ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC022001
Case Name	Angela Trout v. SIU-Edwardsville
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0061
Number of Pages of Decision	15
Decision Issued By	Carolyn Doherty, Commissioner, Christopher Harris, Commissioner

Petitioner Attorney	John Winterscheidt
Respondent Attorney	Caitlin Fiello

DATE FILED: 2/1/2024

/s/Carolyn Doherty, Commissioner

Signature

DISSENT /s/Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANGELA TROUT,

Petitioner,

vs. NO: 22 WC 22001

SIU - EDWARDSVILLE,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under Section 19(b) of the Act 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, prospective medical care and temporary total 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 further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill. 2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

The Commission affirms the Arbitrator's conclusion that Petitioner sustained an accident that arose out of and in the course of her employment with Respondent. However, the Commission reaches this conclusion by also using an employment-related risk analysis pursuant to *McAllister v. Ill. Workers' Comp. Comm'n*, 2020 IL 124848.

To be compensable under the Act an injury must "arise out of" and occur "in the course of" one's employment. *Id*. ¶ 32. Both elements must be present at the time of the injury to justify compensation. *Id*. The Commission finds that Petitioner suffered an accident in the scope of her employment. Obtaining a drink on a break falls within the personal comfort doctrine and thus was in the course of the employment. *Karastamatis v. Industrial Comm'n*, 306 Ill. App. 3d 206, 211 (1999).

The "arising out of" component is primarily concerned with causal connection. *McAllister*, 2020 IL 124848, ¶ 36. An injury is said to "arise out of" one's employment if its origin is in some risk connected with or incidental to the employment so that there is a causal connection between the employment and the accidental injury. *Id*. A risk is incidental to the employment when it belongs to or is connected with what the employee has to do in fulfilling his or her job duties. *Id*. The Commission first considers whether Petitioner was subject to an employment-related risk. 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*. ¶ 46.

In this case, while the building at issue is a very busy public building and others were using the stairs at the time of Petitioner's injury, Petitioner testified without rebuttal that her office was in the basement and she was required to ascend and descend stairs to access her office, approximately four to six times per work day. Petitioner also testified without rebuttal that there are two flights of stairs from the basement to the first floor. She further testified without contradiction that she uses stairs much more often while working than while she is away from the workplace. Accordingly, the Commission finds that Petitioner was subject to a risk distinctly associated with her employment as she was engaged in an activity that an employee might reasonably be expected to perform incident to his or her assigned duties. Thus, the Commission finds that Petitioner's accident arose out of her employment with Respondent.

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 filed May 8, 2023 is hereby modified as stated herein and otherwise 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 the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

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

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

February 1, 2024

d: 12/21/23
CMD/kcb
045

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

/s/ *Marc Parker*
Marc Parker

SPECIAL CONCURRENCE

I write separately as I find Petitioner's injury compensable under a neutral risk analysis, akin to the fact pattern in the case of *Village of Villa Park v. Illinois Workers' Compensation Comm'n,* 2013 IL App (2d) 130038WC, and not an employment risk under *McAllister v. Ill. Workers' Comp. Comm'n,* 2020 IL 124848.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC022001
Case Name	Angela Trout v. SIU-Edwardsville
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	11
Decision Issued By	Edward Lee, Arbitrator

Petitioner Attorney	John Winterscheidt
Respondent Attorney	Caitlin Fiello

DATE FILED: 5/8/2023

THE INTEREST RATE FOR THE WEEK OF MAY 2, 2023 4.90%

/s/Edward Lee, Arbitrator

Signature

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

May 8, 2023

/s/ Michele Kowalski

Michele Kowalski, Secretary

Illinois Workers' Compensation Commission

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Angela Trout
Employee/Petitioner

v.

SIU-E
Employer/Respondent

Case # **22** WC **022001**

Consolidated cases: **n/a**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Collinsville**, on **March 29, 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, **03/29/22**, 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 $**19,212.96**; the average weekly wage was $**369.48**.

On the date of accident, Petitioner was **56** 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 $**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**.

Respondent is entitled to a credit of $**561.79** under Section 8(j) of the Act.

ORDER

Medical benefits

Respondent shall pay Petitioner $107.50 for her out-of-pocket medical expenses and pay amounts pursuant to Sections 8(a) and 8.2 of the Act, for reasonable and necessary medical services referenced herein. Respondent is entitled to a credit for amounts it has previously paid to the providers referenced herein.

Prospective Medical Treatment

Respondent shall authorize and pay for Dr. Matthew Bradley's recommended treatment of Petitioner's right shoulder and authorize and pay for all diagnostic testing and treatment attendant thereto, until Petitioner reaches maximum medical improvement from her March 29, 2022 accident.

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.

Edward Lee_____ **MAY 8, 2023**
Signature of Arbitrator

STATE OF ILLINOIS)
) SS
COUNTY OF MADISON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
19(b) ARBITRATION DECISION

ANGELA TROUT,
Employee/Petitioner,

v. Case # 22 WC 022001

SIU-E,
Employer/Respondent.

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner filed an Application for Adjustment of Claim which alleged she injured her right shoulder, right arm, and body as a whole, arising out of and in the course of her employment with Respondent, after tripping on stairs on March 29, 2022. (Arbitrator's Exhibit 2, hereinafter, "AX 2"). The issues to be resolved by this Hearing pursuant to Sections 19(b) and 8(a) of the Act, are whether Petitioner sustained accidental injuries that arose out of and in the course of her employment; whether Petitioner's current condition of ill-being is causally connected to this injury, and; whether Petitioner's need for additional medical treatment for her right shoulder is causally related to the accident in question. (AX 1).

Petitioner is fifty-seven years old and is employed by Respondent as an Office Support Specialist for sixteen-and-a-half years. As the administrative assistant to the program director of the university newspaper, her job entails typing, emailing, overseeing payroll and the business duties of the newspaper. Petitioner's office is located in the basement of a building on the university campus, and as such, Petitioner is required to ascend and descend stairs to get to and from her workplace. The building and the stairs are open to and regularly used by the public, students, and staff. Prior to March 29, 2022, she walked up and down those stairs four to six times daily while working her part-time job for Respondent. (Respondent's Exhibit 5,

hereinafter, "RX 5). Petitioner testified that she ascends stairs much more often while working than while she is away from the workplace.

On March 29, 2022, Petitioner was ascending the stairs from her basement workstation to refill her Yeti water cup she was carrying for a meeting that was to begin shortly thereafter. She tripped over the top step and fell forward, breaking her fall with her dominant, right hand that held the water container. She felt immediate pain in her right shoulder that "shot" up her arm.

Prior to March 29, 2022, Petitioner had never injured her right shoulder, had never received medical treatment for her right shoulder and the shoulder had never adversely affected her ability to work.

The accident was reported to Petitioner's supervisor and Accident reports were entered in evidence by both parties. (Petitioner's Exhibit 1, hereinafter, "PX 1"; RX 1, 2, 3, 4).

Respondent's Report of Injury, signed by Petitioner, states, "I was walking up the stairs from the lower level of the Morris University Center to the 1st floor. As I approached the landing at the top of the first set of stairs, I tripped on the step and fell on the landing. The weight of the impact of my fall was on my right hand, arm, and shoulder." (PX 1). The Illinois Form 45, Employer's First Report of Injury states, "EE was walking up the stairs with a Tervis cup in hand, she fell landing on the Tervis cup." (RX 2).

Believing her condition would improve spontaneously, Petitioner did not seek immediate medical treatment. When her shoulder pain did not improve, she saw her personal physician, Dr. Laura Bird on April 21, 2022. Dr. Bird's office note of that date records the accident, noting, "[s]he did have a cup in her hand." Dr. Bird also recorded Petitioner's right shoulder and neck symptoms, and following a physical examination, diagnosed right shoulder pain, prescribed medication, and referred Petitioner to physical therapy. (PX 2).

Petitioner underwent therapy at Athletico and that provider's May 17, 2022, Initial Evaluation record states, "Patient is a 56 year old female that presents to therapy with complaints of right shoulder pain after she fell up the steps and landed on a cup." (PX 3). Physical therapy was instituted that day and Petitioner testified that it "somewhat" improved her condition. (PX 2).

Petitioner had a trip to Poland scheduled to occur that spring, but the time away from work did not resolve her shoulder symptoms. Therefore, she sought additional medical treatment at Multicare Specialists upon her return. A Multicare Specialists, History and Physical form was completed on August 22, 2022, that recorded, "SIUE, office support last 16 years, 3/29, walking upstairs, tripped, holding a cup in R hand, reached forward with R hand and fell onto the cup, instantly felt pain… from to shoulder and down into R. arm…". (PX 4). A possible rotator cuff tear was diagnosed, physical therapy was instituted, and an MRI of the shoulder was ordered that took place on August 25, 2022, at MRI Partners of Chesterfield. (PX 5).

