intermittent. (Id.) The Petitioner testified that he experienced loss of bladder or bowel control shortly after the accident, but he didn't notice it fully until it started getting a lot worse in April or May 2023. (T. 24) He said he never had this issue before the accident. (Id.)

Following a physical examination, Dr. Hurford diagnosed cervicalgia, spondylosis and low back pain. (PX12) She recommended a cervical epidural steroid injection for ongoing cervical symptoms, continued pain medications, a lumbar medial branch block, confirmatory testing and possible radiofrequency ablation (RFA). (Id.) She noted that if the Petitioner's vague myelopathic findings persisted or worsened, the Petitioner would see Dr. Taylor in follow-up. (Id.) Dr. Hurford performed left L3 medial branch, left L4 medial branch and left L5 dorsal ramus blocks on October 10, 2023. (Id.) The Petitioner testified that the lumbar branch blocks provided relief. (T. 20)

Throughout the treatment by Dr. Taylor and Dr. Hurford, the Petitioner continued chiropractic care. (PX3) He attended 37 visits from March 28, 2023, through October 12, 2023. (Id.)

On November 3, 2023, the Petitioner underwent a Section 12 examination by Dr. Michael Chabot, an orthopedic surgeon at Orthopedic Specialists. (RX1, Deposition Exhibit B) The Petitioner described his complaints as severe, sharp, localized and electric shocking type pain. (Id.) He complained of numbness in his fingers, feet and thighs, weakness in his arms, shoulders and thighs, loss of bowel or bladder control, impotence and migraines. (Id.) Dr. Chabot noted that pain diagrams revealed diffuse involvement of the entire body to include posterior neck, posterior thorax, thoracolumbar, lumbar spine, lumbosacral spine, bilateral poster shoulders and upper and lower extremities in a diffuse, non-radicular pattern. (Id.) The Petitioner rated his pain as 9/10. (Id.)

Dr. Chabot reviewed the Petitioner's medical records and performed a physical examination. (Id.) On the April 13, 2023, cervical MRI, he noted: evidence of reasonably well-preserved disc space height; normal alignment; no evidence of fracture, perched facet or facet fracture; no evidence of focal disc herniation; and no evidence of central or foraminal stenosis. (Id.) On the April 28, 2023, thoracic spine MRI, he saw evidence of irregularity of the endplates with some degree of degeneration through the mid and lower thoracic region and no evidence of focal disc herniation or neural compression. (Id.) On the April 28, 2023, lumbar MRI, he noted: evidence of well-preserved disc space height; good disc signal; no evidence of fracture, spondylolysis, disc herniation or neural compression; and some degree of dorsal lipomatosis, mild facet and ligamentum flavum hypertrophy at L3-4 and L4-5 resulting in minimal canal narrowing. (Id.) He said a cervical CT scan performed on April 10, 2023, revealed: evidence of well-preserved disc height; no fracture, s, focal disc herniation or neural compression; evidence of calcification along the posterior margin of the disc at C6-7 and less so at C7-T1; and minimal posterior annulus calcification at C7-T1. (Id.)

Dr. Chabot diagnosed cervical, thoracic and lumbar strain associated with the work injury, morbid obesity and history of depression, anxiety and bipolar disorder. (Id.) He stated that the Petitioner's level of subjective complaints was not supported by his examination and strongly suggested symptom embellishment and possibly underlying psychosocial issues. (Id.) He said a degree of symptom embellishment also was supported by the diffuse nature of the Petitioner's complaints to include loss of bowel control and impotence in the absence of any evidence of cranial injury or neural compression. (Id.) He stated that the diagnostic studies failed to document any evidence of acute injury or acute neural compression to the cervical, thoracic and lumbar spine. (Id.) He opined that: treatment to date had been reasonable and necessary to address complaints associated with the Petitioner's injury; the Petitioner reached maximum medical improvement regarding his work injury; the Petitioner could return to full and unrestricted work duties; and the Petitioner was not a candidate for RFA or surgery. (Id.)

The Petitioner returned to Dr. Taylor on December 28, 2023, and reported continued neck pain radiating into his shoulders and left upper extremity, numbness to his left arm, low back pain radiating into his left greater than right lower extremity. (PX10) Cervical X-rays that day showed hypermobility of C5-6 and cervical congenital stenosis. (Id.) Lumbar X-rays were unable to be obtained secondary to the Petitioner's body habitus. (Id.) Dr. Taylor also performed psychological testing. (Id.) He diagnosed cervicogenic neck pain, cervical hypermobility at C5-6, axial back pain, stenosis of the cervical and lumbar spine and objective psychological testing consistent with underlying psychological disorder. (Id.) He said the accident aggravated the Petitioner's pre-existing baseline static congenital cervical and lumbar stenosis. (Id.) He agreed that the Petitioner's complaints in his neck and left arm were caused by hypermobility that he said was caused by the work exposure. (Id.)

Dr. Taylor expressed concerns about potential psychological dysfunction, based on the psychological testing that were consistent with evidence of psychological/mood disorder and noted that the Petitioner was working with a psychological professional. (Id.) Dr. Taylor recommended additional nonoperative treatment with Dr. Hurford. (Id.) He noted that the Petitioner was morbidly obese and recommended treatments to facilitate weight loss. (Id.) He issued an addendum note on January 10, 2024, giving the Petitioner work restrictions of no lifting greater than 25 pounds. (Id.)

Dr. Taylor testified consistently with his records at a deposition on February 29, 2024. (PX15) He said he found no evidence of symptom magnification in his examination of the Petitioner. (Id.) He explained that people with congenital stenosis are predisposed to be more susceptible to traumatic injury because they have a smaller space available for their nerves. (Id.) He said the accident aggravated the Petitioner's pre-existing baseline static congenital cervical and lumbar stenosis. (Id.) He said the Petitioner's complaints in his neck and left arm were caused by hypermobility that he said was caused by the work exposure. (Id.)

Dr. Taylor stated that because his interactions with the Petitioner made him feel there could be baseline psychological conditions that were affecting the way he presented himself and the way this condition might have been affecting him, he performed psychological testing that confirmed there were some psychological conditions that underlie the Petitioner's general behavior and mood for which the Petitioner was being treated. (Id.) He said these conditions did not affect his orthopedic causation opinions. (Id.) Dr. Taylor explained that patients who suffer from psychological disorders report higher rates of acute pain and are more likely to develop chronic pain than the general population. (Id.)

As to the recommended injections, Dr. Taylor stated that they were reasonable and necessary as a standard nonoperative treatment to exhaust before considering surgical intervention. (Id.)

Regarding the work restrictions he gave on January 10, 2024, Dr. Taylor explained that stenosis in the neck and low back makes it very difficult to function especially at a high physical level, and it is optimal if a patient is going to get satisfactory relief and resolution of their condition through nonoperative treatment that they be given an opportunity to recover and nonoperative treatment before trying to restress the system with heavy labor. (Id.)

On cross-examination, Dr. Taylor stated that his physical examinations of the Petitioner's cervical and lumbar spines were nonfocal – meaning normal – but that did not dispute or contradict his subjective report of pain. (Id.) He acknowledged that there was a discrepancy between the Petitioner's representation of pain on paper and his presentation physically, but he could not say this was due to the Petitioner's psychological baseline condition. (Id.)

Dr. Chabot testified consistently with his report at a deposition on April 5, 2024. (RX1) He differed with Dr. Taylor's diagnosis of cervicogenic neck pain, stating that the diagnosis suggests some kind of disc pathology, which he said was not indicated on the imaging studies. (Id.) As to Dr. Taylor's diagnosis of axial back pain, Dr. Chabot stated that the diagnosis means the pain is limited to just the midline of the spine, but when he saw the Petitioner, the symptoms into both legs were more diffuse than axial. (Id.) He said it appeared the Petitioner's complaints evolved over time – from being more focal initially to being more diffuse when he saw the Petitioner. (Id.)

As to his examination of the Petitioner, Dr. Chabot stated that it revealed that the Petitioner's motion was not profoundly restricted, it strongly suggested evidence of psychosocial

overlay, the Petitioner's sensory patterns in the left arm and left leg were not a physiologic pattern of neurologic or physiologic origin in light of the imaging studies. (Id.) He said he did not perform any psychological testing. (Id.)

Dr. Chabot said the Petitioner did not need work restrictions because he did not exhibit any significant functional deficits that would prohibit him from performing his prior work duties. (Id.)

Regarding the recommended RFAs, Dr. Chabot did not think the procedure would have any benefit because the Petitioner's complaints were too diffuse and his pain levels were too high to suggest that the procedure had a predictable, possible long-term benefit. (Id.)

On cross-examination, Dr. Chabot did not doubt there could have been some disc bulging in the Petitioners cervical spine. (Id.) He acknowledged that he did not mention in his report that the Petitioner reported an excellent response to the medial branch blocks and said this response could suggest that at least the facets were contributing to some of the Petitioner's pain. (Id.) He again pointed out that the Petitioner's complaints were broad and diffuse, leading to his opinion that RFAs are highly unlikely to offer any lasting improvements. (Id.) He acknowledged that reasonable physicians could disagree on determining whether the RFA recommended by Dr. Hurford was reasonable and necessary. (Id.) He admitted that he did not specifically address the recommended cervical injections in his report, adding that his finding that the Petitioner was at maximum medical improvement implied that they were not indicated. (Id.) Dr. Chabot said he did not perform epidural injections, facet injections or RFAs. (Id.)

The Petitioner testified that his neck, left arm and low back symptoms were still present at the time of arbitration, and he began developing radiating symptoms down the right upper and lower extremities in May or June 2023. (T. 21-22) He said he was experiencing more pins and needles in his feet and legs and less stabbing pain but more numbness and tingling in his arms and

hands. (T. 32) He said he wants to undergo the lumbar RFAs and cervical epidural steroid injections. (T. 21)

## 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?**

Dr. Chabot diagnosed cervical, thoracic and lumbar strain associated with the work injury. Dr. Taylor diagnosed cervicogenic neck pain, cervical hypermobility at C5-6, axial back pain, stenosis of the cervical and lumbar spine that he said were aggravated by the work accident.

The Arbitrator notes that Dr. Chabot apparently did not see the X-rays Dr. Taylor took on December 28, 2023, that showed hypermobility at C5-6. He did not testify about this finding. Dr. Chabot also appeared to rely greatly on his findings of symptom magnification, diffuse symptoms and possible underlying psychosocial issues. He did not specifically address the recommendations for cervical epidural steroid injections any more than saying that it was implied that they were not necessary.

Dr. Taylor had more information at his disposal in rendering his opinions, including the December 28, 2023, X-rays and psychological testing. He did not find symptom magnification, and the Petitioner's psychological issues did not affect his opinions.

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).

In this case, the circumstantial evidence supported Dr. Taylor's opinions. The Petitioner was asymptomatic and able to perform is job duties without restriction before the accident and pain and had decreased abilities afterwards. His pain complaints may have been diffuse, but the Arbitrator finds that the Petitioner was essentially credible in that he was having pain. Furthermore, the medial branch blocks did provide relief – an indicator that an injury was present.

Lastly, as the Petitioner's treating physicians, Dr. Taylor and Dr. Hurford had more opportunities to become familiar with the Petitioner and his conditions.

For all these reasons, the Arbitrator gives greater weight to Dr. Taylor's opinions and to Dr. Hurford's treatment recommendations.

The Arbitrator also notes that the Respondent stipulated that the Petitioner's conditions were causally connected to the work accident through Dr. Chabot's Section 12 examination. Neither Dr. Chabot nor the respondent objected to the medical treatment that was provided until that time. The Arbitrator notes that the Petitioner was still experiencing pain, and there were no intervening incidents to which his pain could be attributed.

Therefore, the Arbitrator finds that the Petitioner has met his burden of proof establishing causal connection between the accident and his cervical and lumbar spine conditions.

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

The Respondent stipulated that it has or will pay for all medical services through December 6, 2023. For the reasons stated above regarding causation, the Arbitrator finds that the evaluation

by Dr. Taylor on December 28, 2023, was reasonable and necessary to treat Petitioner's condition and to plan Petitioner's prospective treatment.

Therefore, the Arbitrator orders the Respondent to pay the expenses for the treatment provided by Dr. Taylor on December 28, 2023, pursuant to Sections 8(a) and 8.2 of the Act.

**Issue (K): Is Petitioner entitled to any prospective medical care?**

Upon establishing causal connection and the reasonableness and the necessity of recommended medical treatment, employers are responsible for necessary prospective medical care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d. 13 (1997). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 325 Ill. App. 3d 527, 758 N.E.2d 18 (2001).

The Petitioner underwent chiropractic therapy and injections, which failed to give sustained relief. At the time of arbitration, the Petitioner was still experiencing pain. Although Dr. Chabot did not find the recommended injections and RFA to be reasonable and necessary, he does not perform such procedures in his practice. He again relied upon his findings of diffuse symptoms in concluding that an RFA was unlikely to be beneficial. However, the Petitioner's favorable response to the medial branch blocks show otherwise and gave Dr. Hurford a reasonable basis to conclude that the RFA would be beneficial.

As to the cervical injections, Dr. Chabot did not address them in his report, stating later that the lack of necessity of such treatment should be implied because he found that the Petitioner had reached maximum medical improvement. However, Dr. Chabot did not address the findings on the December 28, 2023, X-rays showing hypermobility and stenosis.

For these reasons and those stated above regarding causation, the Arbitrator finds Dr. Taylor's opinions and Dr. Hurford's treatment recommendations deserve greater weight than the opinions of Dr. Chabot.

The Arbitrator finds that the medical treatment provided thus far has not returned him to his pre-accident condition, and further treatment is necessary to diagnose, relieve or cure the effects of his injury.

Therefore, the Arbitrator finds that the Petitioner is entitled to prospective medical care as recommended by Dr. Taylor and Dr. Hurford – specifically the lumbar RFA and cervical epidural steroid injections and follow-up visits to Dr. Hurford and Dr. Taylor to determine whether additional care is needed – 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 December 12, 2023, through April 26, 2024. 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.

Dr. Chabot found continued work restrictions unnecessary. For the reasons stated above, the Arbitrator gives Dr. Chabot's opinion less weight than those of his treating physicians – especially in light of the Petitioner's continued symptoms.

Therefore, the Petitioner is entitled to TTD benefits pursuant to Section 8(b) of the Act for 58 weeks, from March 18, 2023, through April 26, 2024. The Respondent shall receive credit for TTD paid in the amount of $12,829.35.

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 | 21WC026491 |
| Case Name | Davett Fisher v.<br>Sedona Staffing Service |
| Consolidated Cases | |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 24IWCC0615 |
| Number of Pages of Decision | 23 |
| Decision Issued By | Kathryn Doerries, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Matthew Compton |
| Respondent Attorney | Jessica Bell |

DATE FILED: 12/30/2024

/s/Kathryn Doerries,Commissioner

Signature

STATE OF ILLINOIS )
) SS.
COUNTY OF PEORIA )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DAVETT FISHER,

Petitioner,

vs. NO: 21 WC 026491

SEDONA STAFFING SERVICE,

Respondent.

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causation, notice, temporary total disability, medical expenses, and nature and extent of disability, and being advised of the facts and law, reverses the Decision of the Arbitrator, and denies Petitioner's claim for compensation, for the reasons stated below.

The Arbitrator found that Petitioner gave timely notice and proved a repetitive trauma injury to the left knee arising out of and in the course of his employment on May 11, 2021. The Arbitrator further found Petitioner's current condition of ill-being was causally related to the accident. The Arbitrator awarded medical and temporary total disability benefits and 10% loss of use of the left leg pursuant to Section 8(e) of the Act. The Commission views the evidence and the law differently and finds Petitioner failed to prove by the preponderance of the evidence that he sustained an accident that arose out of and in the course of his employment.