Of significance, the MRI revealed: Focal full thickness tear involving the anterior half of the distal supraspinatus tendon insertion without complete tendon retraction, and; Mild acromioclavicular osteoarthritis with small subacromial bursal effusion. (PX 5).

Given the MRI findings, Multicare specialists referred Petitioner to Dr. Matthew Bradley, whom Petitioner saw on September 22, 2022. On that date, Dr. Bradley recorded, "[O]n March 29, 2022 [Petitioner] was walking up a flight of stairs with a cup of water in her hands. She tripped on the top step and fell onto her outreached right arm." Dr. Bradley diagnosed a right rotator cuff tear and recommended surgical intervention and imposed work restrictions of no lifting greater than five pounds with her injured right arm, pending surgery. Dr. Bradley opined that Petitioner's ongoing right shoulder pain and need for surgical intervention are causally related to her March 29, 2022, fall. (PX 6).

Respondent refused to authorize Dr. Bradley's surgery and Petitioner continues to work for Respondent under Dr. Bradley's restrictions.

Secondary to the medical care Petitioner received for her injuries, medical in the amount of $12,966.08 were generated by the providers referenced above. Of that amount, Petitioner's medical insurance provided by Respondent paid $561.79, Petitioner paid $107.50 out-of-pocket, and a balance of $8,881.00 remains unpaid. (PX 7).

Petitioner testified that she has constant pain in her right shoulder that radiates down her arm since the accident and experiences stiffness and numbness in her shoulder. The pain awakens her from sleep, and she wakes up every morning with numbness in her hand. She has

lost strength and range of motion in her right arm and by the end of the workday, she has lost feeling in her right hand.

Petitioner testified that she would like to undergo the surgery recommended by Dr. Bradley so she can return to "normal usage" of her shoulder and arm.

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, an injury must "arise out of" and "in the course of" employment. 820 ILCS 305/1(d). Both elements must be present at the time of the accidental injury to justify compensation. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38 44-45, 109 Ill.Dec. 166, 509 N.E.2d 1005 (1978); *Illinois Bell Telephone v. Industrial Comm'n*, 131 Ill.2d 478, 483, 137 Ill.Dec. 658, 646 N.E.2d 603 (1989); *Fire King Oil Co. v. Industrial Comm'n*, 62 Ill.2d 293, 294, 342 N.E.2d 1 (1976); *Wise v. Industrial Comm'n*, 54 Ill.2d 138, 142, 295 N.E.2d 459 (1973). Therefore, to obtain compensation under the Act, Petitioner bears the burden of proving two elements by a preponderance of the evidence: First, that the injury occurred in the course of her employment; Second, that the injury arose out of her employment. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203, 278 Ill.Dec. 70, 797 N.E.2d 665 (2003).

The phrase "in the course of employment" refers to the time, place and circumstances of the injury. *Scheffler Greenhouses, Inc. v. Industrial Comm'n*, 66 Ill.2d 361, 366-67, 5 Ill.Dec. 854, 362 N.E.2d 35 (1977). "A compensable injury occurs 'in the course of' employment when it is sustained while a claimant is at work or while [s]he performs reasonable activities in conjunction with [her] employment." *Wise*, 54 Ill.2d at 142, 295 N.E.2d 459. Here, the record is clear that Petitioner was at work when she sustained accidental injuries. She was performing activities in conjunction with her job as an Office Support Specialist, specifically preparing for an office meeting, when she tripped and fell.

The fact that Petitioner was on her way to re-fill her water container for the meeting does not take her out of the course and scope of her employment. The Personal Comfort doctrine provides that an employee, while engaged in work, may do things that are necessary and reasonable to her health and comfort and remain in the course of employment. This applies even if the act is personal in nature and done only for the benefit of the employee. *Illinois Consol. Tel. Co. v. Industrial Comm'n*, 314 ILL. App,3d, 347, 247 Ill.Dec. 333, 732 N.E.2d 49 (5th Dist. 2000). The course of employment is not broken by these personal acts. *Eagle Discount Supermarkets v. Industrial Comm'n*, 82 Ill.2d 331, 421 N.E.2d 492 (1980). Petitioner's refilling her water container to remain hydrated falls squarely into the Personal Comfort doctrine.

An injury arises out of one's employment if its origin is in a risk connected with or incidental to the employment so that there is a causal relationship between the employment and the accidental injury. *Orsini v. Industrial Comm'n,* 117 Ill.2d 38, 109 Ill. Dec. 166, 509 N.E.2d 1005 (1978). In order to meet this burden, a claimant must prove that the risk if injury is peculiar to the work ***or*** that she is exposed to the risk of injury to a greater degree than the general public. *Id*. Specifically, the Court has acknowledged the existence of three categories of risks: (1) risks distinctly associated with employment; (2) personal risks, and; (3) neutral risks which have no particular employment or personal characteristics. *Springfield Urban League v. Illinois Workers' Compensation Comm'n*, 2013 Il.App. (4th) 120219WC, 990 N.E.2d 284, 290 (4th Dist. 2013).

The first category involves risks that are distinctly associated with employment. "Employment risks include the obvious kinds of industrial injuries and occupational diseases and are universally compensable." *Illinois Institute of Technology Research Institute*, 314 Ill.App. 3d at 162, 247 Ill.Dec. 22, 731 N.E.2d 795. Examples of employment-related risks include "tripping on a defect at the employer's premises, falling on uneven or slippery ground at the work site, or performing some work-related tasks which contributes to the risk of falling." *First Cash Financial Services*, 367 Ill. App. 3d at 106, 304 Ill. Dec. 722, 853 N.E.2d 799.

"Personal risks" generally do not arise out of employment. *Illinois Institute of Technology Research institute v. Industrial Comm'n,* 314 Ill. App. 3d 149, 731 N.E.2d 795 (2000).

The third category, "neutral risks" generally do not arise out of employment and are compensable only where the employee was exposed to the risk to a greater degree than the general public. This increased risk may be qualitative, such as some aspect of employment that contributes to the risk, or qualitative, such as the number of times they are required to encounter the risk. *Springfield*, 2013 Il.App. (4th) 120219WC, 990 N.E.2d 284, 290 (4th Dist. 2013).

Walking up and down public stairs is a neutral risk shared equally by the employee with the general public. However, Petitioner's fall on the steps here is compensable for two reasons. First, Petitioner's employment placed her risk of tripping and falling on the stairs because she was quantitatively exposed to a greater risk while working, due to her work site being in the basement of the building. Her credible and unrebutted testimony establishes that she walked up and down those stairs four to six times daily while working her part-time job for Respondent, which was much more often than she traversed stairs when away from the workplace.

Second, Petitioner was carrying her Yeti water container in her dominant, right hand when she tripped and fell while walking up the stairs. It is notable that the medical records and Petitioner's testimony establishes that the hand striking the ground when she fell was still holding the water container. The fact that her hand was not free to hold the railings or otherwise avoid falling after she tripped, exposed her to a greater risk of injury on the staircase than that to which the general public is exposed. Again, that Petitioner would fill her water container to remain hydrated is reasonable and foreseeable, under the Personal Comfort doctrine.

Our Appellate Court affirmed the Commission's award of benefits in a factual situation remarkably similar to the case at bar in *Knox County YMCA v. Industrial Comm'n*, 311 Ill.App.3d 880, 725 N.E.2d 759, 244 Ill.Dec. 286 (2000). In *Knox*, the claimant's employment mandated that she attend a class. Before the class began, she stopped to pick up a sandwich and soft drink. After attending the class, the employee descended a well-lit stairwell with railings on

both sides and a runner on each step. By her own admission, the stairs were in "good shape." The employee, while holding the soft drink, the food she had purchased and her purse, fell while descending the staircase, thereby sustaining injuries. *Knox*, 311 Ill.App.3d 880, 883. Rejecting Knox's argument that the accident did not arise out of employment because the staircase was not defective, the Court acknowledged that "in and of itself, the act of descending a staircase at the employer's place of business does not establish a risk greater than that faced by the general public." However, the Court noted that because the employee held her purse and soft drink when the fall occurred, her risk of injury increased. With free hands, the Court noted, she would have been able to grab the railings and prevent the fall. *Knox*, 311 Ill.App.3d 880, 884. The same analysis applies here. But for the fact that Petitioner was holding the water container, she would have been able to prevent her fall.

For these reasons, I find that Petitioner's March 29, 2022, accident arose out of and in the course and scope of her employment with Respondent.

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

There is no legitimate dispute that Petitioner's right shoulder injury and her need for surgery was caused by and is necessitated by her March 29, 2022, work accident. Prior to her accident, she had never injured her right shoulder, had never received medical treatment for her right shoulder and the shoulder had never adversely affected her ability to work. Petitioner's treating surgeon, Dr. Bradley opined that Petitioner's ongoing right shoulder pain and need for surgical intervention are causally related to her March 29, 2022 fall. There is no evidence to contradict this opinion.

Considering all the evidence, I find that Petitioner's present condition of ill-being with respect to her right shoulder, is causally related to her work injury of March 29, 2022.

K. Is Petitioner entitled to any prospective medical care?

There is nothing in the record to contradict Dr. Bradley's opinion that Petitioner requires right shoulder surgery to cure and relive the effects of her March 29, 2022, work accident. Having previously found that a causal connection exists between the need for this surgery and Petitioner's work accident, I also find that Petitioner has not reached maximum medical

improvement and has proven her need for Dr. Bradley's proposed surgery. Respondent is therefore ordered to authorize and pay for the surgery and all diagnostic testing and treatment attendant thereto, until Petitioner reaches maximum medical improvement.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC001751
Case Name	Johnny Chadwick v. James Hardie Building Products, Inc.
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0062
Number of Pages of Decision	23
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Elizabeth Vicars
Respondent Attorney	Jim Magiera

DATE FILED: 2/1/2024

/s/ Kathryn Doerries, Commissioner

Signature

24IWCC0062

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JOHNNY CHADWICK,

Petitioner,

vs. NO: 21 WC 01751

JAMES HARDIE BUILDING PRODUCTS, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b)/8(a) having been filed by the Petitioner herein, and notice given to all parties, the Commission, after considering the issues of benefit rates and temporary total disability (TTD), and being advised of the facts and law, vacates the award of TTD and modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

The Commission affirms and adopts the decision of the Arbitrator except with respect to the award of temporary total disability. The parties stipulated on review that the Arbitrator's Decision regarding TTD in the Order contained clerical errors. Therefore, the Commission remands the case to the Arbitrator for the sole purpose of correcting the clerical errors in the Order.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed on December 13, 2023, is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of TTD

benefits is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that this matter is remanded to the Arbitrator for the sole purpose of correcting the clerical errors in the Order pertaining to the TTD award.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent authorize and pay for, pursuant to the fee schedule, the treatment recommended by Dr. Rhode, including, a total knee replacement, for Petitioner's right knee, pursuant to Section 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay directly to Petitioner all reasonable and necessary medical expenses as outlined in the decision, itemized in PX 1 pursuant to the medical fee schedule regarding Petitioner's right knee condition as provided in Sections 8(a) and 8.2 of the Act. Respondent shall receive credit for amounts paid. Respondent is entitled to apply a credit against medical paid pursuant to Section 8(j) and hold Petitioner harmless for same.

IT IS FURTHER ORDERED BY THE COMMISSION that the following medications are specifically denied: Lunesta, cyclobenzaprine, lidocaine topical cream, eszopiclone, and pregaba as outlined in the Arbitrator decision. Further, physical therapy treatment after December 30, 2021, is denied. Pursuant to Section 8.2 (e), neither Petitioner nor Respondent is responsible for the remaining visits after December 30, 2021, as the charges were unreasonable and unnecessary.

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.

February 1, 2024

O013124
42

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC001751
Case Name	Johnny Chadwick v. James Hardie Building Products, Inc.
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	20
Decision Issued By	Roma Dalal, Arbitrator

Petitioner Attorney	Elizabeth Vicars
Respondent Attorney	Jim Magiera

DATE FILED: 12/13/2023

THE INTEREST RATE FOR THE WEEK OF DECEMBER 12, 2023 5.19%

/s/ Roma Dalal, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF LASALLE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

JOHNNY CHADWICK
Employee/Petitioner

v.

JAMES HARDIE BUILDING PRODUCTS, INC.
Employer/Respondent

Case # **21** WC **001751**

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 **Dalal**, Arbitrator of the Commission, in the city of **Ottawa**, on **September 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. ☒ 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, **12/21/2020**, 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 $ **2,686.00 in 4 weeks** ; the average weekly wage was $**671.50**.

On the date of accident, Petitioner was **43** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of $**27,320.05** for TTD, $ for TPD, $ for maintenance, and $**0** for other benefits, for a total credit of $**27,320.05**.

Respondent is further entitled to a credit of $**120.77** under Section 8(j) of the Act.

ORDER

Pursuant to Section 8(a) of the Act, the Respondent shall authorize and pay for, pursuant to the fee schedule, the treatment recommended by Dr. Rhode, including, a right total knee replacement, for Petitioner's right knee.

Respondent shall pay Petitioner temporary partial disability benefits of $411.66/week for 138 weeks commencing January 14, 2021 through September 28, 2023, as provided in Section 8(a) of the Act. Respondent shall receive credit for amounts paid.

Respondent shall pay directly to Petitioner all reasonable and necessary medical expenses as outlined in the decision, itemized in PX1 pursuant to the medical fee schedule regarding Petitioner's right knee condition as provided in Sections 8(a) and 8.2 of the Act. Respondent shall receive credit for amounts paid. Respondent is entitled to apply a credit against medical paid pursuant to 8(j) and will hold Petitioner harmless for same.

Specifically, the Arbitrator denies the following medications: Lunesta, cyclobenzaprine, lidocaine topical cream, eszopiclone, and pregaba as outlined in the Arbitration Decision. The Arbitrator also denies any physical therapy treatment after December 30, 2021. Pursuant to Section 8.2(e), neither the Petitioner nor the Respondent is responsible for the remaining visits after December 30, 2021 as the charges are unreasonable and unnecessary.

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 13, 2023

Signature of Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF LASALLE)

ILLINOIS WORKERS' COMPENSATION COMMISSION

JOHNNY CHADWICK,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 21 WC 001751**
	)	**Arbitrator Dalal**
JAMES HARDIE BUILDING PRODUCTS, INC.	)	
	)	
	)	
	)	
Respondent.	)	

FINDINGS OF FACT

This matter proceeded to hearing on June 28, 2023 in Ottawa, Illinois before Arbitrator Roma Dalal on Petitioner's Immediate Hearing under Section 19(b). Issues in dispute include causation, disputed medical bills, TTD benefits of 138 weeks, and prospective medical. (Arb.Ex.1)(T.5).

Johnny Chadwick (hereinafter referred to as "Petitioner") testified he is now a 46-year-old male, roughly 43 years old on the date of accident. Petitioner was employed as a Fork truck driver in the shipping department with James Hardie Building Products (hereinafter referred to as the "Respondent"). Petitioner was employed for approximately a month prior to the injury. He noted he had to undergo a preemployment physical prior to beginning employment. (T.10). He further noted he underwent a prior right knee surgery about 15 to 20 years prior for an ACL reconstruction for which he was released full duty. (T.12). He testified he had not sought out any medical care for his right knee prior to his employment. He further noted he previously injured his left ankle in 2012. (T.13).

Petitioner testified on December 21, 2020 he tripped over banding on the ground from the pulp mill. He attempted to step over it like a lunge and his right knee went sideways and popped out. (T.14-15). He subsequently reported the injury and filled out an accident report. (T.15-16). Petitioner testified Respondent sent him to IVCH Occupational Medicine after the incident and underwent X-rays.

Petitioner then began treating with Dr. Rhode in January of 2021. (T.17). Petitioner testified he underwent an MRI and was subsequently recommended a right knee arthroscopy. He underwent a Section 12 examination with Dr. Levin and the surgery was authorized and performed on July 27, 2021. (T.17-18). After the surgery, Petitioner testified he was still in a lot of pain and felt unstable. In addition, his knee would pop out of place. (T.19). Petitioner underwent postoperative physical therapy and received pain medications. He also underwent injections to the right knee. Petitioner noted he never felt pain free or able to fully extend his knee. (T.20). Petitioner eventually underwent a second MRI on October 7, 2021 and was recommended a right total knee replacement. The right knee replacement surgery has not been

authorized. Petitioner noted his pain level is around a 5 and has issues with instability. (T.21). Petitioner testified he wishes to undergo the recommended surgery. He noted during this time, Dr. Rhode took him off work and he has remained off work (T.24). Petitioner acknowledged Petitioner's Exhibit 1 was the medical bills and receipts of out-of-pocket treatment he had received as the result of the December 21, 2020 accident. (T.23).

On Cross-Examination, Petitioner stated he can currently walk and drive his car. (T.24). He further noted he injured his ACL due to a dirt bike accident but did not remember the year of that injury. (T.25). Petitioner confirmed he has not worked since the accident date. (T.26). He further noted he was not taking prescription pain medications prior to the December 21, 2020 accident. (T.27). Petitioner was honest with Drs. Levin and Rhode. (T.27).

Medical Summary

The medical records of Dr. Terry Love were entered into evidence showing Petitioner underwent no treatment to the right knee. (PX5). The medical records of St. Margaret's Occupational Health were entered into evidence indicating Petitioner was seen on October 30, 2022 for a pre-employment physical which did not note anything. (PX4).