Factual Background

Petitioner was employed with Respondent, Sedona Staffing, and assigned to work at Tazewell Machine Works (hereinafter "Tazewell"), an aluminum casting manufacturer where he worked with molten aluminum poured into molds. Petitioner could not recall the exact date he started at Tazewell but testified his employment started sometime in April 2021. Tazwell initially assigned Petitioner to work on the "shaker machine." Petitioner testified he worked in that position

for "maybe a little over a week." (T. 10) Petitioner testified that metal parts would come out of molds and the machine would shake sand off the molds. (T. 10-11) Petitioner testified he used a crane to lift a bar and then break off the pieces at the ends with a hammer. (T. 11) The parts were then placed into carts, which Petitioner pushed to another area where additional cutting and grinding were performed. Depending on the size of the parts, between four and ten parts were typically placed into the carts. (T. 12) Co-workers helped push the heavier carts. (T. 12) Petitioner testified the carts weighed between 100 and 250 pounds and he pushed the carts a distance of "maybe 60 to 80 feet." (T. 13)

Petitioner testified he next worked in a different position he identified as "metal pour." (T. 13) Petitioner testified he dipped a ladle into a furnace and poured molten aluminum into "flasks that had molds in them." (T. 14) Petitioner testified the ladles weighed between 10 and 15 pounds when empty and around 35 to 40 pounds when filled. Petitioner estimated a ladle could hold maybe a gallon or two of the molten aluminum. (T. 14) Petitioner further testified he worked on different assembly lines involving molds of varying sizes. Some molds were small enough to fill with one scoop of aluminum and other molds required additional scoops. If multiple scoops were needed, then he and coworkers simultaneously poured the molten aluminum into the mold. (T. 16) The flasks were then moved down the assembly line towards the shaker area. Petitioner testified the smaller size flasks were pushed down the line by hand. The larger size flasks were pushed by two workers on tracks in the floor. (T. 17) Petitioner testified the larger size molds could weigh as much as 500 to 600 pounds. (T. 17) In between pours, Petitioner would lay the ladle down and clamp the flasks. Petitioner testified, "A lot of times, I would sit the ladle down. So, there was a lot of sitting the ladle down, because you would have to clamp those . . . So, you sit down, you clamp them, you push them towards the automatic assembly." (T. 18) Petitioner testified he poured approximately 40 smaller size molds per day and about 12 larger size molds per day. (T. 18) Petitioner testified he was also required to load and clean the furnace. (T. 19) Loading the furnace required taking scrap metal and metal ingots and throwing them into the furnace by hand. At the end of the workday, he used a scraper, described like a flat shovel, and scraped whatever was inside the furnace. (T. 20)

Petitioner testified he began noticing pain and swelling in his left knee in May 2021. (T. 20) Petitioner first sought treatment on May 11, 2021, at OSF Prompt Care. He denied injury and reported he developed knee pain "one week ago." (PX1 at 1) There was no mention of employment. There was no documented history suggesting Petitioner associated or correlated his knee pain with his work. A notation by nurse Nicolle Elwell indicated that Petitioner "*thinks he might have fluid to knee*." (Emphasis added.) (PX1 at 5) Petitioner testified he was advised surgery was needed and he received a referral to see Dr. Steven Below. (T. 21) Petitioner testified he notified Respondent about his visit to the clinic on or about May 11, 2021. (T. 21)

Petitioner presented to Dr. Below for initial evaluation on May 17, 2021. (PX2) At this visit, he complained of "*4-6 weeks of increasing* popping, clicking, catching, some occasional locking*."* (Emphasis added.) (PX2) Petitioner reported he "started a new job approximately 4 weeks ago." (PX2) Dr. Below noted, "It seems like it inflamed the area." Dr. Below further noted

that Petitioner "has pain bending, kneeling, squatting." (PX2) Petitioner testified that Dr. Below recommended an MRI, after which he underwent surgery. (T. 22) At his pre-op evaluation at St. Francis Medical Center on August 12, 2021, an advanced practice nurse documented the following: "He has had left knee pain for *the past 5 months*." (Emphasis added.) (RX2) This five-month timeline placed the onset of Petitioner's knee pain during the first week of March 2021; before he started the job with Respondent. Petitioner testified he attended post-operative therapy and he eventually recovered. (T. 22-23) Petitioner testified he was able to work when he completed therapy. (T. 23) Petitioner testified he did not have any issues with his knee prior to May 2021. (T. 24)

On cross-examination, Petitioner described the cart he used to move the parts as a metal cart larger than a grocery cart and equipped with a handle. (T. 25) Petitioner admitted his estimated weight of the cart when filled with parts was a guess. (T. 25) Petitioner agreed he only pushed carts while working with the shaker machine for one week in April 2021. (T. 25) Petitioner agreed his estimated weight of the ladle he used for metal pouring was also a guess. Petitioner also testified his estimated weight range for the larger size flasks, and his estimated distance that he pushed the flasks, were also guesses. (T. 26)

Michelle Marfell testified for Respondent. She was employed as an office manager and was familiar with Petitioner. Ms. Marfell was questioned regarding her communications with Petitioner relevant to the claimed injury. On May 11, 2021, Petitioner left a voice mail advising he had a "personal injury" involving his leg and was going to get it checked out. (T. 33) Ms. Marfell testified that Petitioner's voicemail message followed standard operating procedure for reporting an absence from work. (T. 34) Ms. Marfell testified she emailed the manager at Tazewell, and he replied that Petitioner had already contacted Tazewell to call off that day. (T. 34-35) The next day, Petitioner left a voicemail advising he was calling off for a second day. Petitioner stated he still needed to get his leg checked out and would bring in his paperwork. Ms. Marfell further testified that Petitioner later delivered paperwork indicating he was to be taking time off work. (T. 35-36) Ms. Marfell next heard from Petitioner on August 25, 2021. It was during this August call when Petitioner stated he wanted to talk with someone about workers' compensation and wanted to file a claim to support his family. (T. 36)

Ms. Marfell testified that Petitioner never reported a work injury to her during the month of May 2021. (T. 36) She further testified Petitioner's voicemails made no mention of a work injury. The phone call on August 25, 2021, was the first time Petitioner mentioned his injury was work-related. (T. 37) Ms. Marfell testified she informed Petitioner he needed to come in to fill out an injury report. Petitioner agreed and visited the office on September 7, 2021. (T. 37) Together they filled out an injury report. Ms. Marfell testified she verified Petitioner's name, address, social security number, and date of birth. Ms. Marfell testified she asked Petitioner about the claimed injury; however, Petitioner did not know how it happened. (T. 37-38) The information gathered during the meeting was entered into a form on the computer which was printed, signed by Petitioner, and forwarded to the risk department. The information was then used to create Respondent's First Report of Injury, which was dated September 7, 2021.

The First Report of Injury identified the accident date as 5/10/21**.** The "Date Employer Notified" was listed as 8/25/21. In the box labeled "Specific Activity the Employee was Engaged in when the Accident or Exposure Occurred," the box was filled in to say, "Not Provided." In the box asking, "How Injury or Illness/Abnormal Health Condition Occurred," the form stated:

> After 1 month at job sent to prompt care. They said cyst. Went back for follow-up MRI at Prompt Care. They scheduled for surgery. Dr. consulted with MRI tech. Did surgery and was told it was a torn meniscus.

Ms. Marfell testified the information in the report was "exactly what he said to me." (T. 40) Ms. Marfell further testified she had Petitioner read the report before he added his signature.

On cross-examination, Ms. Marfell confirmed Petitioner's employment with Respondent's staffing agency commenced in April 2021. (T. 41) Ms. Marfell testified that in the second voicemail Petitioner stated, he was "going to have to have surgery based on what they had said about his personal injury with his leg from the day before." (T. 43) Ms. Marfell further testified that Respondent does not possess an archive of voicemails; however, she prepared notes memorializing the voicemails which were "profiled" in Petitioner's file. (T. 42, 43-44) Ms. Marfell also testified that she reviewed the notes a "few days ago" in preparation for her appearance at the hearing. (T. 44)

Dr. Steven Below is a board-certified orthopedic surgeon. (PX #3 at 3) Dr. Below testified he specializes in sports medicine and primarily provides treatment for the knee and shoulder. Dr. Below testified he first saw Petitioner on May 17, 2021. (PX #3 at 4) Petitioner complained of knee pain which started about four to six weeks prior to his evaluation. Petitioner described some popping, clicking, catching, and occasional locking with swelling. (PX #3 at 5) Petitioner reported he had started a new job about four weeks ago. Dr. Below testified that Petitioner stated, "it seemed like it had inflamed the area and started to have pain in that area." (PX #3 at 5) Petitioner also complained of pain with bending, kneeling, and squatting. Dr. Below testified his findings on examination included some mechanical symptoms and swelling. "It appeared that he had some type of a small collection of fluid or a cyst over the anterolateral aspect of the knee." Dr. Below testified his initial diagnosis was left knee internal derangement with mechanical symptoms and small ganglion cyst. (PX #3 at 5) Dr. Below recommended an MRI.

Dr. Below testified he next saw Petitioner on June 14, 2021. (PX #3 at 6) He reviewed the MRI which demonstrated a ganglion cyst. Dr. Below described the finding as "[k]ind of a parameniscal cyst in that area of the knee." (PX #3 at 6) Dr. Below further testified he told Petitioner that he wanted to review the findings with the radiologist to better clarify the source of the cyst. Dr. Below testified he conferred with Dr. Cohen at St. Francis, during which they went over the MRI in detail and assessed the fluid was coming from a small tear in the lateral meniscus. (PX #3 at 6-7) Dr. Below then called Petitioner to discuss treatment options.

Dr. Below performed a left knee arthroscopy on August 24, 2021. Dr. Below indicated the surgery included a partial lateral meniscectomy and an open excision with debridement of a small parameniscal cyst. (PX #3 at 7) Dr. Below testified his post-operative diagnosis was left knee lateral meniscus tear with parameniscal cyst and inflamed plica. Dr. Below saw Petitioner two weeks later and ordered post-operative therapy. (PX #3 at 7-8) At that visit, Petitioner's pain was controlled, and he was doing well. (PX #3 at 8; T. 116) Dr. Below next saw Petitioner on October 7, 2021, when he was six weeks out from the surgery. (PX #3 at 8) Petitioner's knee had some swelling but Petitioner was otherwise progressing normally. Dr. Below released Petitioner for light duty work with a max 20-pound limit and no bending, kneeling, or squatting. Petitioner was directed to return for follow-up in six weeks; however, Petitioner did not return at that time. (PX2) Dr. Below testified he next saw Petitioner on February 10, 2022, when Petitioner was 24 weeks out from surgery. (PX #3 at 8-9) Petitioner reported he was having a little bit of trouble with the knee. (PX #3 at 8-9) Dr. Below testified that Petitioner was "getting ready to get into truck driving and was about ready to complete his driving class and reported he occasionally had trouble getting in and out of vehicles. (PX #3 at 9) Petitioner did not return after this visit.

On the issue of causation, Petitioner's attorney asked Dr. Below whether the meniscus tear was "something that can be caused or aggravated by repetitive or strenuous squatting or bending at work." Dr. Below testified, "that is a possibility." (PX #3 at 12) Petitioner then asked the doctor to answer the same question for the ganglion cyst. Dr. Below testified, "that is a possibility." (PX #3 at 12; T.120) Petitioner's attorney then asked about the inflamed plica**,** and Dr. Below testified, "that is a possibility." (PX #3 at 12-13) All three opinions were elicited in response to causal connection questions asking whether the three pathologies could have been caused or aggravated by "repetitive or strenuous squatting or bending at work." Bending and squatting were the only two physical activities presented to Dr. Below for causation purposes. Petitioner's attorney then presented a hypothetical question, assuming Petitioner had no prior knee pathology, asking whether Petitioner's employment caused or aggravated the knee conditions. Dr. Below testified, "That is a possibility." (PX #3 at 13)

On cross-examination, Dr. Below testified he did not know "all the details" of the alleged accident. (PX #3 at 14) Though Dr. Below had access to the records from other OSF facilities through the Epic records system, he did not review any chart notes from other treating providers. (PX #3 at 14-15) Dr. Below was not aware that Petitioner had received treatment at OSF Prompt Care on May 11, 2021. (PX3 at 15) Dr. Below agreed that Petitioner reported a history of 4 to 6 weeks of increasing pain. (PX #3 at 15) Asked whether "increasing" pain meant that the pain started earlier, Dr. Below testified he did not know when the pain started. (PX3 at 15) Dr. Below testified that Petitioner reported he started a new job about 4 weeks earlier. Dr. Below conceded that if we go by the documented 4–6-week history, then it was possible that the pain started before Petitioner started his new job. (PX #3 at 15-16) Dr. Below then stated, "I don't know if I have the exact days or times of his – when he started and when he started to have pain, that's all I can tell you." (PX #3 at 16) Dr. Below testified he does not know when Petitioner started working for Tazwell.

Questioned regarding his knowledge of Petitioner's job duties, Dr. Below testified, "I don't except for what counsel has described to me." (PX #3 at 16) Dr. Below further testified, "He said he did a lot of bending, kneeling, squatting in his job, I don't know anything further than that." (PX3 at 16) Dr. Below further testified he did not know how frequently Petitioner was bending at work. (PX #3 at 21) He also did not know how frequently Petitioner was squatting or kneeling at work. Dr. Below testified he had not reviewed anything pertaining to Petitioner's job duties. Dr. Below testified his causation opinion could possibly change if the hypothetical given by Petitioner's attorney was incomplete or inaccurate. (PX #3 at 23) Dr. Below further agreed that the Review of Systems documented during the initial evaluation noted that Petitioner played basketball. (PX #3 at 17) Dr. Below testified that Petitioner could have possibly injured his meniscus playing basketball. (PX #3 at 18)

On continued cross-examination, Dr. Below testified the MRI was completed on May 29, 2021, or about 11 days after his initial evaluation. (PX #3 at 17) The type of cyst Petitioner developed was secondary to the meniscus tear based on the doctor's clinical exam and MRI findings. Dr. Below agreed that Petitioner's cyst was large enough to feel with palpation. (PX #3 at 18-19) Dr. Below further testified that a meniscus tear can leak fluid and cause a cyst to develop either acutely or within days or weeks. (PX3 at 19) Dr. Below testified he did not know when the meniscus tear occurred. He also did not know when the cyst was formed. (PX #3 at 20) Dr. Below agreed that exercise as well as playing basketball can cause a cyst to increase in size or to become symptomatic. (PX #3 at 21)

Dr. Below agreed his operative report documented a "complex traumatic tear of the lateral meniscus." (PX #3 at 26-27) Dr. Below testified that even though the tear was traumatic, the tear was not necessarily acute. (PX #3 at 27-28) Asked if the tear was an acute event, Dr. Below testified, "I can't tell for sure." Dr. Below testified that this was not a normal degenerative tear and that he has no idea when the tear occurred as Petitioner did not provide a specific date. (PX #3 at 28) Dr. Below further testified that the size of the cyst could possibly indicate the tear had been leaking fluid for quite some time, but it could also be acute. (PX #3 at 29) Dr. Below also agreed that twisting is the most common mechanism for lateral meniscus tear. (PX #3 at 29)

Conclusions of Law

In repetitive trauma cases, the issues of accident and causation are intertwined with both issues resolved together. *Boettcher vs. Spectrum Property Group*, 99 IIC 0961; 1999 Ill. Wrk. Comp. LEXIS 409; *Simpson vs. State of Illinois Department of Human Services*, 18 IWCC 255; 2018 Ill. Wrk. Comp. LEXIS 108. In a claim alleging repetitive trauma, the overarching question presented is whether the employment activity was "repeated sufficiently to cause the injury." *Edward Hines Precision Components v. Industrial Comm'n*, 356 Ill. App. 3d 186, 194, 825 N.E.2d 773 (2005). A claimant seeking compensation under a repetitive trauma theory "must prove that his physical structure gave way under the repetitive stresses of his usual work tasks." *Darling vs. Industrial Comm'n,* 176 Ill. App. 3d 186, 192, 530 N.E.2d 1135 (1988). Claimants alleging injury based on repetitive trauma must still meet the same standard of proof as in claims involving a

single traumatic accident. *Peoria County Bellwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524, 530, 505 N.E.2d 1026 (1987); *Williams vs. Industrial Commission*, 244 Ill. App. 3d 204, 209, 614 N.E. 177 (1993). There must be a showing that the disabling injury or condition was related to the employment and not the result of a normal degenerative process. *Peoria County Bellwood Nursing Home vs. Industrial Commission*, 115 Ill. 2d at 530 (1987); *Williams vs. Industrial Commission*, 244 Ill. App. 3d 204, 209 (1993).

In assessing causality, the Commission may consider evidence, or the lack thereof, of the manner and method of a claimant's job to determine if the employment duties were sufficiently repetitive to establish a compensable injury. *Williams vs. Industrial Comm'n*, 244 Ill. App. 3d 204, 211, 614 N.E.2d 177 (1993). The Commission may also consider the degree to which the employment activity varied. *Id*. at 209. Evidence of variability of the employment activity does not necessarily negate causation if the employment activities taken as a whole are repetitive in nature. *City of Springfield vs. Ill. Workers' Comp. Comm'n*, 388 Ill. App. 3d 297, 901 N.E.2d 1066 (2009).

The nature of the evidentiary proof needed to establish a compensable repetitive trauma claim can differ depending on the employment and theory of causation put forth by the claimant. It is well settled that there is no minimum legal requirement that a certain percentage of the workday be spent on repetitive tasks in order to establish the repetitive nature of a claimant's job duties. *Edward Hines Precision Components v. Industrial Comm'n*, 356 Ill. App. 3d 186, 194, 825 N.E.2d 773 (2005). That said, while there is no such minimum requirement, evidence of the frequency, force, duration, and the percentage of the workday devoted to such tasks may be certainly relevant. In an unpublished Rule 23 decision issued many years after *Edward Hines Precision Components,* the Appellate Court reaffirmed that quantitative evidence remains relevant. See *Fisher vs. Ill. Workers' Comp. Comm'n*, 2017 IL App (4th) 160929WC-U. In *Fisher*, the Court indicated that while "[t]here is no requirement that a certain percentage of time be spent on a task in order for the duties to meet a legal definition of 'repetitive,' (*Edward Hines Precision Components v. Industrial Comm'n*, 356 Ill. App. 3d 186, 194 (2005)), to make out a repetitive trauma claim claimant needed to present some evidence he engaged [in] repetitive activities." *Fisher,* 2017 IL App (4th) 160929WC-U, P 20. Making the point clear, the Court also raised the rhetorical question – "*How many times per day did these activities occur?" Id.* In claims where the claimant alleges repetitive trauma resulting solely from repeated unusual or awkward motions without weight related factors, then quantitative evidence of weight, force, and degree of effort or exertion is not required. *Darling vs. Industrial Comm'n*, 176 Ill. App. 3d 186, 194-195, 530 N.E.2d 1135 (1988). Where a repetitive trauma claim is predicated on repeated performance of "common movement made by the general public," then quantitative proof may "carry great weight." *Id*. at 195. Even in repetitive trauma claims based on weight-related job tasks, knowing the amount of weight involved and the exact number of times the task was performed is not always necessary depending on the nature of the work, as in *Northern Illinois Gas Co. vs. Industrial Comm'n*, 148 Ill. App. 3d 48, 498 N.E.2d 327 (1986), where the employee suffered a fatal heart attack after repeatedly shoveling dirt for a full hour while digging to locate an underground pipe for natural gas service. See *Darling* (citing *Northern Illinois Gas Co.*), where the *Darling* Court noted that

the evidence of causation was sufficient in the *Northern Illinois Gas* case without requiring the weight of each shovelful of dirt and the exact number of times the decedent lifted the shovel. *Darling*, 176 Ill. App at 196. In other claims, where weight-related factors are involved, then evidence of weight, force, exertion, frequency, and duration of the activities at issue may be relevant. The question of whether a claimant's work activities are sufficiently repetitive in nature to establish a compensable accident under a repetitive trauma theory must be decided on a case-by-case basis given the particular facts in each case. *Williams*, 244 Ill. App. 3d at 210-11.

Claimants generally rely on expert medical testimony to establish a causal connection. See *Peoria County Bellwood Nursing Home*, 115 Ill. 2d at 530. Though medical testimony is not always required, it is firmly established that expert medical testimony is necessary where the questions involved are within the experts' knowledge only and outside the knowledge of laypersons. *Nunn v. Industrial Com.*, 157 Ill. App. 3d 470, 510 N.E.2d 502 (1987) The Commission has previously recognized that compression neuropathy via repetitive trauma falls under this category requiring such expert testimony. *Jones vs. State of Illinois, Menard Correctional Center*, 19 IWCC 0521; 2019 Ill. Wrk. Comp. LEXIS 898, citing *Johnson vs. Industrial Comm'n*, 89 Ill. 2d 438 (1982). Expert testimony must be weighed like other evidence with its weight determined by the character, capacity, skill, and opportunities for observation, as well as the state of mind of the expert and the nature of the case and its facts. *Madison Mining Company v. Industrial Comm'n*, 309 Ill. 91, 138 N.E. 211 (1923).

The proponent of expert testimony must lay a foundation sufficient to establish the reliability of the bases for the expert's opinion. *Gross v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100615WC. Physicians must have sufficient knowledge of the employment activities to form a credible opinion. "The Commission has determined that a claimant fails to prove causation from repetitive trauma when the treating physician testified repetitive motions caused the injuries but failed to detail what repetitive motions the petitioner engaged in and the frequency of the motions." See *Rutherford vs. State of Illinois, Pinckneyville Correctional Center*, 15 IWCC 119; 2015 Ill. Wrk. Comp. LEXIS 118, and *Jones vs. State of Illinois, Menard Correctional Center*, supra, both citing *Gambrel vs. Mulay Plastics*, 97 IIC 238.

Medical causation opinions may also be rejected where the physician provides a causation opinion based on facts that are not in the record or provided in response to hypothetical questions premised on a job description inconsistent with, or not supported by, the facts. *Session vs. Industrial Comm'n*, 124 Ill. App. 3d at 718 (1984), citing *Caterpillar Tractor Co. v. Industrial Comm'n*, 98 Ill. 2d 400, 405-06 (1983). See also *Tyson vs. State Journal Register*, 2010 Ill. Wrk Comp. LEXIS 65, where the Commission found that "the hypothetical provided Dr. Adair was wholly inconsistent with Petitioner's testimony." 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 (2003). Additionally, if the basis of an expert's opinion is grounded in guess or surmise, it is too speculative to be reliable. A finder of fact is not bound by an expert opinion on an ultimate issue and may look "behind" the opinion to examine the underlying facts. *In re Joseph S.*, 339 Ill. App. 3d 599, 607, 791 N.E.2d 80 (2003).

In the present matter, we find Petitioner failed to prove a compensable repetitive trauma injury. Initially, we note that Petitioner's Application for Adjustment of Claim alleged his knee injury was due to "pushing metal flasks across the factory floor." (AX1) This was not, however, the factual theory on which Dr. Below rendered his causation opinion. Dr. Below's causation opinion was predicated on repeated bending and squatting as the mechanism of injury. Dr. Below's opinion lacked a proper evidentiary foundation because he did not have sufficient knowledge of the employment activities and he based his opinion on alleged facts, bending and squatting, which were presented to the doctor in hypothetical opinion questions but not factually supported in the record.

Dr. Below's documented histories in his medical records were devoid of any specifics regarding Petitioner's job duties or the physical mechanics of his employment activities. Per the documented histories, Petitioner simply reported he developed knee pain after he started a new job. There was no discussion of Petitioner's occupation, job duties, or the physical demands of his job. Petitioner complained of pain associated with bending, kneeling, and squatting; however, we read the documented complaints as merely describing in general terms certain bodily motions that triggered Petitioner's symptoms; there was nothing documented to suggest Petitioner was describing physical demands at work.

Dr. Below identified three pathologies which he related to Petitioner's employment. Those three pathologies were: (1) lateral meniscus tear, (2) parameniscal cyst, and (3) inflamed plica. Dr. Below opined that causation for all three pathologies was a "possibility." Even though his causation opinions were phrased in terms of *possibility*, the Commission is permitted to accept a doctor's opinion even where the phraseology or words used to express the opinion are somewhat equivocal if the Commission finds the opinion to be credible based on the totality of the medical testimony. See *Homebrite Ace Hardware vs. Industrial Comm'n*, 351 Ill. App. 3d 333, 340, 814 N.E.2d 126 (2004) Here, however, based on our review of Dr. Below's testimony as a whole, we find his causation opinion was based on facts that were not supported by the record and speculative.

During Dr. Below's deposition, Petitioner's attorney posed three opinion questions asking whether the meniscus tear, cyst, and inflamed plica were each "something that can be caused or aggravated by *repetitive or strenuous squatting or bending at work*." (Emphasis added.) (PX #3 at 12-13) Squatting and bending were the only two physical activities presented to Dr. Below for causation purposes. Accordingly, since Dr. Below's causation opinions were predicated on the assumption that Petitioner's employment required repetitive squatting and bending, the doctor's opinions are only valid if the assumption is accurate and supported by the facts in evidence. On cross-examination, Dr. Below agreed his causation opinions could possibly change if the history was incomplete or inaccurate.

At trial, Petitioner described his job duties in particular detail; however, he never mentioned squatting or bending. Petitioner worked the "shaker" machine during the first week of employment, after which he worked as a metal pourer. Regarding the "shaker" machine, Petitioner testified he used a crane to lift a bar and then he used a hammer to break off pieces at the ends of

the metal parts. As parts were placed into carts, Petitioner pushed the carts to another area where additional cutting and grinding were performed. The testimony demonstrated pushing of carts involving the legs and arms was required; however, Dr. Below never addressed pushing carts as a mechanism of injury. Petitioner never described any defects or issues concerning the carts or their wheels. Petitioner never described any defects or issues concerning the surface of the factory floor and there was no evidence of any downward or upward sloping ramp or flooring involved. He never described any problems associated with tilting or any need to balance the carts while pushing them. The carts were equipped with a handlebar and there was no testimony describing any bending, squatting, or awkward positioning. Dr. Below never identified the activity of simply pushing carts as a plausible mechanism of injury. Dr. Below agreed that twisting was a cause for lateral meniscus tear; however, there was no evidence of any knee twisting at work. Regarding his work as a "metal pourer," Petitioner used a ladle to pour molten aluminum into flasks containing molds. The flasks were then moved down the assembly line towards the shaker area. Petitioner testified the smaller size flasks are pushed by hand down the line. The larger size flasks were pushed by two workers on tracks in the floor. There was no testimony describing any squatting or bending while working in the metal pour position. Petitioner also testified he was responsible for throwing scrap metal into the furnace and later scraping the furnace for cleaning. At no time did he mention bending, kneeling, or squatting in connection with these tasks. Based on the foregoing, Petitioner's testimony failed to support the factual assumptions underpinning Dr. Below's causation opinions.

Additionally, Dr. Below was also unable to accurately answer questions pertaining to other aspects of the case. Dr. Below testified he did not know "all the details" of the alleged accident. Dr. Below was also unable to say when Petitioner's pain started, and he did not know when Petitioner started working at Tazwell. Dr. Below was also unable to say when the meniscus tear occurred. He testified that while the tear was traumatic, that does not necessarily mean the tear was acute. Asked if the tear was an acute event, Dr. Below testified, "I can't tell for sure." Dr. Below testified he also does not know when the cyst was formed.

We also find it significant that Petitioner denied injury and made no mention of his employment when he first sought treatment at OSF Prompt Care on May 11, 2021. At that time, there was no documented history suggesting Petitioner associated or correlated his knee pain with his work. Additionally, the records for this initial treatment visit contained a notation by nurse Nicolle Elwell that Petitioner "*thinks he might have fluid to knee*." (T. 63) This notation suggests Petitioner knew enough about his condition to self-diagnose fluid in the knee and implies Petitioner had this problem before, thus calling into question his denial of any prior knee problems before May 2021. Petitioner also provided inconsistent timelines describing the onset of his knee pain. On May 11, 2021, when Petitioner presented to OSF Prompt Care, he reported his knee pain started one week earlier, on or about May 4, 2021. Then, when Petitioner presented to Dr. Below on May 17, 2021, he complained of left knee *increasing* symptoms of 4-6 weeks' duration, placing the onset of Petitioner's knee problem sometime between April 5 and April 19, 2021. Petitioner later provided a third timeline when he presented for his pre-op evaluation at St. Francis Medical Center on August 12, 2021. This pre-op evaluation was offered into evidence by Respondent. (RX2) As

documented by the advanced practice nurse, Petitioner "had left knee pain for the past 5 months." This five-month timeline placed the onset of Petitioner's knee problem in the first week of March 2021; before he started the job with Respondent.

Finally, Dr. Below agreed his medical records noted that Petitioner played basketball. Dr. Below then testified "that's a possibility" when asked if Petitioner could have injured his meniscus playing basketball. Dr. Below further testified that exercise as well as playing basketball can cause a cyst to increase in size or to become symptomatic. At trial, however, Petitioner never denied playing basketball, never testified for how long or how often he played basketball, and he never denied any basketball related knee traumas or injury. Petitioner did not testify regarding the last time he played the sport. Given Dr. Below's admission that Petitioner could have torn his meniscus playing basketball, Petitioner's failure to address his basketball history is notable.

Petitioner argues that Respondent's failure to offer contrary medical opinion evidence supports Petitioner's claim. While the Commission may certainly consider the absence of contrary medical opinion evidence in deciding causation, we observe that the Commission is under no obligation to accept medical opinion testimony merely because its unrebutted. See *Sorenson vs. Industrial Comm'n*, 281 Ill. App. 3d 373, 382-382, 666 N.E.2d 713 (1996); *Fickas vs. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041-1042, 721 N.E.2d 1165 (1999). The Commission is free to disbelieve any witness including medical experts. The Commission is also free to reject a medical opinion even in the absence of contrary opinion evidence if it finds the unrebutted testimony not credible. If a treating doctor's causation opinion is suspect or speculative, the absence of contrary or rebuttal expert opinion does not convert a treating doctor's flawed opinion into a credible opinion.

Petitioner further argues that causation is supported by the "chain of events." 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 in certain circumstances. *International Harvester v. The Industrial Commission,* 93 Ill. 2d 59, 442 N.E.2d 908 (1982). The Commission finds those circumstances are not present in this case as claims alleging a repetitive trauma injury concern primarily medical questions and Petitioner provided inconsistent timelines for the onset of his knee symptoms.

Therefore, the Commission finds that Petitioner failed to prove by a preponderance of the evidence that he sustained an accidental injury arising out of and in the course of his employment on May 11, 2021. All other issues are rendered moot. Accordingly, the Arbitrator's decision is hereby reversed and Petitioner's claim for compensation is denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's award dated July 5, 2023, is vacated and Petitioner's claim for compensation is hereby denied.

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

The bond requirement in Section 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) (West 2013)*. Based upon the denial of compensation herein, no bond is set by the Commission. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

**December 30, 2024**

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KAD/swj
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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 | 21WC026491 |
| Case Name | Davett Fisher v.<br>Sedona Staffing Service |
| Consolidated Cases | |
| Proceeding Type | |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 10 |
| Decision Issued By | Adam Hinrichs, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Matthew Compton |
| Respondent Attorney | Jessica Bell |

DATE FILED: 7/5/2023

/s/Adam Hinrichs, Arbitrator

Signature

**THE INTEREST RATE FOR THE WEEK OF JULY 5, 2023 5.26%**

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**

**DAVETT FISHER** Case # **21** WC **026491**
Employee/Petitioner
v.
**SEDONA STAFFING SERVICES**
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **ADAM HINRICHS**, Arbitrator of the Commission, in the city of **PEORIA**, on **05/17/2023**. 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 **MAY 11, 2021**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**21,892.00**; the average weekly wage was $**421.00**.

On the date of accident, Petitioner was **36** years of age, ***single*** with **2** dependent children.

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

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

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

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

**ORDER**

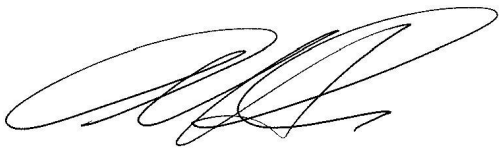
Respondent shall pay Petitioner TTD benefits of $381.33 per week for 6 2/7 weeks, from August 24, 2021 through October 7, 2021, as provided in Section 8(b) of the Act.

Respondent shall pay the outstanding medical bills for Petitioner's reasonable and necessary medical care, totaling $7,117.89, pursuant to Sections 8(a) and 8.2 of the Act. Respondent shall make this payment directly to Petitioner's attorney in accordance with Section 9080.20 of the Rules Governing Practice before the IWCC.

The Respondent shall pay the Petitioner permanent partial disability benefits of **$381.33/week** for **21.5** weeks because the injury Petitioner sustained caused a **10%** loss of use to his left leg pursuant to Section 8(e) of the Act.