On December 23, 2020 Petitioner underwent X-rays of the right knee which revealed: 1) multiple loose bodies suspected in the right knee joint (osteochondromatosis); 2) moderate to severe osteoarthritis greatest in the medial and lateral joint compartments; 3) small joint effusion; and (4) prior ACL reconstruction. (PX4, p.6). At the time of the December 28, 2020 Occupational Health visit, the impression/diagnosis was a right knee sprain. *Id.* at. 28.

Petitioner first presented to Dr. Rhode at Orland Park Orthopedics on January 14, 2021. (PX3, p.248). Petitioner presented for a work-related right knee injury that occurred December 21, 2020, when he was returning from lunch and slipped and fell, indicating there was banding that was loose on the floor. He initially stepped on the banding and then attempted to step over, and as he stepped down on his right knee, it "blew out." Petitioner was recommended an MRI and was to remain off work. (PX3, p.248-249).

On February 1, 2021 Petitioner underwent an MRI of the right knee revealing postoperative changes of ACL reconstruction, minimal residual meniscal tissue involving the posterior horn/body medial meniscus, chronic, ununited fracture deformity involving the posterior aspect of the lateral tibial plateau, and tricompartmental cartilage disease right knee with regions of grade III/IV chondromalacia. (PX3, p.295, PX7).

Petitioner followed up with Dr. Rhode on February 11, 2021. Petitioner noted a continued sensation of instability with knee locking. Petitioner underwent an injection and was diagnosed with derangement of the posterior horn of the medial meniscus due to an old tear or injury. (PX3, p.243-244). Petitioner returned on February 25, 2021. Petitioner continued with mechanical symptoms, noting his knee continued to lock despite the recent injection. Petitioner was recommended arthroscopic surgery. *Id.* at 241-242. Petitioner followed up on March 11, 2011 and continued to await surgical intervention, indicating a Section 12 examination was being scheduled.

On April 26, 2021, Petitioner presented to Dr. Mark Levin for a Section 12 examination. (RX18). Dr. Levin went over Petitioner's accident, medical records and examined Petitioner. Dr. Levin diagnosed Petitioner with a chronic underlying preexisting right knee arthritis. Petitioner was having symptomatic locking of his knee secondary to loose bodies in the knee. This was strictly based on his history of having full knee range of motion prior to December 21, 2020 work injury. Dr. Levin opined the alleged work injury could have dislodged an underlying preexisting loose body to be impinging the knee joint and causing symptoms. Petitioner has had appropriate treatment. At this time a right knee arthroscopy would be appropriate. Petitioner was not at MMI. He was capable of working at sitting job only. (RX18).

Petitioner followed up on April 8, 2021, May 6, 2021, May 20, 2021, June 3, 2021, and June 17, 2021. He was awaiting surgery and the Section 12 report. (PX3, p.225-240). Petitioner returned on July 1, 2021, noting the Section 12 physician agreed with the need for an arthroscopy. *Id*. at 223. Petitioner returned again on July 15, 2021 with no changes. *Id*. at 221.

On July 27, 2021, Petitioner underwent a right knee partial lateral meniscectomy and loose body removal with a post-operative diagnoses of right knee lateral meniscus tear and multiple loose bodies greater than 5 mm. (PX3, p.361).

Petitioner followed up on August 6, 2021 and August 12, 2021 and remained off work. (PX3, p.217-219).

Petitioner began physical therapy on August 18, 2021. Petitioner was to undergo therapy two times a week for four weeks. (PX3, p.214). Petitioner underwent therapy throughout August 2021. Petitioner returned to Dr. Rhode on August 26, 2021 and was to continue with therapy and remained off work. (PX3, p.207-208). Petitioner remained off work throughout September 2021 undergoing therapy. At the time of the September 20, 2021 physical therapy session, it was noted Petitioner stated his right knee "gave out" and buckled while he was descending the stairs outside of his home that morning. (PX3, p.191). On September 23, 2021, Petitioner underwent a right knee injection. Petitioner was recommended a repeat MRI. (PX3, p.187-188). Petitioner continued therapy in October 2021. (PX3, p.181).

On October 7, 2021, Petitioner underwent a right knee MRI which was suggestive of ACL impingement; interval increase in signal involving the far posterior aspect of the posterior horn medial meniscus; findings may represent postsurgical change or retear; radial tear in the anterior horn body junction lateral meniscus; and tricompartmental degenerative osteoarthritis. (PX3, p.298).

Petitioner followed up with Dr. Rhode on October 21, 2021. Petitioner continued to experience significant pain, stating he "cannot live like this." The MRI demonstrated post-traumatic degenerative changes. Dr. Rhode noted Petitioner had undergone an intraarticular steroid injection with temporary relief. Based on the same, he was recommended a total knee arthroplasty. (PX3, p.169-170). Petitioner continued therapy in November 2021. (PX3).

Petitioner followed up on November 18, 2021. Petitioner continued to experience significant pain. Petitioner was to undergo a Section 12 examination. He was awaiting a TKA, was off duty and was to follow back post-op or four weeks. Petitioner would also attempt topical lidocaine to address his nociceptive pain. (PX3, p. 148).

On December 9, 2021, Petitioner presented for a second section 12 examination with Dr. Mark Levin. Dr. Levin reviewed updated medical records and examined Petitioner again. Dr. Levin diagnosed Petitioner with subjective report of knee pain. He noted there may have been a small lateral meniscal tear. Petitioner's present condition was coming from underlying chronic tricompartment arthritis and the need for any total knee arthroplasty would have been present irrespective of the alleged work injury of December 21, 2020. Petitioner's work injury did not aggravate or accelerate the progressive deteriorating condition. Dr. Levin noted Petitioner was a candidate for a right total knee arthroplasty for his underlying chronic preexisting tricompartment arthritis which was present prior to the December 21, 2020 injury. For the December 21, 2020 injury, Petitioner was at maximum medical improvement. At this point, Petitioner would be capable of working in a sitting job only. From his underlying knee condition, Petitioner may have difficulty being on uneven surfaces or doing repetitive stair climbing. These restrictions are related to his non-work-related condition not his current work injury. Lastly, Dr. Levin noted he cannot substantiate the ongoing need for Norco. (RX19).

Petitioner continued therapy in December of 2021. (PX3). Petitioner followed up with Dr. Rhode on January 13, 2022 noting pain. Dr. Rhode noted Petitioner's symptomatology was made significantly worse secondary to his work-related injury. In Dr. Rhode's opinion he had sustained an interval change to his condition secondary to his work-related injury. *Id.* at 114-115.

Petitioner continued to follow up with Dr. Rhode on January 27, 2022, February 10, 2022, February 24, 2022, March 10, 2022 (injection provided that day), March 24, 2022, April 7, 2022, April 21, 2022, May 5, 2022, and May 19, 2022. During the June 2, 2022 visit Petitioner noted he also had left lower extremity pain, noting a medial gastric strain. (PX3, p.54). Petitioner continued to follow up on June 16, 2022, June 28, 2022, July 14, 2022, July 28, 2022, August 11, 2022, August 25, 2022, September 8, 2022, September 22, 2022 (injection provided that day), October 22, 2022, November 7, 2022, November 17, 2022, and December 1, 2022. On December 15, 2022, Dr. Rhode recommended a medial unloader brace in hopes of lessening his severe symptoms. *Id.* at 21-22. Petitioner returned on December 29, 2022, January 26, 2023, February 23, 2023, March 23, 2023, May 18, 2023, June 15, 2023, July 13, 2023, August 10, 2023, and September 7, 2023 waiting for authorization of surgery. Petitioner remained off work and was following up accordance with the prescription monitoring program. (PX3, p.3-4).

Petitioner underwent therapy from January through June 2022, which did not show improvement. (PX3).

Deposition Testimony

Dr. Blair Rhode

The parties proceeded with the evidence deposition of Dr. Blair Rhode on July 25, 2022 and May 3, 2023. (PX8 and PX9). Dr. Rhode is an orthopedic surgeon with a subspeciality in sports medicine. (PX8, p.11). Dr. Rhode testified he began treating Petitioner in January 2021 due to a work-related right knee injury on December 21, 2020 necessitating surgery. He subsequently underwent postoperative therapy and was progressing in a usual fashion. *Id*. at 13. Dr. Rhode administered an injection to the right knee on September 23, 2021 because Petitioner continued to be symptomatic. Dr. Rhode also ordered a new MRI. The MRI showed the ACL continued to be intact but there was moderate to significant chondral loss. At that point, they discussed his options. He could live with the symptoms or consider a total knee

arthroplasty. *Id*. at 14-15. Petitioner indicated he wanted to proceed with surgical intervention. Since Dr. Rhode made a recommendation for another surgery, he continued to see him on a regular basis and kept him off work. Dr. Rhode advised he continued to prescribe prescription medication for Petitioner which are medically necessary for his condition. *Id*. at 15. He further noted Petitioner continued therapy while waiting for surgery. Dr. Rhode indicated they were in a palliative stage waiting for treatment so trying to do things to maintain some level of function for Petitioner. *Id*. at 16. Dr. Rhode testified he reviewed the second IME report from December 2021 from Dr. Levin who opined Petitioner had preexisting degenerative joint disease. Dr. Rhode noted Petitioner denied having preexisting symptoms and it was his opinion Petitioner sustained an interval change secondary to his work-related injury. *Id*. at 17. Lastly, he noted Petitioner's condition was worsening and to a reasonable degree of medical and orthopedic certainty, the cause for Petitioner's current condition and need for surgical intervention is related to the work-related accident. *Id*. at 18.