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

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



Signature of Arbitrator

July 5, 2023

## FINDINGS OF FACT

Petitioner filed an Application for Adjustment of Claim alleging an injury to his left leg as a result of a work accident on May 11, 2021. (AX 1). The Request for Hearing form admitted at hearing listed the issues in dispute as follows: accident, notice, causal connection, medical bills, temporary total disability benefits, and the nature and extent of the injury. (JX 1).

Davett Fisher ("Petitioner") testified he was employed by Sedona Staffing Services ("Respondent") on the date of his alleged accident, May 11, 2021. Respondent is a staffing agency supplying temporary employees on various work assignments with other employers. Petitioner was assigned to work at Tazewell Machine Works by Respondent, and that he started working there in April 2021. (TX p. 10).

Petitioner testified he initially worked as a "shaker" for Respondent. Petitioner worked as a shaker for approximately one week. Petitioner testified regarding the job duties of a shaker, noting he would use a crane to lift "bars" out of molds and use a hammer to break off end pieces from the molds. Petitioner occasionally lifted a bar himself, but most of the time there was a crane for lifting the bars. After the molds/bars were shaken/cleaned, they were placed on a metal cart. Petitioner testified that the number of molds per cart varied, based on the various size of the molds in the facility. Once the molds were on the cart, the cart was pushed to another area in the factory. Petitioner estimated the loaded carts weighed between 100 and 250 pounds. (TX pp. 10-13). Petitioner testified sometimes he pushed the cart by himself, but sometimes he pushed it with a co-worker. The weight of the carts varied, depending on the molds in it at the time. Petitioner testified the distance the cart was pushed varied as well, depending on where it was located within the factory. (TX pp. 10-13).

Petitioner testified that after he worked as a shaker, he then began working as a "metal pourer" for Respondent. Petitioner testified this job involved using a ladle to scoop liquid aluminum from the furnace to pour into flasks. The ladle was approximately 4 feet long, and after the aluminum was poured into the flask, the ladle was set down so the flasks could be clamped. Petitioner estimated the ladle he used weighed between 10 to 15 pounds when empty, and 35 to 40 pounds when full. The ladle would hold approximately a gallon of liquid. Petitioner testified he would pour roughly 40 small molds per day and roughly 12 larger molds per day. After the molds were poured, they would be moved to the shaking area. The small molds were pushed by hand on an assembly line. The large molds were pushed along the floor by 2 individuals. Petitioner estimated the large molds weighed between 500 and 600 pounds, and had to be pushed up to 60 feet to the next area. Petitioner testified after the flasks were filled, they were pushed down the line to the next section. Petitioner testified sometimes he pushed the flasks himself, and sometimes two employees would push the flask together. Petitioner testified the flasks were on a track on the ground. In between each pour, the ladle would be placed on the ground, then retrieved from the floor for the next pour. (TX pp. 13-19).

Petitioner testified that his job as a metal pourer also included loading and cleaning the furnace. This involved putting scrap metal into the furnace and using a flat shovel to scrape out the inside of the furnace, respectively. (TX pp. 19-20).

Petitioner testified that he began noticing pain and swelling in his left knee while working at Tazewell Machine Works the month following his start date, in May 2021. Petitioner testified he initially sought treatment at OSF Prompt Care. On May 11, 2021, Petitioner presented at OSF with complaints that "started 1 week ago. Patient reports he developed pain to the left knee about 1 week ago. Pain with flexion only. No injury. Reports he feels a lump to his knee cap. No drainage, no erythema. No calf pain or pain behind knee. Takes Tylenol daily for pain."

Petitioner denied any incident to his knee and thought it may be fluid. An x-ray was ordered, which was negative. Petitioner was diagnosed with acute pain of left knee and cyst of left knee joint. Petitioner was referred to surgery. (PX 1 p. 1-7).

Petitioner testified he notified a supervisor of his injury on May 11, 2021. (TX pp. 20-22).

On May 17, 2021, Petitioner presented to Dr. Steven Below for a surgical consult. Dr. Below's note indicates Petitioner presented with a complaint of "4-6 weeks of increasing popping, clicking, catching, some occasionally locking in the left knee." The note indicates Petitioner started a new job "approximately 4 weeks ago," and "it seems like it has inflamed the area." Dr. Below suspected either a ganglion cyst or bursitis. He ordered an MRI. (PX 2, pp. 1-2). At this initial surgical consult, Petitioner noted "none" in response to the following inquiries: "date of injury or onset of symptoms," "if injury, how injury occurred," and "past surgery." Petitioner reported that he had increased pain with "flexing" and "squatting." The note also references Petitioner's job at Tazewell Machine Works alongside a reference that he plays basketball. (PX 2, pg. 4). Petitioner testified he had no knee problems prior to this alleged work injury. (TX 24).

Petitioner followed up with Dr. Below on June 14, 2021, at which time Dr. Below noted he wanted to review the MRI with the radiologist. The note references mechanical symptoms laterally and an anterior lateral ganglion cyst. Further, the note indicates Petitioner reported his problems had been going on for "the last 6-8 weeks since he started that job," and that he denied any "definite injuries." Surgery was recommended. (PX 2, pg. 8).

On August 24, 2021, Petitioner underwent a left knee arthroscopy, partial meniscectomy, arthroscopic extensive debridement of parameniscal lateral meniscus cyst, with excision of medial suprapatellar inflamed plica, left knee open anterior ganglion cyst excision. (PX 2, pp. 1 to 3 of 3). Petitioner was referred for and completed a course of physical therapy post-operatively, which Petitioner testified was helpful. (PX 3 & 4)

Petitioner followed up with Dr. Below on September 9, 2021, and reported doing well with therapy, but had soreness in the left knee. He followed up again October 7, 2021, at which time Dr. Below noted Petitioner was doing well, with some normal residual swelling in the left knee, and he was released to return to work with restrictions and instructions to return in 6 weeks. (PX 2, pp. 17-19).

Petitioner next followed-up with Dr. Below on February 10, 2022, with some left knee complaints that he reported experiencing getting in and out of his new job truck driving. He was instructed to return in 6 weeks and provided some restrictions to return to work. Petitioner did not return to Dr. Below. (PX 2, pp. 22-23).

Petitioner testified he had some discomfort initially after surgery, with some pain, but that it healed. At the time of trial, Petitioner testified the only thing he notices about his left knee is the scar from the surgery; he denied any lingering issues with respect to function or pain in his left knee. (TX pp. 23-24).

**Testimony of Michelle Marfell**

Michelle Marfell testified at Respondent's request. Ms. Marfell testified she currently works at Sedona Staffing as the Office Manager. Ms. Marfell confirmed Petitioner's testimony regarding Sedona's business of staffing

employees to client locations, and further confirmed one such client was Tazewell Machine Works, where Petitioner was assigned. (TX pg. 30).

Ms. Marfell testified she heard from Petitioner on May 11, 2021, confirming that he called in to the Sedona office and left a voicemail regarding his inability to report to work that day. Ms. Marfell testified Respondent's employees are required to call prior to starting work if they are going to be absent or late. Ms. Marfell testified Respondent's office does not open until 7:00, and as Petitioner's job started at 6:30, it was "standard procedure" to leave a voicemail. (TX pp. 32-33).

Ms. Marfell testified she contacted the manager of Tazewell Machine Works to advise of Petitioner's absence, and was advised that Petitioner had already contacted Tazewell Machine Works and reported his injury. (TX pp. 34-35).

Ms. Marfell testified she next heard from Petitioner the following day on May 12, 2021, at which time he left a voicemail again before the office opened for the day. Ms. Marfell testified Petitioner reported he still needed to get his leg checked out and that he would bring in paperwork. Ms. Marfell testified that Petitioner brought in the paperwork he promised, and that she next heard from Petitioner on August 25, 2021. (TX pp. 35-36).

Ms. Marfell testified that she spoke to Petitioner on August 25, 2021, and he wanted to speak to someone about filing a workers' compensation claim. Ms. Marfell testified that she explained the process to Petitioner, noting he needed to report to the office to complete an injury report in person so they could go over the details together. Ms. Marfell testified Petitioner presented in her office on September 7, 2021, at which time she completed an injury report. Petitioner did not sign the injury report, but "Michelle (Illegible)" was noted as the preparer of the report. (TX pp. 36-37, RX 1).

Ms. Marfell testified further in regard to the injury report. Under the section "How injury or illness/abnormal health condition occurred. Describe the sequence of events and include any objects or substances that directly injured the employee or made the employee ill," Ms. Marfell confirmed the information provided in response to this question is what Petitioner reported to her, and that she had Petitioner review and confirm the details. The injury report indicates the response to the above titled section was: "After 1 month at job went to Prompt Care, they said cyst, went back for follow up MRI at Prompt Care. They schedule for surgery. Dr. Consulted with MRI Tech. Did Surgery and was told it was torn meniscus." (RX 1).

Ms. Marfell testified that she could not produce a copy of any voicemails Petitioner left her. However, she did review her "word for word" notes/reports from Petitioner's voicemails prior to hearing. Respondent did not produce the notes/reports from those voicemails which Ms. Marfell testified were in Petitioner's file, which was at Respondent's office. (TX pp. 42-49). Respondent entered no job description into the record.

**Testimony of Dr. Steven Below**

Petitioner's treating surgeon, Dr. Steven Below, was deposed by the parties on November 3, 2022. (PX 3). Dr. Below testified consistently with his medical records, noting that Petitioner initially reported to him that his knee complaints began when he started a new job about four weeks prior to his first visit. (PX 3 p. 5). Regarding causation, Dr. Below testified as follows:

Q: Let's go through the postoperative diagnosis, Doctor. The left knee meniscus tear, is that something that can be caused or aggravating by repetitive or strenuous squatting or bending at work?

A: That is a possibility.

Q: Same question, Doctor, but with regards to the ganglion cyst.

A: That is a possibility.

Q: And lastly, same question but with regards to the inflamed plica.

A: That is a possibility."

Q: And for my next question, Doctor, I want you to assume hypothetically that Mr. Fisher will testify that he had no prior knee pathology before his work at Tazewell Machine Works, based upon that, Doctor, do you have an opinion, based upon a reasonable degree of medical certainty, as to whether Mr. Fisher's work caused or aggravated the conditions that you diagnosed and treated.

A: That is a possibility. I'm just going off of my – the patient's history and my clinical exam and radiographic findings.

- (PX 3, pp. 12-13).

When asked to clarify that his knowledge of Petitioner's job duties came from, Dr. Below testified: "He said that he did a lot of bending, kneeling, squatting in his job. I don't know anything further than that." Dr. Below testified that Petitioner did not provide a history of a single, traumatic incident at work, but that the tear to Petitioner's meniscus was not a normal degenerative tear, and that the tears were more straightforward horizontal and vertical tears. (PX 3, pp. 14-16, 27-28).

Dr. Below testified that a usual course of recovery for the surgery he provided to Petitioner would allow Petitioner to return to work full duty within 6 to 8 weeks. (PX 3 p. 11).

## CONCLUSIONS OF LAW:

**Issue (C): Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent? & Issue (F): Is Petitioner's current condition of ill-being causally related to the injury? The Arbitrator finds as follows:**

To obtain compensation under the Act, a claimant must prove that some act or phase of their employment was a causative factor in their 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. Thus, a claimant may establish a causal connection in such cases if he can show that a work-related injury played a role in aggravating his preexisting condition. *Sisbro, Inc. v. Industrial Comm'n,* 207 Ill. 2d 193, 205 (2003). "A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." *International Harvester v. Industrial Com.,* 93 Ill. 2d 59 (1982).

Although medical testimony as to causation is not necessarily required, in cases "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." *Nunn v. Industrial Comm'n*, 157 Ill.App.3d at 477-478. Cases involving aggravation of a pre-existing condition primarily concern medical questions and not legal questions. *Berry v. Industrial Commission*, 99 Ill.2d 401 (1979). Where there is evidence of a pre-existing degenerative condition, medical opinion evidence is necessary to establish a causal link between the repetitive trauma incident and the Petitioner's work activities. *Johnson v. Industrial Commission*, 89 Ill.2d 438 (1982).

In the present case, there is no evidence that Petitioner suffered from a pre-existing condition in his left knee. There is no evidence that Petitioner had any prior injuries or accidents involving his left knee. There is no evidence that Petitioner had any prior medical treatment involving his left knee. Further, Petitioner credibly testified that he had no prior issues with his left knee prior to beginning work for Respondent.

Petitioner testified that he worked in heavy industrial setting. In order to perform his job duties in this heavy and physically demanding workplace, it is clear from his described job duties that he was required to perform many functional movements, all while working with heavy items.

Petitioner credibly testified that his left knee began to bother him shortly after beginning working for Respondent in the course of their heavy industrial operations. Petitioner's initial medical records are consistent in his reports of noticing knee pain with the performance of his job duties, over the course of approximately four weeks, while working for the Respondent. Dr. Below in reaching his conclusions found that Petitioner's job duties, which included such functional movements of bending, squatting, and kneeling, could have contributed to his diagnoses, and the need for the surgical intervention that he performed.

Respondent claims they had voicemails from Petitioner, and "word for word" notes/reports from those voicemails indicating that Petitioner sustained a "personal injury." However, Respondent failed to produce those voicemails and notes at hearing. Respondent also argues that Petitioner's job description to Dr. Below is incomplete. However, Respondent failed to produce a job description to Petitioner, to Dr. Below, or at hearing. The law does not allow Respondent to use documentation within their control, which is not produced, as both a sword and a shield. Respondent's failure to produce documentation at hearing which is solely within their control and not available to the Petitioner allows for an adverse inference to be imputed to the Respondent in regard to said evidence. See *Reo Movers, Inc. v. Industrial Commission*, 226 Ill. App. 3d 216, 224.

Respondent did not provide any documentation from Petitioner's employment file other than an injury report, a report which is consistent with Petitioner's testimony and the medical records. (RX 1). Moreover, Respondent provided no expert medical opinion from a Section 12 examiner.

The Arbitrator, as the trier of fact in this case, has the responsibility to observe the witnesses testify, judge their credibility, and determine how much weight to afford their testimony and the other evidence presented. The Arbitrator observed the Petitioner and found him to be thoughtful, sincere, consistent and credible. Petitioner's testimony regarding his job duties and his associated complaints is supported by the record. Further, the Arbitrator does not find the testimony of Respondent's witness, Ms. Marfell, to be credible in regard to her recollections from voice and paper documentation in Respondent's possession that Respondent failed to produce.

It is clear from the records and testimony that Petitioner performed very heavy job duties in his employment with Respondent, and those job duties caused pain and swelling in his left knee. Petitioner reported his injury to the Respondent immediately. Dr. Below confirmed that Petitioner's work activities could cause an injury of the nature he sustained. The Arbitrator finds the unrebutted medical opinion of Dr. Below persuasive.

Given that Petitioner had no pre-existing issues in his left knee, a chain of events analysis is sufficient here for Petitioner to prove his injury is work-related. The Arbitrator finds that the Petitioner has met his burden under a chain of events analysis. Further buttressing his claim, the Petitioner offered the unrebutted and credible opinion of his treating surgeon, Dr. Below, that his injury was related to the performance of his job duties.

The Petitioner has proven by the preponderance of the evidence that he sustained an accident to his left knee arising out of and in the course of his employment for the Respondent. The Arbitrator finds that Petitioner sustained a cumulative trauma injury to his left knee that arose out of and in the course of his employment with Respondent manifesting on or about May 11, 2021.

Moreover, given the totality of the evidence, the credible testimony of the Petitioner, the medical evidence in the record, the chain of events, and the unrebutted credible opinion of Dr. Below, the Arbitrator finds that Petitioner's current condition of ill-being in his left knee is causally related to his cumulative trauma work injury manifesting on or about May 11, 2021.

**Issue (E) Was timely notice of the accident given to Respondent?**

Incorporating the above, Ms. Marfell testified she heard from Petitioner on May 11, 2021, confirming that he called in to the Respondent's office and left a voicemail regarding his inability to report to work that day due to an injury. Ms. Marfell testified Respondent's employees are required to call prior to starting work if they are going to be absent or late. She indicated Respondent's office does not open until 7:00, and as Petitioner's job started at 6:30, he followed proper protocol by leaving a voicemail. (TX pp. 32-33).

Additionally, Ms. Marfell testified that when she contacted the manager of Tazewell Machine Works to advise of Petitioner's absence, she was advised that Petitioner had already contacted Tazewell Machine Works and reported an injury. (TX pp. 34-35).