On Cross-Examination, Dr. Rhode testified he was not sure how Petitioner came under his care. (PX8, p.20). Dr. Rhode acknowledged Petitioner had undergone a prior ACL reconstruction to the right knee. *Id*. at 22. Dr. Rhode further noted in his opinion Petitioner had a prior medial meniscectomy as well. *Id*. at 23. Dr. Rhode testified based on the December 21, 2020 fall he believed Petitioner sustained a lateral meniscus tear. *Id*. at 24. The working diagnosis changed from medial to lateral because intra-operatively Petitioner had a lateral meniscus tear. Relative to what he saw medially, he certainly could have aggravated his medial compartment, but there was no evidence of a new onset medial meniscus tear. *Id*. at 24-25. Dr. Rhode further noted he did not know if Petitioner fell to the ground when he fell. *Id*. at 27. Dr. Rhode confirmed Petitioner underwent surgery at his facility and had surgery at his surgical center. Dr. Rhode testified he believed Petitioner had preexisting tricompartment arthritis before the accident. *Id*. at 28. When asked whether he believed that the need for a total knee replacement was attributable to any specific compartment in the knee, Dr. Rhode responded that based on Petitioner's sequential exams with his primary complaint of medial joint line tenderness, he thought the medial compartment was the most symptomatic compartment. *Id*. at 29.

The parties proceed with a second supplemental deposition of Dr. Blair Rhode on May 3, 2023. (PX9). Dr. Rhode noted since his previous deposition either he or his PA, Mark Bordick, had seen Petitioner on a consistent basis. *Id*. at 6. Dr. Rhode noted Petitioner's condition has worsened in his symptomology. In addition, Dr. Rhode had to perform a subsequent injection on September 9, 2022 providing temporary relief. *Id*. at 6-7. Dr. Rhode continued to believe Petitioner should remain off work and the need for the recommended right total knee arthroplasty is causally related to the work accident that he described back in December 2020. Dr. Rhode further testified he recommended a medial unloader brace which was reasonable and necessary and causally related to the work injury. *Id.* at 8. Dr. Rhode testified it was his opinion that the various prescription medications that his office had been prescribing and dispensing to Petitioner, including Diclofenac, Meloxicam, Norco, and Cyclobenzaprine, were causally related to the work injury, and keeping him in a palliative situation. *Id*. at 8-9.

Dr. Rhode testified that his office records dated August 16, 2021, August 31, 2021, and November 3, 2021 all specifically reference the responses that were prepared related to the utilization reviews that were performed. (PX9, p.10). He testified the various lab tests including the urine drug screen performed on February 25, 2021 were reasonable and necessary and causally related to the work injury because the official disability guidelines recommend period, random urine toxicology screening in a patient that has been chronically or acutely maintained on opioids. *Id*. at 10-11. As to the various medications that were

prescribed and dispensed to Petitioner on June 30, 2021 and July 26, 2021, Dr. Rhode testified those medications – including Cyclobenzaprine, Norco and Odansetron, were in anticipation of surgery. *Id*. at 12. He testified that in his opinion those medications were reasonable and necessary for Petitioner's anticipated post-operative recovery.

On Cross Examination, Dr. Rhode noted Petitioner's intake on preexisting medications was blank. (PX9, p.14). Dr. Rhode further indicated he was the sole owner of South Chicago Surgical Centers. *Id*. at 14. He noted he had no final relationship to Bob Rady, Vertez Anesthesia. Dr. Rhode noted all the prescriptions prescribed to Petitioner are out of the pharmacy that he owns at Orland Park Orthopedics. *Id*. at 15. He testified he set pricing for various codes on testing and topical medications. *Id*. at 16. Dr. Rhode testified as to the high volume of his practice and his record keeping. He stated he had to run a high-volume practice. He noted that to document nonsuppurative neuropathic spasm on every-doing pain score levels and all of that would be an impossibility. *Id.* at 20.

Dr. Mark Levin

The parties proceeded with the evidence deposition of Dr. Mark Levin on September 14, 2022. (RX21). Dr. Levin testified he examined Petitioner on April 26, 2021, took a history of the accident, and reviewed medical records. (RX21, p.7-8). Petitioner had told him that he had not seen any doctors for his right knee for 15 to 20 years. *Id*. at 12. Dr. Levin testified he took x-rays on the date of the evaluation which showed tricompartment arthritis chronically which was long standing and had been going back to when he injured his ACL 20 years ago. It also showed multiple loose bodies in both the posterior and intercondylar notch area. Dr. Levin testified his physical exam of Petitioner aligned with the findings of the x-ray. Petitioner had lack of motion on extension which was consistent with the loose bodies impinging the joint. Dr. Levin testified Petitioner had tricompartment arthritis but was now complaining of a new onset of a locked knee on extension from the long-standing loose bodies. *Id*. at 13-14. Dr. Levin also reviewed the MRI. After review of the records and physical examination, Dr. Levin diagnosed Petitioner with long-standing pre-existing severe arthritic changes of the knee, and was status post ACL, with long-standing multiple loose bodies. He testified that when he evaluated Petitioner, he was complaining that he could not fully extend his knee which was consistent with those loose bodies moving around and getting caught in the joint. *Id*. at 17-18. He testified if Petitioner was previously able to fully extend his knee, then after the accident the loose bodies moved, that could be considered a dislodging of a loose body that became symptomatic and that it would be appropriate to address that to try to remove any impinging loose bodies. He recommended an arthroscopy with removal of the loose bodies. He had recommended that photographs be taken intraoperatively but that the operative report is also used. He did not feel that Petitioner could return to full duty work at that time and felt he was only able to do a sit-down job with no repetitive standing, bending, swatting, climbing, or walking pending surgery. *Id.* at 18-19.

Dr. Levin also testified he authored another report dated December 9, 2021. At the time, he performed a physical exam of Petitioner and took an interim history from him since his last evaluation. Petitioner told Dr. Levin Dr. Rhode was now recommending a right total knee arthroplasty. (RX21, p.19-20). Dr. Levin testified the only medication Petitioner was on that was used to treat the pain in the knee at the time of his evaluation on December 9, 2021 was Norco. *Id*. at 21. Dr. Levin examined Petitioner, took another x-ray showing tricompartment arthritis, and reviewed the October 7, 2021 MRI. *Id.* at 21-22. Dr. Levin reviewed the medical records and the July 27, 2021 surgical report. Dr. Levin testified prior to this accident Petitioner had undergone surgery for an ACL reconstruction along with a partial medial

meniscectomy. He felt the injury over the 20 years did progress to the point where now he has tricompartment arthritis of the knee. He also testified Petitioner had chronic loose bodies of the knee which he felt would date back to the previous injury of 20 years prior. He reiterated he did not feel the MRIs showed a post traumatic condition dating from December of 2020, due to the fact there was no bony edema in either MRI. His diagnosis of Petitioner was long-standing end stage pre-existing tricompartment arthritis. *Id.* at 32-34. He further stated if Petitioner was symptomatic at this point, he would require a total knee arthroplasty, but he did not feel it was from the accident of December 21, 2020. He testified the only diagnosis and treatment that would be related to the work accident would be surgery to remove the loose bodies. He felt any other surgeries would be done to any other portions of the knee are not related. He did not feel the lateral meniscus tear and repair was work related because Petitioner had no symptoms on the lateral side of his knee. Dr. Levin testified regarding the lateral meniscus repair that Petitioner did not have a problem with the same. In addition, Dr. Rhode superficially cut off a frayed tear, but Dr. Levin did not feel it was from a traumatic episode that occurred in December of 2020. Dr. Levin reiterated Petitioner needed a total knee replacement, and felt he needed it before the injury in December of 2020. He did not feel it was caused or aggravated by the accident of December 21, 2020. *Id.* at 34-36. Petitioner was at maximum medical improvement with no work restrictions. *Id*. at 37-38.