Given that Respondent's witness confirmed that Petitioner properly reported an injury to both Respondent and Tazewell Machine Works, the Arbitrator finds that timely notice of the accident was given to Respondent.

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

Incorporating the above, the Arbitrator finds that the medical services provided to Petitioner for his left knee were reasonable and necessary to cure and relieve the effects of his work injury. Respondent has not paid all appropriate charges for these reasonable and necessary medical services. Petitioner's Exhibit 4 provides the reasonable and necessary outstanding medical bills outlined in a medical lien totaling $7,117.89.

The Respondent shall pay this outstanding medical lien for Petitioner's reasonable and necessary medical care for his left knee, pursuant to Sections 8(a) and 8.2 of the Act. Respondent shall make this payment directly to Petitioner's attorney in accordance with Section 9080.20 of the Rules Governing Practice before the IWCC.

**Issue (K): What temporary benefits are in dispute? The Arbitrator finds as follows:**

Incorporating the above, Dr. Below opined that a typical return to work, full duty, after the surgery he performed on Petitioner is six to eight weeks. Petitioner was off work from August 24, 2021, the date of surgery, until October 7, 2021, a period of 6 2/7 weeks. TTD benefits are awarded for Petitioner's off-work period.

**Issue (L): What is the nature and extent of the injury? The Arbitrator finds as follows:**

Pursuant to Section 8.1(b) of the Act, in assessing the nature and extent of Petitioner's injury, the Arbitrator considers the following five factors:

Considering the five factors listed in Section 8.1(b), the Arbitrator finds as follows:

1. An impairment report prepared by a physician using the most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment.": No AMA impairment report was entered into evidence. The Arbitrator has considered this factor and lends it no weight.

2. The occupation of the injured employee: The Petitioner's job was that of shaker/metal pourer, a heavy and physically demanding job. The Arbitrator has considered this factor and lends it some weight.

3. The age of the employee at the time of the injury: Petitioner was 36 years old at the time of injury. The Arbitrator has considered this factor and lends it some weight.

4. The employee's future earning capacity: There was no evidence of wage diminution in the record. The Arbitrator has considered this factor and lends it some weight.

5. Evidence of disability corroborated by the treating medical records: Petitioner underwent a left knee arthroscopy, comprised of a partial lateral meniscectomy and an open debridement of a small parameniscal cyst. Petitioner testified that his left knee has been good post-operatively. Dr. Below testified that Petitioner had a good surgical result. The Arbitrator has considered this factor and lends it more weight.

After considering the evidence in the record, and the factors enumerated in Section 8.1(b) of the Act, the Arbitrator finds that Petitioner is entitled to an award of 10% loss of use of the left leg pursuant to Section 8(e) of the Act.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 17WC018922 |
| Case Name | Gregory Meracle v.<br>The American Coal Company, |
| Consolidated Cases | |
| Proceeding Type | Petition for Review under 19(b) |
| Decision Type | Commission Decision |
| Commission Decision Number | 24IWCC0616 |
| Number of Pages of Decision | 21 |
| Decision Issued By | Amylee Simonovich, Commissioner |

| | |
|---|---|
| Petitioner Attorney | Roman Kuppart |
| Respondent Attorney | Julie Webb,<br>Kenneth Werts |

DATE FILED: 12/30/2024

/s/Amylee Simonovich,Commissioner
Signature

DISSENT: /s/Amylee Simonovich,Commissioner
Signature

24IWCC0616

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

Gregory Meracle,

Petitioner,

vs. NO: 17 WC 018922

The American Coal Company,

Respondent.

DECISION AND OPINION ON REVIEW

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

*Petitioner's Testimony*

Petitioner testified he was 69 years old at the time of hearing. T.7. He had been working in the coal mines for 23 years. T.8. His employment was underground and while working in the mines he was regularly exposed to coal and rock dust. *Id*. He testified his last shift working in a coal mine was on November 10, 2015. T.23. He was working for American Coal as a master mechanic at their Galatia mine at the time. T.8. Petitioner testified that on that day he was exposed to and breathed coal dust. *Id*. His employment with Respondent ended as a result of being laid off due to the coal mine shutting down. *Id*. Petitioner testified that but for being told to go home on his last day of employment with Respondent, he would have reported for his next shift and continued to work for them. T.27.

Since leaving the mines, Petitioner opened his own auto repair garage, Hitek Auto in 2017. T.9-10. Petitioner testified he was both the owner and technician. *Id*. He performed tune-ups, brake jobs, diagnostics, and air conditioning type work. *Id*.

Petitioner's work history included working as a maintenance worker, carpenter, and auto mechanic. T.11. He had also previously worked in a coal mine at Old Ben Number 21 for approximately 16 years. *Id*. In January 1992, he opened Hitek for the first time, working there until 1997. T.12. After his employment with American Coal ended, he reopened Hitek garage in

July 2017. *Id*.

While working at American Coal, starting in May 2010, Petitioner was a master mechanic. *Id*. That was his classification throughout his employment. *Id*. His work was underground, and he estimated the exertional requirements would be classified as heavy labor. T.13-14. He worked on the diesel equipment in the mine underground and had to change tires that were very heavy because they were solid rubber. T.14. He explained that a lot of the smaller heavy work was done in the mine. *Id*. Petitioner testified that caused problems with his breathing. *Id*.

Petitioner testified that as of the date of the hearing, he felt he had breathing problems. T.15. He first noticed the breathing problems around the time Old Ben shut down. *Id*. He could tell a difference in what work he was able to accomplish and what he wasn't able to accomplish. *Id*. He would have to take breaks. *Id*. He testified that he was having to do that "now more than ever". *Id*. He testified it was "too hard on my heart and everything else" to keep going. *Id*.

Petitioner testified he performed yard work, but noted he had to take breaks when doing it. T.16-17. He testified he could probably walk a quarter to a half mile on regular level ground at a regular pace before noticing a change in his breathing. T.17. At a faster pace, he would have more of a problem. *Id*. Petitioner testified that he could go a couple of flights of stairs without getting winded, but he would have to take breaks between floors. T.17-18.

Petitioner testified that from the onset of his breathing issues after leaving Old Ben until the time of hearing, his breathing had gotten worse. T.18. He had been on breathing medication. *Id*. Petitioner testified that he had scar tissue on his lungs due to having bronchitis as a child and "all this just compounded everything". *Id*. When he has had a cold or a bad flu, he needed either a breathing treatment or an inhaler. *Id*.

Petitioner testified that before the mine shut down, he had to stop and take breaks due to his breathing while he was working in the mines. T.20-21. He testified that he needed the help of a coworker to finish his job. T.21. He had never had a desk job or anything other than manual labor. *Id*. He denied ever smoking. *Id*. He admitted to having diabetes, high blood pressure and anxiety. *Id*. He denied any other known health problems. T.22.

When asked how his breathing affected his activities of daily life at the time of hearing, he indicated that it didn't allow him to do what he wanted to do. T.18. He testified he had to sit down and rest more to accomplish a task. *Id*.

Petitioner testified he had a target retirement age of 65 and by being laid off at 62 instead of 65, it cost him benefits on his Social Security. T.33. He testified that he and his wife had returned to work because their 401(k)s took a hit with the economy. *Id*.

*B Readings of Petitioner's May 25, 2017 Chest X-ray*

On June 5, 2017, Dr. Smith provided his report detailing his B-reading of the Petitioner's chest x-ray from May 25, 2017. PX2, p. 92. He found the study to be a quality 1. *Id*. He found interstitial fibrosis of classification p/s, bilateral mid to lower zones of the lungs were involved

bilaterally of a profusion of 1/0. *Id*. He found evidence of simple coal worker's pneumoconiosis with small opacities in mid to lower zones bilaterally. *Id*.

On January 18, 2020, Dr. Meyer issued a report following his B-reading of the same x-ray. He found the study to be a quality 1. RX1, p.89. He disagreed with Dr. Smith's reading of the x-ray, noting the reading showed Petitioner's lungs were clear and there were no radiographic findings of CWP. *Id*.

As part of his records review for Respondent, Dr. Rosenberg also reviewed the x-ray from May 25, 2017. RX2, p.18. He opined the study was a quality 2 with decreased expansion. *Id*. He did not see any parenchymal changes of pneumoconiosis. RX2, p.22. He rated the study as 0/0 with elevation of the right hemidiaphragm. RX2, p. 18.

*Dr. Istanbouly Testimony*

Dr. Istanbouly provided his deposition testimony on December 14, 2021. PX1. Dr. Istanbouly was a pulmonologist who both practiced in southern Illinois and provided Section 12 examinations. PX1, p.5-8. He obtained an occupational and medical history from Petitioner, reviewed a pulmonary function test and chest x-ray and performed a physical examination. PX1, p. 8.

At the time of the evaluation with Dr. Istanbouly, Petitioner provided a consistent history of his work in the coal mines. PX1, p. 9.

Petitioner had no previous history of pulmonary disease and was a non-smoker. He complained of occasional spells of coughing for the prior few months, which was triggered by talking loud, brisk walking, and irritating smells. The cough was occasionally productive of slight yellowish sputum. He mentioned mild exertional dyspnea. Petitioner had advised him he was able to walk for 1/2 mile to one mile without a breathing problem. He was not taking any type of breathing medication at the time of Dr. Istanbouly's examination.

Dr. Istanbouly testified that the presentation of CWP would vary depending on the intensity of the patient's lung disease. PX1, p. 10. They could be asymptomatic or having mild to significant respiratory symptoms, like a cough, wheezing, sputum production or dyspnea. *Id*. He testified it was not unusual for a person with early stages of coal workers' pneumoconiosis to be asymptomatic. *Id*. He did not believe a person needed abnormalities on a physical examination of the chest to have simple coal worker' pneumoconiosis. *Id*. He testified it was not unusual for someone with that condition to have no abnormalities on physical examination of the chest. *Id*.

Dr. Istanbouly testified that the pulmonary function studies were valid. PX1, p.11. They were within the normal limits per ATS Guidelines. *Id*. He testified it was possible, and not unusual that a pulmonary function test could be normal in a person with simple CWP. *Id*. He testified that having pulmonary function within a normal range did not necessarily mean the lungs had not been damaged. PX1, p. 11.

Dr. Istanbouly reviewed and interpreted the chest x-ray taken at Ferrell Hospital on May 25, 2017 and found it to be of diagnostic quality. PX1, p. 13. The x-ray revealed mild bilateral interstitial changes, mainly in the mid to lower zones consistent with simple CWP. PX1, p.13-14. He testified that the profusion was 1/0 per the B-reader, Dr. Henry Smith. *Id*.

Dr. Istanbouly testified that he diagnosed Petitioner with CWP which was caused by his long-term coal dust inhalation. PX1, p. 15. Dr. Istanbouly opined that Petitioner had clinically significant pulmonary impairment based upon his reported cough and exertional dyspnea. PX1, p. 18. He recommended avoiding any further coal dust inhalation to prevent the progression of his lung disease. *Id*.

On cross-examination, Dr. Dr. Istanbouly agreed that Petitioner communicated to him that his last job duties at the coal mine were physically demanding, however he did not relate a problem in doing the job duties. PX1, p.32. Petitioner had also communicated to him that he was employed as a mechanic working in his own shop. PX, p.20. Dr. Istanbouly acknowledged that there were causes for exertional dyspnea other than respiratory disease, including heart disease and deconditioning. PX1, p.23.

*Dr. Rosenberg Testimony*

Dr. David Rosenberg conducted a review of medical records and chest x-ray regarding Petitioner at the request of Respondent's counsel. Dr. Rosenberg testified he is a board-certified physician of internal medicine. RX2, p.4. He performed both evaluations and treatment of black lung conditions in private practice. RX2, p.24-26. Dr. Rosenberg testified he had been a B-reader since 2000. RX2, p.26-27.

Dr. Rosenberg testified that cough is not considered an objective determinant of pulmonary impairment. RX2, p.15. Dr. Rosenberg testified that one looks to the FEV1/FVC ratio of the spirometry part of the pulmonary function testing to determine whether an obstruction exists. RX2, p.15-16. Dr. Rosenberg testified that based upon the results of that testing there was no indication of restriction in Petitioner. RX2, p.16-17.

Dr. Rosenberg testified that based upon the results from pulmonary function testing on Petitioner, from a respiratory standpoint, he was capable of heavy manual labor. RX2, p.18.

Dr. Rosenberg read the chest x-ray of Petitioner dated May 25, 2017 and found it to be quality 2 with decreased expansion. RX2, p.18. He testified that the study was considered to be 0/0 with elevation of the right hemidiaphragm. *Id*.

Dr. Rosenberg testified that for a positive finding the profusion rating must be 1/0 or higher. RX2, p.20. A 0/1 profusion is technically a negative interpretation. *Id*. Dr. Rosenberg testified that the distinction between a category 1 pneumoconiosis and the film that is negative for pneumoconiosis is an area of inter-reader variability. RX2, p.20. He agreed that it was not necessary to be a B-reader to diagnose CWP. RX2, p.35.

Dr. Rosenberg testified that Petitioner's medical records did not outline any evidence of chronic respiratory issues, aside from recurrent bronchitis and some wheezing. RX2, p.22. Radiographically, Petitioner did not have the features of pneumoconiosis. *Id*. Dr. Rosenberg opined he had no pulmonary functional abnormalities and no respiratory impairment related to past coal mine dust exposure. *Id*.

Dr. Rosenberg testified that a person could have CWP and not know it. RX2, p.30. He admitted that a person with simple CWP could have normal diffusion capacity, normal pulmonary function studies and a normal physical examination. RX2, p.31-32, 34. A person with simple CWP radiographically could also be asymptomatic. *Id*.

*Legal Analysis and Conclusions*

The claimant in an occupational disease case has the burden of proving both that he suffers from an occupational disease and that a causal connection exists between the disease and his employment. *Anderson v. Indus. Comm'n*, 321 Ill.App.3d 463, 467 (2001).

The evidence in this case reflected appropriate testing for CWP, including physical examination findings, pulmonary function testing, and radiographic studies. Dr. Istanbouly found that Petitioner's physical examination was normal and Dr. Rosenberg did not perform a physical examination of Petitioner. PX1, p.10; RX2, p.32. The Commission recognizes a physical examination is not necessary to rule out a diagnosis of CWP.

With regard to the pulmonary function testing, both Dr. Istanbouly and Dr. Rosenberg agreed that Petitioner's pulmonary function tests were within normal limits. PX1, p.11; RX2, p.17-18. They also both agreed that a person could have normal pulmonary function and have CWP. PX1, p. 11; RX2, p.31. Again, the Commission notes that normal test results also can support a finding that Petitioner has no pulmonary disease.

The Commission finds the experts' interpretation of the x-ray of May 25, 2017 to be the most probative as to whether Petitioner suffers from a work related occupational disease. This x-ray was examined by B-readers retained by both Petitioner and Respondent. An opinion regarding the interpretations of the x-ray were provided by Dr. Smith, Dr. Meyer and Dr. Rosenberg. All of the B-readers had different findings, with only Dr. Smith finding the presence of simple CWP. Dr. Meyer was unequivocal in his opinion that there was no evidence of CWP visualized in the x-ray of May 25, 2017. He noted that if the films were to come through on a regular clinical workday, it would be read as no acute cardiopulmonary disease. RX1, p.45. While Dr. Rosenberg performed his own interpretation of the x-ray, he agreed with Dr. Meyer's opinion that there was no CWP present.

The Commission finds the opinions of Drs. Meyer and Rosenberg to be more persuasive.

While the Commission agrees that Dr. Istanbouly has significant experience and credentials in the field of pulmonary studies, his credentials do not provide any evidence of expertise in interpreting chest x-rays for the presence of pneumoconiosis. Dr. Istanbouly admitted he was not certified as a B-reader. PX1, p.14. In his practice, he does not assign profusion ratings

to the films he interprets, and he could not say whether the film he reviewed for Petitioner had a profusion of 1/0 versus 0/1. PX1, p.28-29. For the radiographic analysis aspect of the diagnosis, he needed to rely upon Dr. Smith's interpretation of the x-ray. The Commission notes that the radiographic interpretation is only one piece of the evaluation for a diagnosis of CWP and while a physician is not required to be an A or B-reader to interpret films for the presence of pneumoconiosis, having such training and certification lends credibility to an expert's opinion.