On Cross Examination, Dr. Levin testified 20% of the individuals he sees in his office are for IMEs. Dr. Levin admitted he reviewed the October 30, 2020, pre-employment physical of Petitioner noting no subjective issues with his knees, no issues with walking, bending, squatting, stooping, or climbing. (RX21, p.44). Dr. Levin also admitted all the records before the accident going back to 2010 did not reference any right knee complaints, although Dr. Levin stated one record from 2018 indicated Petitioner was using a cane. *Id*. at 45. Dr. Levin was then cross-examined regarding that record and admitted that it was his interpretation of Petitioner using a cane. There was simply a hand-written four-letter word that could have also been interpreted to be shorthand for cancelled on the April 11, 2018 note from Dr. Love. No other notes on that page were written regarding any exam done on that date. *Id*. at 47-48. The Doctor basically said the need for a total knee replacement came at the point that a patient feels they cannot function, and that is an appropriate time to do a knee replacement. *Id* at. 50.

Utilization Review – Dr. Scott Tucker

Dr. Tucker issued a utilization review report dated September 16, 2021. (RX1, p.2). He non-certified the medications of meloxicam, Rabeprazole, Norco, Cyclobenzaprine, Eszopicione, Pregaba, and Ondansetron after applying the ODG Guidelines. (RX1).

The parties proceed with the evidence deposition of Dr. Scot Tucker on July 25, 2023. (RX3). In his deposition Dr. Tucker testified that this was a basic outpatient 15-minute surgery. As such there was no need for all these different medications. Most patients are able to tolerate the pain with some over the counter anti-inflammatories and Tylenol. In his opinion, there was no real need for all these multiple medications including a sleep aid and a muscle relaxant, a nerve pill or nausea medicine or proton pump inhibitor for stomach ulcers. (RX1, p.17). On Cross-Examination, Dr. Tucker noted he did not provide the summary. *Id*. at 27. He also agreed that a treating physician is typically in the best position to determine physician care. *Id*. at 29. He further noted if Petitioner had meloxicam prior to June 3, 2021 with a positive response, he would have potentially certified that medication. *Id*. at 30. He further noted that the FDA approved the use of ondansetron for postoperative use. *Id*. at 31. He noted people usually do not have trouble with sleeping after surgery. Lunesta is typically prescribed for individuals with insomnia. *Id*. at 32.

Utilization Review – Dr. Chafik

On May 10, 2023 Dr. Chafik issued a utilization review report non-certifying meloxicam, Rabeprazole, Norco, cyclobenzaprine, Eszopiclone, pregaba, and Ondansetron. (RX2, p.2).

The parties proceed with Dr. Dara Chafik's deposition on July 12, 2023. (RX6). Dr. Chafik testified he is a board-certified orthopedic surgeon with a specialty in the shoulder and elbow. (RX6, p.6-7). He testified all the requested medications were submitted for the right knee pain diagnosis. *Id*. at 12. All the medications were denied. The first medication Meloxicam was denied as the records did not indicate the presence of acute musculoskeletal injury, osteoarthritis, or rheumatoid arthritis. *Id*. at 12. Rabeprazole was denied because there was no history of gastroesophageal reflex disease or any GI issues. *Id*. at 14. Norco was denied because the records did not indicate a functional response to prior use of the requested medication or appropriate monitoring. *Id*. at 14. The next medication is cyclobenzaprine which was denied as there was no presence of muscle spasms on physical exam. The next medication was Lunesta which was denied as there not was no documentation of difficulty sleeping. *Id*. at 15. Ondansetron was anti-nausea medication which was denied as there was no documentation of postoperative nausea and vomiting. Dr. Chafik testified he utilized the ODG guidelines in making his determination. *Id*. at 16. He further noted that he was not sure of what Petitioner was taking prior to the June 3, 2021 office visit. *Id*.at 32. Dr. Chafik noted that looking at the medications, it would be very unusual if he is having orthopedic surgery to prescribe most of these medications. The only medication that may be reasonable is the Norco and maybe the Meloxicam. Anything else is unusual to include the neuropathic medication, sleeping pill along with narcotic, along with a muscle relaxer. Dr. Chafik noted that was dangerous. *Id*. at 34-35.

On Cross-Examination, Dr. Chafik testified he was not licensed to practice in Illinois. (PX6, p.18). He testified all the medications were denied for the diagnosis of chronic right knee pain. (RX2, p. 13). He testified he did not understand why all these medications were prescribed like neuropathic medication, a sleeping pill, along with the narcotic, along with the muscle relaxer. He noted it was dangerous. (RX2, p. 35).

Utilization Review – Dr. Ayyar

On January 4, 2022 Dr. Ayyar issued a utilization review report non certifying lidocaine and diclofenac after applying the ODG guidelines. (RX7, p.2). He also issued A utilization review report dated July 20, 2021 which noncertified laboratory testing ordered and resulted on February 25, 2021. (RX7).

The parties proceeded with Dr. Ayyar's evidence deposition on June 29, 2023. Dr. Ayyar is a board-certified occupational medicine physician. (RX9, p.7). The Doctor testified that he did not feel that the drug testing was medically necessary because there was no mention if the drug testing was done randomly, there was no complete medication list that was attached, and there was no comment on the results of the drug test in the particular chart note. (RX9, p.12-13). In regards to the topical lidocaine and topical diclofenac they were not medically necessary. (RX9, p.15). With respect to the topical Lidocaine, he testified that this medication should only be used for neuropathic pain. He further testified that neuropathic pain is defined as pain arising from a nerve. The doctor further testified that if the provider felt that the claimant's pain was neuropathic in nature, that he should have first tried anti-neuropathy drugs such as Tricyclic antidepressants or anti-epilepsy drugs. With respect to the topical Diclofenac, the Doctor testified that it is a topical NSAID which is typically used for the treatment of arthritis in small joints considered Meno-topical treatment such as the knees, hands, elbows, or feet. The doctor's main issue of

dispute was that the claimant was already using an oral NSAID, Meloxicam. It was his opinion that the combination of both was redundant. He felt that the claimant should use one or the other, not both. The Doctor further testified that, based on the December 2, 2021, chart note in which the claimant presented with complaints of neck and shoulder pain, that it would not be considered appropriate to use Diclofenac for those. The Doctor further testified that based on ODG guidelines, the amount of formulation was improper. He felt the guidelines indicated that only a 1% formulation of Diclofenac was appropriate. (RX9, p.16-19).

On Cross-Examination, he noted he performed these medical reviews daily. (RX9, p.23). Utilization review was his primary professional activity. (RX9, p.24). Dr. Ayyar agreed that physicians can disagree on a course of treatment. He also admitted that the guidelines now allow for Diclofenac in a 1.5% formulation. *Id*. at 34. With respect to his opinion that a physician should not use topical Lidocaine as a first means of treatment for neuropathic pain, he did admit that he only reviewed one chart note regarding the right knee which was from November 18, 2021. He was not provided with any information and has no information regarding what was prescribed previously to the claimant. *Id*. at 39.

Utilization Review – Dr. Arsht

On October 11, 2021, Dr. Arsht issued a Utilization Review report non-certifying laboratory testing. (RX10). This was noncertified because the list of medication Petitioner may have been on was not obtained as a part of the drug test. (RX10).

The parties proceeded with the evidence deposition of Dr. Steven Arsht on June 27, 2023. (RX12). On Cross-Examination, Dr. Arsht testified he was unaware Petitioner was prescribed Norco. (RX12, p.26). If he had known that and reviewed the notes referencing the prescription for Norco it was possible it would change his determination. (RX12, p.27).

Utilization Review – Dr. Makda

On August 23, 2021, Dr. Makda, issued A utilization review report non-certifying meloxicam, rabeprazole, norco, cyclobenzaprine, eszopiclone, pregaba, and ondansetron. (RX13). In response to the non-certification an appeal letter dated August 16, 2021 was issued from Dr. Rhode's office indicating the use of meloxicam, proton pump inhibitor, Norco, flexeril, lunesta, Zofran, and Lyrica for issued secondary to the fact that the claimant underwent general anesthesia with intraoperative treatment with intravenous opioids followed by postoperative treatment with oral opioids. In addition, Dr. Rhode prophylactically treated with oral ondansetron to prevent postoperative nausea and vomiting. Eszopiclone was prescribed for acute sleep disturbance. Muscle relaxants were noted not to be only intended for low back pain. *Id.* at 3. In response as to the meloxicam prescription the report indicated that the prior denial indicated that documentation did not clearly identify the efficacy of the prescribed medication. It was also unclear if Petitioner had any functional benefit and decrease in pain with the requested medication. *Id.* at 6. In response to the prescription for Rabeprazole the report indicated that there was no documented history of gastrointestinal bleeding or any risk factors increasing the probability of gastrointestinal complications secondary to unsaid use. *Id.* at 6. In response to the Norco and Narcosoft prescription the report indicated ODG generally recommends over the counter laxatives as a first line treatment for opioid induced Constipation versus newer specifically targeted opioid induced constipation medications. It was noted that in this case there was no documentation of complaints of constipation or a plan including

initiation of opioid therapy. *Id.* at 6. In response to the cyclobenzaprine prescription, it was noted there was no medical report corresponding to the requested date of service on July 26 2021 and there was no documentation of muscle spasm or concurrent is with therapy. *Id.* at 7. In response to the Pregaba prescription the report indicated there was no documentation of a diagnosis with evidence of neuropathic ideology and therefore Petitioner did not meet the criteria. *Id.* at 7. Lastly, in response to the prescription of Ondansetron, report indicated without evidence of nausea the anti-emetic medication was not medically necessary. *Id.* at 7.

The Parties proceeded with the evidence deposition of Dr. Junaid Makda on May 25, 2023. (RX15). Dr. Makda testified he is a board-certified orthopedic surgeon that specializes in hip and knee replacements and licensed to practice in Illinois. (RX15, p. 7-8). He authored a report dated August 23, 2021, with respect to the medical necessity regarding a request for the following medications: Meloxicam, Rabeprazole, Norco, Cyclobenzaprine, Eszopiclone, Pregabalin, and Ondansetron. He testified he reviewed some office visits from Dr. Rhode, information provided to him from Travelers, a care review report of Dr. Mauro, and claim file information from Health Comp. He also testified that the Utilization Review was appealed by Dr. Rhode's office in a letter dated August 16, 2021. (RX15, p.11-12). Based on his review, he felt the medications were non-certified. With respect to the Meloxicam, he stated he was aware Petitioner had used Meloxicam before but was not provided the information to know the efficacy of the medication for Petitioner before allowing it to be prescribed again. With respect to Rabeprazole, he also needed to see if Petitioner had any prior gastrointestinal issues. Regarding the Cyclobenzaprine, he was not provided any documentation of whether Petitioner was having muscle spasms. Regarding the Eszopiclone, he had no information provided regarding any sleep disturbances Petitioner had. Regarding the Pregabalin, he was not provided any information Petitioner was having neuropathic pain. Finally, regarding the Ondansetron, he testified it was used primarily for nausea and vomiting and he was not provided any history of those issues with Petitioner. (RX15, p.13-14). The doctor also testified that he authored a November 18, 2021, report regarding laboratory testing. He testified he reviewed two office notes of Dr. Rhode, a lab report, and an appeal request by Dr. Rhode. His rational for non-certifying the laboratory testing was that he had no proof that there was a point of contact screening prior to the request for those tests. (RX15, p.16).

On Cross Examination, Dr. Makda testified he does 2 to 3 Utilization Reviews per day, and he receives between $25 and $100 per report. (RX15, p.21-22). He also admitted physicians can disagree on the course of recommended treatment for a patient. (RX15). With respect to his August 23, 2021 report, he admitted antiemetics and pain medications are prescribed prophylactically in anticipation of surgery. (RX15, p.29).

The TTD Payout was entered into evidence at the time of arbitration as Respondent's Exhibit 16. (RX16). The Medical Payout entered into evidence at the time of arbitration as Respondent's Exhibit 17. (RX17).

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 his testimony to be persuasive. The Arbitrator compared Petitioner's testimony with the totality of the evidence submitted and finds the witness reliable. While the Arbitrator did note some inconsistencies, the Arbitrator recognizes that there was no evidence to contradict his testimony.

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

The Findings of Fact and Conclusions of Law, as stated above, are adopted herein. To obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in her ensuing injuries. A work-related injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. "A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." *International Harvester v. Industrial Com.*, 93 Ill. 2d 59, 63 442 N.E.2d 908 (1982). Prior good health followed by a change immediately following an accident allows an inference that a subsequent condition of ill-being is the result of the accident. *Navistar International Transportation Co. v. Industrial Commission*, 315 Ill. App. 3d 1197, 1205, 248 Ill. Dec. 609, 734 N.E.2d 900 (2000).

When a preexisting condition is present, a claimant must show that "a work-related accidental injury aggravated or accelerated the preexisting [condition] such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of the preexisting condition." *St. Elizabeth's Hospital v. Workers' Compensation Commission*, 864 N.E.2d 266, 272-273 (5th Dist. 2007). Even when a preexisting condition exists, recovery may be had if a claimant's employment is a causative factor in his or her current condition of ill-being. *Sisbro, Inc. v. Industrial Commission*, 797 N.E.2d 665 (2003). Allowing a claimant to recover

under such circumstances is a corollary of the principle that employment need not be the sole or primary cause of a claimant's condition. *Land & Lakes Co. v. Industrial Commission*, 834 N.E.2d 583 (2d Dist. 2005).

In the instant case, the Arbitrator finds Petitioner's current condition of ill-being is causally related to his work accident. Petitioner testified he was working full duty in regards to his right knee. Petitioner testified he had a preexisting right knee injury 15 years ago. Petitioner had not sought out any medical treatment for the previous 15 years prior to the work accident. In addition, Petitioner underwent a pre-employment physical a few month prior to the accident and did not document any right knee pain or complaints. The Arbitrator places no weight on this preexisting injury given the gap in time and lack of medical records and/or complaints. Based on the same, the chain of events presented in this case show Petitioner's right knee became symptomatic after his work accident. There is no evidence that prior to Petitioner's work accident, he received any medical treatment or required to take time off from work. There was no evidence introduced about Petitioner's pre-accident work performance not being satisfactory. There was no evidence presented of intervening or subsequent injuries to the right knee that could explain Petitioner's injury and current condition. The Arbitrator finds Petitioner met his burden of proof by a preponderance of the evidence that his condition of ill-being was causally related to his work accident based on the chain of events in addition to the medical opinions contained in the record giving causal connection.

The Arbitrator finds Respondent agreed Petitioner sustained a compensable accident on December 21, 2020. Respondent agreed as a result of the work accident, Petitioner required medical treatment and ultimately sustained a right knee strain reaching MMI based on Dr. Levin's opinion. The primary issue at Arbitration is whether treatment subsequent to date, consisting of the total knee replacement for Petitioner's right knee as recommended by Dr. Rhode is related to the work accident. The Arbitrator finds Petitioner's current condition of ill-being in his right knee is causally related to his December 21, 2020 work injury.

Petitioner injured his right knee in an undisputed work accident on December 21, 2020. He has treated consistently with his physicians since that time but still has significant pain in his right knee. Petitioner has undergone physical therapy, diagnostic testing, surgery, and injections, but his symptoms in the right knee remain present. In evaluating the opinions of Dr. Rhode and Dr. Levin, the Arbitrator finds that the opinions of Dr. Rhode are more persuasive. Dr. Rhode testified that the need for the knee replacement was related to the accident. He testified that based on Petitioner's sequential exams with his primary complaint of medial joint line tenderness since the accident, he thought that the medial compartment was the most symptomatic compartment that was the cause of the ongoing pain and need for the knee replacement. When Dr. Rhode recommended the knee replacement on October 21, 2021, Petitioner had significant limitations on his ability to function, including the inability to walk more than 2 blocks. This was less than a year after the accident. His medial knee pain complaints were consistent all through this time.

Dr. Levin, Respondent's expert, testified Petitioner would have needed the knee replacement even before the date of accident. He then contradicted himself and testified that "the need for a total knee replacement comes at the point that the patient feels they cannot function, and that is an appropriate time to do a knee replacement." Petitioner was functioning without symptoms or limitations to his knee before the accident. He also testified that his opinion was based on the lack of progression of the arthritis on the

two MRIs. However, the Arbitrator notes it was not until after the accident that his underlying arthritis became symptomatic. Under Illinois law, the courts have stated that it is well settled that the IWCC may infer causation from a sequence of lack of symptoms prior to the accident. *Steak & Shake v. IWCC,* 2016 IL App. (3rd) 150500WC. The courts have also held that despite no objective evidence of change between MRIs, the need for surgery can be accelerated when the injured worker was able to work full duty before an accident. *Schroeder v. IWCC,* 2017 IL App. (4th) 160192WC.

The Arbitrator finds Petitioner's right knee was asymptomatic prior to this injury. Subsequent to the injury, Petitioner had consistent complaints of pain in his knee through the time that Dr. Rhode recommended surgery in October of 2021, less than a year after the accident. At no time did Petitioner's symptoms resolve. The records are clear that Petitioner not only had pain, but had lack of motion, instability, and significant swelling during this time period. Based on the evidence set forth above, the Arbitrator finds Petitioner's current condition of ill-being in his right knee is causally related to his work accident of December 21, 2020.

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

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

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

The Arbitrator notes Petitioner submitted a substantial amount of medical bills into evidence. In regards to the prescription medication, Dr. Rhode prescribed an array of medications. Petitioner testified he took pain medications after his knee surgery. (T.20). Petitioner further clarified he takes pain medication, Meloxicam and a medication that starts with an R. (T.27-28).