The Commission finds Dr. Rosenberg's opinion to carry more weight than Dr. Istanbouly's. Dr. Rosenberg testified persuasively as to the protocol for the reading of a chest x-ray for pneumoconiosis and his application of the same in his overall evaluation of Petitioner. Dr. Rosenberg testified that profusion is the degree of intensity of the findings observed on the chest x-ray. He testified that for a chest x-ray to be positive for pneumoconiosis the profusion rating must be 1/0 or higher and that he found Petitioner's x-ray to demonstrate a 0/0 profusion rating. RX2, p.18, 20. This finding was supported by Dr. Meyer's similar finding in his interpretation of the May 25, 2017 x-ray. RX1, p.40-41.

Based upon the normal physical examination and pulmonary testing and the persuasive opinion of Dr. Rosenberg that Petitioner's radiological study demonstrated no evidence of CWP, the Commission finds Petitioner failed to prove by a preponderance of the evidence that he suffered from CWP. The Commission hereby reverses the decision of the Arbitrator.

Even if the Commission had found Petitioner had met his burden with regard to the finding of an occupational disease arising out of and in the course of his employment, we would also have found Petitioner did not prove by a preponderance of the evidence that he suffered timely disablement pursuant to Sections 1(e) and (f) of the Occupational Diseases Act.

Petitioner obtained the coal workers' pneumoconiosis diagnosis within two years of leaving the Respondent's employment, however, simply being diagnosed with an occupational disease does not equate to a finding of disablement. *Hicks v. Industrial Commission*, 251 Ill. App. 3d 320 (5th Dist. 1993). Petitioner still has the burden of proving either a functional impairment or an inability to earn full wages as a coal miner due to his occupational disease within two years of the date of his last exposure. The Commission finds Petitioner failed to meet this burden of proof.

There was no evidence introduced to suggest that any physician took Petitioner off work as a result of an occupational disease. Petitioner left work in the coal mine due to being laid off because the mine shut down. T.8. Petitioner did not leave the mine because of a problem in physically performing his job or on the advice of a physician due to a respiratory disease. Petitioner testified that but for being sent home by the mine on the day that he was, he would have continued to work there and would have reported for his next shift. R.27. Petitioner also opened his own auto repair garage in 2017. T.12. Petitioner testified he typically works 30 hours per week in his auto repair business. T.25.

Further, Petitioner advised Dr. Istanbouly that he was not taking any breathing medications at the time of the examination. T.22. Petitioner testified that he had taken some breathing

medications in the past but was not taking any as of the date of arbitration. T.18, 26-27. He was not specific as to when he took those medications or what conditions they were treating.

Petitioner's medical records reveal that Petitioner had intermittent episodes of recurrent bronchitis in 2015 for which he was prescribed medication. RX4. The medical records did not reveal any chronic respiratory problems or ongoing use of medications for a pulmonary condition.

While Dr. Istanbouly testified that Petitioner related mild exertional dyspnea, he also acknowledged that there were many causes of that condition, other than respiratory disease, including heart disease and deconditioning. PX1, p.9, 23.

Dr. Rosenberg testified that from a respiratory standpoint, Petitioner was capable of heavy manual labor. RX2, p.18.

Overall, Petitioner failed to prove by a preponderance of the evidence that he had a functional impairment or that he was unable to earn full wages as a coal miner due to an occupational disease.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on September 19, 2023, is reversed in its entirety and all benefits are denied.

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

**December 30, 2024**

o: 10/29/2024
AHS/kjj
051

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

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

Dissent

I respectfully dissent from the opinion of the majority as the medical evidence supports a finding of occupational disease and timely disablement. I would affirm the Decision of the Arbitrator with regard to these issues.

I find Dr. Istanbouly's opinions to be credible and supported by both Petitioner's subjective complaints and the objective imaging. I disagree with the majority's finding that Dr. Istanbouly's opinion was not persuasive due to his lack of certification as a B-reader. Dr. Istanbouly demonstrated a more than sufficient understanding of the condition of CWP, as well as the studies and methods of diagnosing the condition. Both Dr. Istanbouly and Dr. Rosenberg testified that a physician need not be a B-reader in order to make a diagnosis of CWP. PX1, p.14; RX2, p.35.

Dr. Istanbouly has been a practicing evaluator and practitioner of black lung cases for 16 years. PX1, p.6. I believe his experience and credible testimony/opinions were sufficient to prove a diagnosis of CWP.

Petitioner provided a history of complaints which can be suggestive of CWP. Petitioner testified he had first started to notice symptoms of shortness of breath and fatigue while he was still employed with Respondent. T.14, 16. He testified he needed assistance performing his heavy-duty work tasks prior to his lay off. T.20-21. He testified to a limitation in his ability to walk distances and an even greater limitation on his ability to walk quickly. T.17. He testified that his breathing affected his activities of daily life and it didn't allow him to do what he wanted to do. T.19. Petitioner advised Dr. Istanbouly that he had developed occasional spells of coughing, which was occasionally productive of slight yellowish sputum. PX1, p.9. Petitioner also reported mild exertional dyspnea. *Id*. While these symptoms are not necessary for a diagnosis of CWP, when viewed as a whole they do demonstrate a clinical correlation to the findings of Dr. Smith and Dr. Istanbouly.

The Arbitrator correctly found that Dr. Istanbouly's opinion was more credible than Dr. Rosenberg. While Dr. Rosenberg opined there was no evidence of CWP, he also admitted that: 1) a person could have CWP without having chest x-ray evidence of the disease, 2) a person with CWP may not know they have the disease, 3) a person could have shortness of breath despite normal pulmonary function, and 4) a person could have a certain amount of their lungs with focal areas of impairment and still have normal global function. I agree that these admissions weakened Dr. Rosenberg's overall position.

I further agree with the Arbitrator that the criteria under Section (d) of the Occupational Diseases Act was met, based upon Petitioner's work as a coal miner for approximately 23 years, which is well over the statutorily required 10 years, and his credible diagnosis of CWP. 820 ILCS 310/1(d). As such, the Section (d) presumption applies. Respondent's defense was focused solely on the disproving of the existence of the CWP. As stated above, I find Dr. Istanbouly's opinions on that diagnosis to carry more weight than Dr. Rosenberg's. As there was an absence of evidence to show any alternative basis for Petitioner's pulmonary complaints/condition, I would also find the presumption that Petitioner's coal workers' pneumoconiosis arose out of his employment in the coal mines was not credibly rebutted by Respondent. Therefore, I would find Petitioner was successful in proving by a preponderance of the evidence that he was afflicted with CWP and that it arose out of his employment.

I further agree with the Arbitrator that Petitioner satisfied the requirements under Section (e) and (f) of the Occupational Diseases Act. 820 ILCS 310/1(e) and 1(f). Petitioner demonstrated a disability in the function of his body. He testified to increased respiratory difficulty with his activities of daily living, like working in the yard and carrying heavy things. T.16-19. He also testified to his need for breaks while performing tasks when he did not previously need to take such breaks. *Id*. Petitioner further showed a disablement in the function of his body within two years of his last occupational exposure through his diagnosis from Dr. Istanbouly. The Petitioner's last exposure to coal dust was on November 10, 2015. In his report of September 25, 2017, Dr. Istanbouly diagnosed Petitioner with CWP and further opined that additional dust exposure was medically ill-advised for a person diagnosed with CWP. PX1, p.19, 58. Thus, Petitioner's

diagnosis of CWP would have prevented him from returning to work in the coal mines. Dr. Istanbouly's opinion effectively demonstrated medical evidence of Petitioner's disablement at the time of his September 25, 2017 report.

For the foregoing reasons, I would affirm the Decision of the Arbitrator with regard to the finding of an occupational disease and timely disablement.

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

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 17WC018922 |
| Case Name | Gregory Meracle, v. The American Coal Company, |
| Consolidated Cases | |
| Proceeding Type | |
| Decision Type | Corrected Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 11 |
| Decision Issued By | Edward Lee, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | Roman Kuppart |
| Respondent Attorney | Julie Webb,<br>Kenneth Werts |

DATE FILED: 9/20/2023

**THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 19, 2023 5.30%**

/s/Edward Lee, Arbitrator

Signature

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

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**CORRECTED ARBITRATION DECISION**

**GREGORY MERACLE,**
Employee/Petitioner

v.

**THE AMERICAN COAL COMPANY,**
Employer/Respondent

Case # **17** WC **018922**

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 **Herrin**, **Illinois** on **June 27, 2023**. After reviewing all the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

**DISPUTED ISSUES**

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

**FINDINGS**

On **August 25, 2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**57,400.72**; the average weekly wage was $**1,103.86**.

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

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

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

**ORDER**

PETITIONER HAS PROVEN THAT HE HAS COAL WORKERS' PNEUMOCONIOSIS AND IS DISABLED BECAUSE OF HIS OCCUPATIONALLY INDUCED LUNG DISEASE, WHICH WAS CAUSED BY HIS OCCUPATIONAL EXPOSURE WITH RESPONDENT.

PETITIONER HAS PROVEN THAT HIS COAL WORKERS' PNEUMOCONIOSIS WAS PRESENT AND HE WAS DISABLED BY THE DISEASE WITHIN TWO YEARS OF HIS LAST EXPOSURE AS REQUIRED BY SECTION 1(F).

RESPONDENT SHALL PAY THE PETITIONER THE SUM OF $ 662.32 /WEEK FOR A PERIOD OF 25 WEEKS, AS PROVIDED IN SECTION 8(D)(2) OF THE ACT, BECAUSE THE INJURIES SUSTAINED CAUSED A PERMANENT AND PARTIAL DISABLEMENT TO THE EXTENT OF 5% .

**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_____ **SEPTEMBER 20, 2023**
Signature of Arbitrator

**Gregory Meracle v. American Coal Company**
**17 WC 018922**

## FINDINGS OF FACT

### Testimony at Arbitration and Medical Evidence

On May 26, 2019, Dr. Henry K. Smith reviewed a chest x-ray taken on May 6, 2019. (PX2, exhibit 2). Dr. Smith is board certified in radiology and is a NIOSH certified B-Reader. Dr. Smith passed his initial B-Reader examination in 1987 and maintained his certification status continuously over 32 years. (PX2, exhibit 1). Dr. Smith found that the chest film was a quality 1. Dr. Smith's impression was of simple coal workers' pneumoconiosis with andsmall opacities, primary p, secondary p, in all zones bilateally, of a profusion 1/1.

On June 18, 2018, Petitioner filed an Application For Adjustment of Claim with the Illinois Workers' Compensation Commission. Petitioner listed his date of accident as November 10, 2015. Petitioner listed that the accident occurred from inhalation of coal mine dust, including but not limited to, coal dust, rock dust, fumes and vapors for a period in excess of 23 years.

On December 14, 20212, Dr. Suhail Istanbouly testified via evidence deposition at Petitioner's request. (PX1). Dr. Istanbouly testified that he is board certified in critical care medicine and pulmonary medicine. (PX1, p. 5). Dr. Istanbouly testified that he practiced in Southern Illinois from April, 2003, until the end of March, 2019, when he took a position at Hines VA Hospital in Maywood, Illinois. (PX1, p. 5-6). Dr. Istanbouly was the medical director of the pulmonary department at Herrin Hospital since 2005. He was also the director of the Intensive Care Unit at Carbondale Memorial Hospital and that he had been the director of the Intensive Care Unit at Herrin Hospital. (PX1, exhibit 1).

Dr. Istanbouly testified that he evaluated Petitioner on September 25 2017. (PX1, p. 8). Dr. Istanbouly testified that he took a detailed history from Petitioner, including a medical and occupational history, performed a physical examination, and reviewed the pulmonary function testing and a chest x-ray. (PX1, p. 8).

He testified that Petitioner was a 64year old gentleman who worked as a coal miner for 23 years. Most of his career underground. His last job was a repairman and was heavy labor, which included walking, and shoveling

He has been of occasional coughing spells occasionally productive of slight yellow sputum. Petitioner does have mild exertional dyspnea. He is able to walk for one half to one mile without breathing problems. (PX-1, p. 9).

Dr. Istanbouly testified that it is not unusual for miners with simple coal worker's pneumoconiosis to be asymptomatic. He went on to testify that a coal miner can have coal worker's pneumoconiosis and not know they have it. Dr. Istanbouly testified that Petitioner's physical examination of his chest was normal. Dr. Istanbouly testified that it is not unusual for someone with early stages of coal workers' pneumoconiosis to have a normal physical examination of the chest. (PX1, p. 10-11).

Dr. Istanbouly testified that Petitioner's pulmonary function studies were within normal range. Dr. Istanbouly testified that a person with coal workers' pneumoconiosis could have pulmonary function testing that is completely normal, which is not unusual in the early stages of the disease. (PX1, p. 11). He testified that having pulmonary function within the range of normal does not mean that there is no damage to the lungs. Dr. Istanbouly testified that spirometry is a measure of the global impairment of both lungs rather than a focal impairment of a portion of the lungs. He testified that a person could have a certain amount of their lung with focal impairment, yet the global overall function be normal. (PX1, p.12). Dr. Istanbouly testified that a person could have shortness of breath and a daily cough but have a normal pulmonary function test. Dr. Istanbouly also testified that a person could have a normal diffusing capacity and have mild coal workers' pneumoconiosis. Dr. Istanbouly testified that a person with mild coal worker's pneumoconiosis can have a normal pulse oximetry on room air. (PX1, p. 12).

Dr. Istanbouly testified that he personally reviewed Petitioner's chest x-ray which was dated May 25, 2017. (PX1. p. 13). Dr. Istanbouly testified that he relied on his findings on Petitioner's chest x-ray and that he customarily reviews and interprets chest x-rays in providing care and treatment to his patients. He testified that the chest x-ray he reviewed was of diagnostic quality, and that it revealed mild interstitial changes involving the lower lung zones bilaterally. Dr. Istanbouly testified that you do not have to be a B-reader in order to diagnose someone with coal workers' pneumoconiosis. He also testified that there are not any B-readers in any of the hospitals that he is affiliated, with the closest B-reader being approximately 100 miles away. (PX1, p. 14-15). Dr. Istanbouly testified that he personally diagnosed coal miners in his practice with coal worker's pneumoconiosis without the use of a B-reader. Dr. Istanbouly testified that Petitioner's coal workers' pneumoconiosis was due to long term coal dust inhalation. (PX1, p. 15).

Dr. Istanbouly testified that coal workers' pneumoconiosis is caused by the inhalation of coal dust that causes irritation and inflammation that will ultimately end up forming tiny scars. Dr. Istanbouly testified that the scarring is sometimes referred to as fibrosis, and that the scarring and fibrosis are permanent. Dr. Istanbouly further testified that the scarring and fibrosis cannot carry on the function of normal healthy lung tissue. Dr. Istanbouly testified that, by definition, if you have coal workers' pneumoconiosis then you have an impairment of the function of the lungs, at least at the site of the scar or fibrosis. Dr. Istanbouly testified that only exposure to coal dust can cause coal workers' pneumoconiosis. Dr. Istanbouly testified that there is no cure for coal workers' pneumoconiosis. He went on to testify that there is a certain amount of coal dust that is trapped in the miner's lungs, which will remain there for the rest of his life. (PX1, p. 15-16).

Dr. Istanbouly testified that based on Petitioner's diagnosis of coal worker's pneumoconiosis it is not advisable for Petitioner to ever return to work in the coal mines as there is a risk of progression of the disease. Dr. Istanbouly testified that according to the American Thoracis Society there is no safe level of dust exposure for someone with coal worker's pneumoconiosis. Dr. Istanbouly testified that Petitioner has damage to his lungs as a result of his occupational exposure to coal mine dust. Dr. Istanbouly testified that a person with a chronic lung disease such as coal workers' pneumoconiosis is more susceptible to pulmonary infections

and pneumonias and his coal worker's pneumoconiosis would make it more difficult for him to recover from those pulmonary infections and pneumonias. (PX1, p. 16-19).

On July 26, 2020, Dr. Christopher A. Meyer testified via evidence deposition at Respondent's request. (RX1). Dr. Meyer testified that he is a board-certified radiologist (RX1, p. 7), who is also a NIOSH Certified B-Reader. (RX1, P. 19). Dr. Meyer testified that he currently works as the Vice Chair of Finance and Business Development and professor of diagnostic radiology at the University of Wisconsin Hospital and Clinics in Madison, Wisconsin. (RX1, P. 13-14).

Dr. Meyer testified that he reviewed a chest x-ray of Petitioner dated 05/25/17. Dr. Meyer testified that the films were quality 1. (R13, p. 40). Dr. Meyer testified that it was his impression that there were no radiographic findings of coal workers' pneumoconiosis on either film. (RX1, P. 40-41). However, Dr. Meyer agreed that it was fair to say that experts with similar credentials may disagree on the reading of chest films, especially those in Category 1 of pneumoconiosis. (RX1, P. 57-58). Dr. Meyer testified that he became a B-reader in in January, 1999; however he had taken the test before and failed the test the first time he took it. (RX1, p. 47). Dr. Meyer testified that an intelligent physician with extensive knowledge and training in occupational diseases could fail the B-reading test easily. (RX1, p. 57).

On cross-examination, Dr. Meyer agreed that a negative chest x-ray for coal workers' pneumoconiosis does not necessarily rule out the disease. (RX1, P. 46-47). Dr. Meyer further agreed that many coal miners have had negative chest x-rays for coal workers' pneumoconiosis, but on biopsy or autopsy it is shown that they actually had the condition pathologically. (RX3, P. 46). Dr. Meyers agreed with the Laney and Petsonk study which stated, "[i]ndividual coal macules are generally too small to be appreciated on chest x-rays". (RX1, P. 52-53). Dr. Meyer could not cite any studies to refute the Laney and Petsonk study. (RX1, p. 54-55).

April 27, 2002, Dr. David Rosenberg testified via evidence deposition at Respondent's request. (RX2). Dr. Rosenberg testified that he is board certified in internal medicine, and pulmonary diseases. He also obtained a Master's of public health and is board certified in occupational medicine. (RX2, p. 4-5). Dr. Rosenberg became a B-reader in 2000. (RX2, p. 6-7). He is licensed in Ohio, Kentucky, Tennessee and Florida. (RX2, p. 7). Dr. Rosenberg has examined coal miners for Petitioner's and Respondent's attorneys. Over the years, 95% of the examinations have been done for industry. (RX2, p. 8).

Dr. Rosenberg reviewed Petitioner's medical records as listed on p. 11-16 of his deposition. (RX2, p. 11-15). Dr. Rosenberg reviewed a chest film of Petitioner dated 05/25/17 which was read as a quality 2 film due to decreased expansion and was found to be a category 0/0. (RX2, p. 18).

Dr. Rosenberg concluded that Petitioner does not have a pneumoconiosis or any respiratory related condition consequent to his employment in the coal mine industry and has no associated impairment or disability. (RX2, p. 22).

Dr. Rosenberg testified that he does 5 or 6 records reviews a week for coal worker's litigation. He testified that he had approximately 10 to 20 patients that he is treating for black lung. (RX2, p. 24-25). He went on to testify that he has probably a thousand or two patients in totals, so a very small percentage of Dr. Rosenberg's practice relates to treating coal miners for occupational lung disease. (RX2, p. 25). Dr. Rosenberg testified that he performed black lung examinations for the Department of Labor from 1979 to 1984. He stopped doing the DOL examinations because he left his hospital-based position where they were doing the examinations. (RX2, p. 25). He testified that he still does approximately a couple of hundred examinations per year for occupational disease claims. (RX2, p. 26).

Dr. Rosenberg became a B-reader in 2000 at the hospital or clinic's request. Since they developed the occupational program Dr. Rosenberg felt with his pulmonary background that becoming a B-reader would be a good service to be able to provide companies. He would contract out his services as a B-reader to companies such as General Electric, some steel mills, and some private occupational medicine services. (RX2, p. 26-27).

Dr. Rosenberg agreed that scarring and fibrosis occurs with coal workers' pneumoconiosis. Dr. Rosenberg went on to state that scarring, and fibrosis caused by coal workers' pneumoconiosis adversely affects lung function. He went on to testify that there is no cure for coal workers' pneumoconiosis and the scarring and fibrosis that is caused by the disease is permanent. (RX2, p. 29). Dr. Rosenberg indicated that coal workers' pneumoconiosis could progress, but it is unusual. He agreed that the best treatment for someone with coal workers' pneumoconiosis is to remove that person from the exposure. Dr. Rosenberg agreed that a person could have coal workers' pneumoconiosis without having chest x-ray evidence of the disease. He also agreed that a person can have coal workers' pneumoconiosis and not know that they have the disease. Dr. Rosenberg agreed that a person could have shortness of breath despite normal pulmonary function. He also agreed that a person could have normal pulmonary function and have coal workers' pneumoconiosis, stating that it would not be unusual, and most would have normal pulmonary function. He agreed that a person could have a certain amount of their lungs with focal areas of impairment, yet their global function be normal. He testified that a person could have a lobe of their lung removed and still have normal pulmonary function. (RX2, p. 28-31). He went on to testify that a person could have a normal diffusing capacity and have simple coal workers' pneumoconiosis. (RX2, p. 32).

Dr. Rosenberg did not take a patient history of Petitioner. He did not speak with Petitioner or any of his examining or treating doctors, nor did he perform a physical examination or do any testing on Petitioner. (RX2, p. 32). Dr. Rosenberg testified that a person does not have to have abnormal findings on physical examination of the chest to have coal workers' pneumoconiosis. (RX2, p. 34). He went on to testify that a person with simple coal workers' pneumoconiosis would not have any symptoms. (RX2, p. 34).

Dr. Rosenberg testified that the reading of chest x-rays for coal workers' pneumoconiosis is very subjective. He agreed that it was fair to say that similarly qualified, educated physicians can and do disagree as to the findings on chest x-rays and that would especially be true in borderline cases of 0/1 or 1/0. Dr. Rosenberg agreed that a physician does not have to be a B-reader to diagnose someone with coal workers' pneumoconiosis. He went on to state that the B-

reading system was never designed for diagnosis purposes. Dr. Rosenberg testified that B-readings have never been used diagnostically and should never be used diagnostically. (RX2, p. 34-35). Dr. Rosenberg went on to say that according to the American Thoracic Society there is no safe dust level for someone with coal worker's pneumoconiosis. (RX2, p. 36).

On October 21, 2020, Dr. Henry K. Smith testified on behalf of the Petitioner. (PX2). Dr. Smith has been Board certified in Radiology since 1973 and has been a Certified NIOSH B-reader continuously since 1987. (PX2, p. 11). Dr. Smith holds medical licensure in 5 states. (PX2, p. 13). Dr. Smith is affiliated with or has privileges at numerous hospitals and clinics. PX2, Exhibit 1, p. 4-6). Dr. Smith discontinued seeing walk in patients in 2016 but continues to do consulting work to the present. (PX2, p. 15).

Dr. Smith reviewed a chest film of Petitioner dated 05/25/17. (PX2, p. 36). He rated the film a quality 1 and noted the presence of interstitial fibrosis classification p/S, bilaterally mid and lower zones lung zones of a profusion of 1/0. (PX2, p. 36). Dr. Smith opined that Petitioner has coal worker's pneumoconiosis and has damage to his lungs as a result of his coal worker's pneumoconiosis. (PX2, p. 37).

Respondent's Exhibit 3 is a diffusing capacity test ordered by Respondent. The test was performed by Dr. Jeffrey Selby, who read Petitioner diffusing capacity as normal. No spirometry was performed by Dr. Selby for some reason. Dr. Selby's credentials are not in the record. (RX8)

Respondent entered Petitioner's records from West Frankfort Family Medicice (RX4); St. St. Joseph's Memorial Hospital (RX5); and Logan Primary Care. None of these records contain any testing for an occupational lung disease but treatment for various other health conditions. The only doctor to examine Petitioner for an occupational lung disease was Dr. Istanbouly. I give these records little or no weight as all experts are in agreement that a person could have coal worker's pneumoconiosis and be asymptomatic.

## CONCLUSIONS OF LAW

Petitioner has sustained an injury that arose out of an in the course of his employment. Section 1(d) of the Illinois Workers' Compensation Diseases Act states, in pertinent part:

> A disease shall be deemed to arise out of the employment if there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the occupational disease. The disease needs not to have been foreseen or expected but after its contraction it must appear to have had its origin or aggravation in a risk connected with the employment and to have flowed from that source as a rational consequence. An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when, for any length of time however short, he or she is employed in an occupation or process in which the hazard of the disease

> exists...If a miner who is suffering or suffered from pneumoconiosis was employed for 10 years or more in one or more coal mines there shall, effective July 1, 1973 be a rebuttable presumption that his or her pneumoconiosis arose out of such employment. 820 ILCS 310/1(d)

On June 5, 2017, Dr. Henry K. Smith reviewed a chest x-ray taken on May 25. (PX2, exhibit 2). Dr. Smith is board certified in radiology and is a NIOSH certified B-Reader. Dr. Smith passed his initial B-Reader examination in 1987 and maintained his certification status continuously over 32 years. (PX2, exhibit 1). Dr. Smith found that the chest film was a quality 1. Dr. Smith's impression was of simple coal workers' pneumoconiosis with small opacities, primary p, secondary s, in middle and lower zones bilaterally, of a profusion 1/0.

Dr. Istanbouly testified that he physically examined Petitioner and took a detailed medical and occupational history. Dr. Istanbouly testified that the cause of Petitioner's diagnosis of coal worker's pneumoconiosis was exposure to coal mine dust.

Dr. Istanbouly's testimony reveals his significant experience and credentials in the field of pulmonary studies. Dr. Istanbouly testified that he is board certified in critical care medicine and pulmonary medicine. Dr. Istanbouly testified that he does black lung examinations for the U.S. Department of Labor. He has been the medical director of the pulmonary department at Herrin Hospital since 2005. He is also the director of the Intensive Care Unit at Carbondale Memorial Hospital and that he has been the director of the Intensive Care Unit at Herrin Hospital. Drs. Istanbouly and Smith's extensive experience with occupational lung diseases leads the Arbitrator to find that Petitioner has met his burden of proof in establishing that he has simple coal workers' pneumoconiosis. Dr. Istanbouly is the only expert in this case to examine Petitioner.

Although Respondent's experts, Drs. Meyer, and Rosenberg, disagree with the findings and diagnosis of Drs. Smith, Istanbouly, their opinions are found to be less credible by way of their own testimony. On cross-examination, Dr. Meyer agreed that a negative chest x-ray for coal workers' pneumoconiosis does not necessarily rule out the disease. Dr. Meyer further agreed that many coal miners have had negative chest x-rays for coal workers' pneumoconiosis, but on biopsy or autopsy it is shown that they actually had the condition pathologically. Dr. Meyers agreed with the Laney and Petsonk study which stated, "[i]ndividual coal macules are generally too small to be appreciated on chest x-rays".

Dr. Rosenberg conceded that he had never met, spoken to, or physically examined the Petitioner. Dr. Rosenberg testified that 95% of the examinations he does for black lung are for industry. Dr. Rosenberg agreed that a person could have coal workers' pneumoconiosis without having chest x-ray evidence of the disease. He also agreed that a person can have coal workers' pneumoconiosis and not know that they have the disease. Dr. Rosenberg agreed that a person could have shortness of breath despite normal pulmonary function. He also agreed that a person could have normal pulmonary function and have coal workers' pneumoconiosis, stating that it would not be unusual, and most would have normal pulmonary function. He agreed that a person could have a certain amount of their lungs with focal areas of impairment, yet their global

function be normal. He went on to testify that a person could have a normal diffusing capacity and have simple coal workers' pneumoconiosis.

Given the totality of the evidence, the Arbitrator finds Drs. Istanbouly and Smith, to be more credible than Drs. Meyer, and Rosenberg. Therefore, the Arbitrator finds that Petitioner has satisfied the requirements of Section (d) of the Act. It is apparent that Petitioner's coal workers' pneumoconiosis arose out of his employment as a coal miner, and that there is a causal connection between the conditions under which Petitioner worked and his coal workers' pneumoconiosis. Petitioner worked as a coal miner for approximately 23 years, which is well over the statutorily required 10 years, and he was diagnosed with coal workers' pneumoconiosis. According to Section (d), there is a rebuttable presumption that his coal workers' pneumoconiosis arose out of his employment in the coal mines. The Respondent has not credibly rebutted that presumption. Therefore, Petitioner proved by a preponderance of the evidence that he is afflicted with coal workers' pneumoconiosis and that it arose out of his employment.

This Commission affirms that Petitioner has sustained a permanent partial disability of 10% of the person as a whole. This value is supported by the Commission's decision in *Robinson* where that Petitioner had the same diagnosis, similar complaints, and similar x-ray reading of 1/0. *Hugh James Robinson v. The American Coal Company*, 17 I.W.C.C. 0045, 09 W.C. 45865. Also see, *Holley v. The American Coal Company,* 20 IWCC 0345, 15 WC 23353; *Ball v. Monterey Coal Company,* 18 IWCC 0170, 08 WC 53750; *Maynor v. Tri-County Coal, LLC,* 17 IWCC 0394, 13 WC 27093; *Ondo v. Monterey Coal Company,* 17 IWCC 0349, 08 WC 06504; and *Collins v. Freeman United Coal Mining Co.,* 16 IWCC 0204, 09 WC 08264.

**WITH RESPECT TO ISSUE (O), THE APPLICABILITY OF SECTIONS 1(e) and 1(f) OF THE OCCUPATIONAL DISEASES ACT, THE ARBITRATOR FINDS AS FOLLOWS:**

Section 1(e) of the Occupational Diseases Act states, in pertinent part, "{d}isablement" means an impairment or partial impairment, temporary or permanent, in the function of the body or any of the members of the body." 820 ILCS 310/1(e) The Arbitrator finds that Petitioner has satisfied the requirements of Section (e) of the Act. The Petitioner testified to increased respiratory difficulty with his activities of daily living, like working in the yard or carrying heavy things. He has to take breaks now when he did not use to. Dr. Istanbouly also testified that the inhalation of coal dust that causes irritation and inflammation that will ultimately end up forming tiny scars. Dr. Istanbouly testified that there is no cure for coal workers' pneumoconiosis, and that it is a chronic condition. Dr. Rosenberg agreed that the scarring and fibrosis that occurs in the lungs from pneumoconiosis is irreversible and permanent. Dr. Rosenberg testified that scarring and fibrosis is an alteration of the lung tissue and is also an alteration of the function of the involved lung tissue.

Section 1(f) of the Occupational Diseases Act states, in pertinent part, "[n]o compensation shall be payable for or on account of any occupational disease unless disablement, as herein defined, occurs within two years after the last day of the last exposure to the hazards of the disease." 820 ILCS 310/1(f) Petitioner last worked a day of coal mine employment on

February 4, 2018. Petitioner has not worked in the coal mines and has not had any other exposure to coal mine dust since that date. On May 25, 2017, Petitioner underwent an x-ray with of the chest for pneumoconiosis at Ferrell Hospital. Dr. Smith's impression of that chest x-ray was of simple pneumoconiosis, category p/s, 1/0. Since the Petitioner obtained the coal workers' pneumoconiosis diagnosis within two years of leaving Respondent's employment, he meets the requirement under Section 1(f) of the Act.

Although there is testimony in the record about pathological coal workers' pneumoconiosis, there is no pathology evidence in the record. My findings regarding coal workers' pneumoconiosis are based on the radiographic findings that are contained in the record, the testimony of the experts that a miner does not have to have symptoms, abnormal physical examination of the chest, abnormal pulmonary function, or an abnormal diffusing capacity to have coal workers' pneumoconiosis. I also base my decision on the testimony of the witness at arbitration. I find that Petitioner was a credible witness.

Based on the totality of the evidence, and the factual findings above, the Arbitrator finds that the Petitioner is entitled to occupational disease benefits.

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 21WC025167 |
| Case Name | Rene Pagan v.<br>Georgia Nut Company |
| Consolidated Cases | |
| Proceeding Type | Petition for Review |
| Decision Type | Commission Decision |
| Commission Decision Number | 24IWCC0617 |
| Number of Pages of Decision | 10 |
| Decision Issued By | Deborah Simpson, Commissioner |

| | |
|---|---|
| Petitioner Attorney | David Petrich,<br>William Martay |
| Respondent Attorney | Timothy Furman |

DATE FILED: 12/31/2024

/s/Deborah Simpson,Commissioner

Signature

STATE OF ILLINOIS )
) SS.
COUNTY OF COOK )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rene Pagan,
Petitioner,

vs. NO: 21 WC 25167

Georgia Nut 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 medical expenses, any and all issues raised at trial, permanent disability and temporary disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 29, 2024, is hereby affirmed and adopted.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $27,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

**December 31, 2024**

o: 12/11/24
DLS/rm
046

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

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

/s/*Raychel A. Wesley*
Raychel A. Wesley

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**DECISION SIGNATURE PAGE**

| | |
|---|---|
| Case Number | 21WC025167 |
| Case Name | Rene Pagan v.<br>Georgia Nut Company |
| Consolidated Cases | |
| Proceeding Type | |
| Decision Type | Arbitration Decision |
| Commission Decision Number | |
| Number of Pages of Decision | 8 |
| Decision Issued By | Elaine Llerena, Arbitrator |

| | |
|---|---|
| Petitioner Attorney | William Martay,<br>David Petrich |
| Respondent Attorney | Timothy Furman |

DATE FILED: 5/29/2024

/s/Elaine Llerena, Arbitrator
Signature

**THE INTEREST RATE FOR THE WEEK OF MAY 29, 2024 5.17%**

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**

**Rene Pagan**
Employee/Petitioner
v.
**Georgia Nut Company**
Employer/Respondent

Case # **21** WC **025167**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Elaine Llerena**, Arbitrator of the Commission, in the city of **Chicago**, on **February 29, 2024**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

**DISPUTED ISSUES**

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

**FINDINGS**

On **August 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 $**49,003.76**; the average weekly wage was $**942.38**.

On the date of accident, Petitioner was **36** years of age, ***single*** with **2** dependent children.

Respondent shall be given a credit of $**6,013.44** for TTD from August 19, 2021, through October 21, 2021, as stipulated to by the parties, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**6,013.44**.

Respondent is entitled to a credit of $**9,244.06** under Section 8(j) of the Act.

**ORDER**

Respondent shall pay any outstanding reasonable and necessary medical services, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit of $9,244.06 for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $565.43 per week for 16.700 weeks, because the injuries sustained caused the 10% loss of use of the left foot, as provided in Section 8(e)(11) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $565.43 per week for 30 weeks, because the injuries sustained caused the 6% loss of use 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.

Signature of Arbitrator

**May 29, 2024**

ICArbDec p. 2

## FINDINGS OF FACT

This matter proceeded to hearing on February 29, 2024, in Chicago, Illinois before Arbitrator Elaine Llerena on Petitioner's Request for Hearing. The issues in dispute were causation, medical expenses, and permanency. Arbitrator's Exhibit 1 (AX1).

***Petitioner's Testimony***

In August of 2009, Petitioner worked for Respondent as a line lead. (T. 7) The job consisted of leading the staff who worked on the line, organizing the line, packing and paperwork. *Id.* The job required some lifting, but not when he first started, and walking. *Id.* Petitioner worked as a line lead until August of 2021 when he transitioned into an operator and back up supervisor. (T. 8) When Petitioner transitioned into the role of operator and backup supervisor, he was in charge of running the roasting department and seasoning line. *Id.* This role required him to lift up to 50 pounds or more than 50 pounds with assistance. *Id.*

On Augusts 10, 2021, Petitioner was climbing a staircase on a catwalk while carrying a 50-pound box. (T. 9-10) As he went to fill the hopper, the cart moved, causing Petitioner to tip over the ladder and fall to the ground. *Id.* As a result of the fall, Petitioner injured his left foot and ankle and twisted his back. *Id.* Respondent sent Petitioner to Urgent Care. (T. 10)

Prior to August 10, 2021, Petitioner had not injured nor was he under any medical care for the left foot, ankle or back. (T. 8)

He reported to work the following Monday, August 12, 2021, but showed up late because he could not get out of bed. (T. 11) Petitioner testified that he could not walk down the stairs, could not walk to his car and could not drive to work. *Id.* During the weekend, Petitioner experienced pain in his lower back. *Id.* When he returned to work, Petitioner could not sit down and could not even perform a sit-down job at work. *Id.* Petitioner left work and sought treatment at St. Francis Hospital Ascension. (T. 12)

Petitioner has not had any new injuries since August 10, 2021. (T. 19) Petitioner is not receiving active treatment for the ankle or back. *Id.* Petitioner continues to have pain in his lower back, left ankle and foot. *Id.* Petitioner stated if he drives for 30 minutes, he needs to take a break to stretch due to the pain. (T. 20)

Petitioner was terminated from Respondent's employ in September 2023. (T. 16-17) Petitioner was working light duty at the time. *Id.* Petitioner's medical bills were paid by his group health insurance. (T. 18) Additionally, part of the group health insurance premiums were paid by Respondent. *Id.*

***Summary of Medical Records***

On August 10, 2021, Petitioner saw Krastina Gadjev APNP at Advocate Medical Group. (PX1) Petitioner complained of left foot pain and swelling after falling at work. Left foot x-rays showed a nondisplaced fracture of the medial malleolus of the left tibia. Gadjev diagnosed an unspecified fracture of the shaft of the left tibia, left ankle and joint pain, and left foot pain.

On August 12, 2021, Petitioner saw up with Emma Schmidt PA at AMITA Health emergency room. (PX5) Petitioner complained of worsening low back pain and was wearing a boot on his left foot and using crutches. PA Schmidt diagnosed Petitioner as having low back pain, restricted him to light duty work and recommended that he follow up with orthopedics.

On August 19, 2021, Petitioner saw Dr. Jennifer Connor at Orthopedic & Rehabilitation Centers SC. (PX2) Petitioner reported the August 10, 2021, work accident and complained of left ankle and low back pain, and tingling from the low back into his right foot and knee. Dr. Connor diagnosed Petitioner as having a nondisplaced fracture of the medial malleolus of the left tibia and lumbar radiculopathy. Regarding the ankle, Dr. Connor described Petitioner's fracture as a stable injury and noted that he could continue in the boot but should wean from the crutches and weight bear as tolerated. As to the lumbar spine, Dr. Connor recommended physical therapy and took Petitioner off work. Petitioner underwent physical therapy from August 23, 2021, through March 7, 2022, at Orthopaedic and Rehabilitation Center.

On September 9, 2021, Dr. Connor ordered a lumbar MRI. Petitioner underwent the lumbar MRI in September 2021, the results of which revealed L5-S1 subligamentous posterior broad based disc herniation with an extruded nucleus pulposus which indented the ventral and central portion of the thecal sac with central stenosis, facet arthrosis and ligamentum flava hypertrophy; L4-5 subligamentous posterior central disc herniation with extruded nucleus pulposus which indented the thecal sac with broad based central stenosis and generalized B neuroforaminal narrowing, exacerbated by facet arthrosis and ligamentum flava hypertrophy; and L3-4 mild left lateral recess narrowing. (PX3)

On October 21, 2021, Dr. Connor recommended continued physical therapy for the left ankle and lumbar spine. (PX2) Additionally, Dr. Connor opined that Petitioner's back pain and radiculopathy was related to the work accident and recommended Petitioner be seen by pain management. On December 9, 2021, Dr. Connor continued physical therapy and placed the following work restrictions on Petitioner: no lifting, carrying, pushing or pulling more than 10 pounds and avoid excessive walking or standing. On January 13, 2022, Dr. Connor noted Petitioner was doing well regarding the left ankle, but had been unable to receive additional therapy or treatment with pain management for the lumbar spine.

On April 21, 2022, Petitioner saw Dr. Sheetal DeCaria at Revatilize Medical Center. (PX3) Petitioner reported the work accident and complained of back pain with radiation into the gluteal area and down the lower extremities. Dr. DeCaria diagnosed Petitioner as having bilateral inflammation of the SI joint and lumbosacral radiculopathy. Dr. DeCaria noted that Petitioner was having right greater than left SI joint pain after ambulating unevenly on crutches for three months and offered Petitioner either a right-side SI joint injection or a lumbar epidural steroid injection. Petitioner opted to hold off for the time being. Dr. DeCaria referred Petitioner to Dr. Ackerman for a surgical evaluation and instructed him to follow up should he reconsider the steroid injections. On May 11, 2022, Dr. DeCaria administered an L5-S1 lumbar epidural steroid injection. Dr. DeCaria recommended Petitioner continue physical therapy and his home exercise program.

On May 25, 2022, Petitioner underwent a Section 12 examination (IME) with Dr. Hythem Shadid at Respondent's request. (RX1) Dr. Shadid examined Petitioner and reviewed his medical records. Dr. Shadid diagnosed Petitioner as having chronic mechanical low back pain, which was not causally related to the August 10, 2021, work accident. Dr. Shadid explained that while the medical records referred to the disc herniation, any acute disc herniation would have manifested with sudden onset of pain, which Petitioner did not have. Dr. Shadid opined that the objective findings did not support Petitioner's subjective complaints regarding his lumbar spine and noted there was evidence of symptom magnification and/or possible malingering. Dr. Shadid further opined that testing and treatment for the ankle was reasonable, necessary, and related to the claimed work injury, but not any of the treatment for the lumbar spine. Dr. Shadid determined that no additional treatment was needed for the ankle or low back and placed Petitioner a maximum medical improvement (MMI) as to the left ankle and lumbar spine. Dr. Shadid felt Petitioner could return to work, full duty.

On June 2, 2022, Petitioner followed up with Dr. DeCaria and reported that the injection provided temporary pain relief. Dr. DeCaria again referred Petitioner to Dr. Ackerman for a surgical evaluation as he did

not recommend any further epidurals as well as the fact that Petitioner was not interested in any further injections.

On August 25, 2022, Petitioner followed up with Dr. Connor who recommended that Petitioner see Dr. Ackerman. (PX2) On September 8, 2022, Petitioner followed up with Dr. Connor and reported worsened back pain. Petitioner did not recall any specific injury that would contribute to his worsening pain but noted that he could barely walk, sit or stand and was having difficulty getting out of bed. Dr. Connor diagnosed Petitioner with lumbar radiculopathy, referred Petitioner to pain management, and instructed Petitioner to continue physical therapy. On October 25, 2022, Dr. DeCaria administered bilateral sacroiliac and joint injections. (PX3) Dr. DeCaria opined that Petitioner's back pain was not related to his lumbar spine given the limited response to the lumbar epidural steroid injection. Dr. DeCaria recommended that Petitioner continue physical therapy and weight loss. On December 29, 2022, Petitioner followed up with Dr. Connor and reported that the spinal injection failed to provide pain relief. Petitioner continued to follow up with Dr. Connor and reported ongoing back pain with no improvement. Dr. Connor recommended physical therapy and continued Petitioner's work restrictions.

On March 30, 2023, Petitioner underwent an IME with Dr. Richard Noren at Respondent's request. (RX2) Dr. Noren examined Petitioner and reviewed Petitioner's medical records. Dr. Noren diagnosed Petitioner with preexisting lumbar spondylosis of the lumbar spine and opined that Petitioner sustained a temporary exacerbation of his preexisting lumbar spondylosis. Dr. Noren found that there was no evidence of any acute injury and suggested that Petitioner's lumbar complaints were unrelated to his reported work accident and likely represented symptom magnification and/or malingering. Dr. Noren found the lumbar injections Petitioner underwent were not medically necessary as there is no evidence of mechanism for him to have sacroiliac joint dysfunction. Dr. Noren determined that Petitioner was at MMI and did not require any more treatment and any further evaluation of the lumbar spine would not be related to the work accident. Dr. Noren felt Petitioner could return to work without restrictions.

On April 3, 2023, Dr. Noren issued an AMA Impairment Rating using the 6th edition of the AMA impairment guides. (RX3) Dr. Noren provided a 1% impairment rating.

On September 28, 2023, Petitioner followed up with Dr. Connor and reported continued lumbar spine pain which had worsened since physical therapy ended. (PX2) Dr. Connor recommended Petitioner resume physical therapy when possible.

On January 29, 2024, Dr. Babak Lami prepared a records review report at Respondent's request. (RX4) Dr. Lami diagnosed Petitioner as having subjective back pain. Dr. Lami found that the lumbar MRI showed degenerative changes without any neurocompressive pathology. Dr. Lami opined that there was no lumbar spine injury due to the August 10, 2021, work accident and that Petitioner's subjective complaints were not corroborated by the objective findings. Dr. Lami opined that treatment to date had not been reasonable or necessary and found that it had been excessive, and that Petitioner could return to work without restrictions.

## CONCLUSIONS OF LAW

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

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

The Arbitrator notes that while causal connection was placed in dispute, it appears causal connection was disputed by Respondent for Petitioner's back injury and not his left foot/ankle injury.

The medical records show that Petitioner suffered a non-displaced fracture of the medial malleolus of the left tibia on August 10, 2021. The medical records also note that Petitioner complained of worsened back pain following the August 10, 2021, work accident on August 12, 2021, only two days after the accident. The record does not reveal any intervening incident from August 10, 2021, to August 12, 2021. Additionally, the Arbitrator notes that Petitioner has repeatedly and consistently complained of ongoing back pain following the August 10, 2021, work accident and that Petitioner did not sustain nor was he treating for any back issues prior to August 10, 2021.

The Arbitrator notes that Dr. Shadid, Dr. Noren and Dr. Lami all opined that Petitioner's lumbar spine issue was not causally related to the August 10, 2021, work accident. However, the Arbitrator notes that the September 2021 lumbar MRI showed disc herniations at L5-S1 and L4-5, L3-4 mild left lateral recess narrowing and broad-based central stenosis. It appears to the Arbitrator that Dr. Shadid, Dr. Noren and Dr. Lami seem to focus on the lack of back complaints at urgent care on August 10, 2021, and ignore the abnormal findings on the MRI, the lack of any back problems prior to August 10, 2021, and Petitioner's ongoing back pain complaints. As such, the Arbitrator does not find the findings and opinions of Dr. Shadid, Dr. Noren and Dr. Lami persuasive. Instead, the Arbitrator relies on the findings and opinions of Dr. Conner, who opined that Petitioner's back pain and radiculopathy was related to the August 10, 2021, work accident.

Based on the above, the Arbitrator finds that Petitioner's conditions of ill-being regarding his left lower extremity and lumbar spine is causally related to the August 10, 2021, work accident.

**WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:**

The Arbitrator notes her finding above that Petitioner's current conditions of ill-being are causally related to the August 10, 2021, work accident. The Arbitrator notes that Petitioner started complaining of left lower extremity and back problems after the August 10, 2021, work accident and treated for those problems shortly after the work accident occurred. The Arbitrator also notes that Petitioner underwent conservative care and continues to have pain in his left foot/ankle and back. The Arbitrator also notes that Petitioner did not undergo all the recommended treatment due to lack of authorization from Respondent's workers' compensation carrier, but Petitioner is not seeking additional care. The Arbitrator further notes her finding that the findings and opinions of Dr. Shadid, Dr. Noren and Dr. Lami were unpersuasive.

Based on the above, the Arbitrator finds that Petitioner's treatment following the August 10, 2021, work accident was reasonable and necessary. Respondent shall pay any outstanding medical expenses pursuant to Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit of $9,244.06 (see PX4) 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.

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

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

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.

(b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors;

(i) the reported level of impairment pursuant to subsection (a);
(ii) the occupation of the injured employee;
(iii) the age of the employee at the time of the injury;
(iv) the employee's future earning capacity; and
(v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order.

With regard to subsection (i) of Section 8.1b(b), the Arbitrator notes that the record contains an impairment rating of 1% as determined by Dr. Noren pursuant to the most current edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment. The Arbitrator notes that this level of impairment does not necessarily equate to permanent partial disability under the Workers' Compensation Act, but instead is a factor to be considered in making such a disability evaluation. The Arbitrator gives this factor its appropriate weight.

With regard to subsection (ii) of Section 8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a line lead/operator/back up supervisor at the time of the accident and that he was able to return to work, light duty, through September 2023. The Arbitrator gives this factor considerable weight.

With regard to subsection (iii) of Section 8.1b(b), the Arbitrator notes that Petitioner was 36 years old at the time of the accident. The Arbitrator gives this factor some weight.

With regard to subsection (iv) of Section 8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that no evidence was provided regarding any effect this accident had on Petitioner's future earning capacity. The Arbitrator gives this factor no weight.

With regard to subsection (v) of Section 8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner returned to work, light duty, and remains on restrictions by his treating physicians. Petitioner continues to have left lower extremity and back pain. Dr. Conner recommended on September 28, 2023, that Petitioner resume physical therapy when possible. The Arbitrator gives this factor substantial weight.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 10% loss of use of the left foot pursuant to Section 8(e)(11) of the Act and 6% loss of use of the person as a whole pursuant to Section 8(d)2 of the Act.