In reviewing the URs , the medical testimony and Petitioner's testimony, the Arbitrator finds that the prescriptions prescribed were excessive in nature. The Arbitrator also finds it significant that Dr. Rhode has a vested financial stake in the pharmacy. The Arbitrator does place weight on the URs submitted into evidence. Based on the same, the Arbitrator finds the following medications unreasonable Lunesta, cyclobenzaprine, lidocaine topical cream, eszopiclone, and pregaba. In denying the Lunesta, the Arbitrator agrees there is no documentation of Petitioner's inability to sleep. Dr. Chafik denied Lunesta as there not was no documentation of difficulty sleeping. In addition, the Arbitrator notes Dr. Chafik denied cyclobenzaprine as there was no presence of muscle spasms within the medical records. Again Dr.

Chafik noted that looking at the medications, it would be very unusual if Petitioner is having orthopedic surgery to prescribe most of these medications. The only medication that may be reasonable is the Norco and maybe the Meloxicam. Anything else is unusual to include the neuropathic medication, sleeping pill along with narcotic, along with a muscle relaxer. Dr. Chafik noted that was dangerous.

Dr. Makda agreed with several of the denials based on the same reasoning. Regarding the Cyclobenzaprine, he was not provided any documentation of whether Petitioner was having muscle spasms. Regarding the Eszopiclone, he had no information provided regarding any sleep disturbances Petitioner was having. Regarding the Pregabalin, he was not provided any information Petitioner was having neuropathic pain. Lastly the Arbitrator agrees with the denial of the topical lidocaine as not medically necessary. The Arbitrator finds the UR physicians argument persuasive that this medication should only be used for neuropathic pain. The Arbitrator notes Petitioner is having an orthopedic issue necessitating a total knee replacement. As such the Arbitrator agrees with the denial of the topical lidocaine based on Dr. Ayyar's testimony. The Arbitrator further notes Dr. Rhode's medical records do not support these medications as there were no documented complaints from Petitioner within the records.

The Arbitrator finds the medications of meloxicam, Rabeprazole, Norco, and Ondansetron reasonable and necessary. The Arbitrator notes Dr. Tucker noted if Petitioner had meloxicam prior with a positive response, he would have potentially certified that medication. He further noted that the FDA approved the use of ondansetron for postoperative use. Although Dr. Chafik denied Meloxicam, the Arbitrator notes this medication is utilized for osteoarthritis, a condition Petitioner was documented to have. In addition, Petitioner testified he utilized pain medication, Norco, as well as the medication starting with R. The Arbitrator is interpreting this medication as Rabeprazole. Lastly, the FDA certified Ondansetron prophetically prior to surgery. Dr. Rhode confirmed that he prescribed this in the same manner. Dr. Chafik also noted Norco and possibly the Meloxicam could be reasonable. The Arbitrator finds all the lab testing to be reasonable and necessary as Petitioner was documented to be on narcotics. In addition, the Arbitrator finds the topical Diclofenac to be reasonable and necessary as this medication is typically used to treat arthritis in the knees. The Arbitrator finds it is reasonable to try this medication.

As such, the Arbitrator denies the following medications: Lunesta, cyclobenzaprine, lidocaine topical cream, eszopiclone, and pregaba.

In addition, the Arbitrator has reviewed the physical therapy records. The Arbitrator notes Petitioner was prescribed surgery on October 21, 2021. There is no documentation of any continued benefit in therapy December 2021. Petitioner underwent therapy from January 2022 through June 2022 with no improvement. Moreover, the therapist did not document short term or long-term goals. Petitioner testified he had limited improvement and wanted to proceed with surgery. The Arbitrator notes therapy was not helping as surgery was indicated. The Arbitrator compared the January 10, 2022 therapy note (PX3, p.116) to the June 15, 2022 therapy note (PX3, p.48), and did not see any improvement. In fact, the notes are identical to one another. The Arbitrator finds continued physical therapy, with a pending surgical recommendation, is excessive and unreasonable. Based on the same, the Arbitrator finds therapy through December 30, 2021 reasonable and necessary. The remaining visits are unreasonable and unnecessary.

Pursuant to Section 8.2(e), neither the Petitioner nor the Respondent is responsible for the remaining visits after December 30, 2021 as the charges are unreasonable and unnecessary.

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

With respect to Issue (K) whether Petitioner is entitled to any prospective medical care, the Arbitrator finds the follows:

The Arbitrator incorporates by reference the above Findings of Fact and refers to them by reference herein. Regarding the issue of whether Petitioner is entitled to any prospective medical care, following consideration of the testimony and evidence presented, the same is incorporated by reference, it is found Petitioner's condition is causally related to his work accident and has not stabilized or otherwise reached MMI. Petitioner seeks prospective care in the form of a right total knee arthroplasty as recommended by Dr. Rhode.

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

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

In order to prove entitlement to TTD benefits, a claimant must establish not only that he did not work, but that he was unable to work. *Sharwarko v. Illinois Workers' Compensation Comm'n*, 2015 IL App (1st) 131733WC. An employee is temporarily totally disabled from the time that an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of his injury will permit. *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d 107, 118 (1990). A claimant reaches MMI when he is as far recovered or restored as the permanent character of his injury will permit. *Nascote Industries v. Industrial Comm'n*, 353 Ill. App. 3d 1067, 1072 (2004). Factors to be considered in determining whether a claimant has reached MMI include whether he has been released to return to work, medical evidence, testimony concerning the claimant's injury, the extent of his injury, and whether the injury has stabilized. *Nascote Industries*, 353 Ill. App. 3d at 1072. The period of time during which a claimant is temporarily and totally disabled is a question of fact to be determined by the Commission, and its resolution of the issue will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Archer Daniels Midland*, 138 Ill. 2d at 119-20.

Petitioner is claiming TTD benefits beginning on January 14, 2021 through the trial date, September 28, 2023 as provided in Section 8(b) of the Act. The Arbitrator finds Petitioner has not recovered from his injuries and has not reached Maximum Medical Improvement.

The Arbitrator finds Petitioner was off work from January 14, 2021 through September 28, 2023, i.e., 138 weeks. Based on the same TTD benefits are awarded for this period. Respondent shall receive credit for amounts paid.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	13WC012416
Case Name	Roberto Suarez v. Arlington Lanes, Inc
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0063
Number of Pages of Decision	18
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Michael Rolenc
Respondent Attorney	Matthew Amedeo

DATE FILED: 2/1/2024

/s/Amylee Simonovich, Commissioner

Signature

24IWCC0063

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Roberto Suarez,

Petitioner,

vs. NO: 13 WC 012416

Arlington Lanes,

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 total disability and permanent partial disability, and being advised of the facts and law, reverses the Decision of the Arbitrator in part, modifies the Decision in part as stated below, and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

As it pertains to the issue of causal connection of the left shoulder, the Commission reverses the Decision of the Arbitrator. Petitioner testified that when the table he was standing on collapsed, he fell, hitting his head, low back, and left arm and shoulder. T. 7-8. This mechanism of injury was not disputed by Respondent. Petitioner was taken via ambulance to Northwest Community Hospital, where he complained of left-sided head pain, posterior neck pain, and left forearm pain. Although he made these multiple complaints, he was only diagnosed with intractable low back pain.

Petitioner thereafter presented to his primary care physician, Dr. Otero-Yokana, on February 28, 2013. The History of Present Illness notes, "48 year old male today c/o back pain caused by a fall at work, patient states he was fixing a security camera on the ceiling in his work patient stepped in a table that was not bolted and hit head on a chair and landed on lower back *and left shoulder*…" (Emphasis added). T. 123. Dr. Otero-Yokana diagnosed (1) Spasm of muscle, left side of lower back, (2) Lumbago, (3) Fall resulting in striking against another object; and (4) *Pain in joint, shoulder region*. (Emphasis added.) T. 124. Then on April 9, 2013, in the Review of Systems, Dr. Otero-Yokana notes, "Admits Pain in shoulder(s)." T. 134.

After a course of conservative treatment, Petitioner ultimately came under the care of Dr.

Giannoulias, who performed surgery on the left shoulder on October 30, 2013. T. 299. He participated in physical therapy post-operatively and on January 8, 2013 Dr. Giannoulias indicated that no additional treatment for the left shoulder was necessary. T. 207.

Respondent had Petitioner examined by Dr. Suchy pursuant to §12 on January 27, 2014. Dr. Suchy testified regarding his report via evidence deposition on October 11, 2016. When asked his impressions, he testified: "It was my opinion based on a reasonable degree of medical and orthopaedic certainty as it relates to the work-related incident of February 18, 2013, that Mr. Suarez suffered a traumatic cervical myositis with contusion to his head. He also suffered a traumatic lumbar myositis as well as *a traumatic left rotator cuff tendinitis*." (Emphasis added.) T. 523.

Based on the above, the Commission modifies the Arbitrator's Decision to find that Petitioner's left shoulder condition is causally-related to the accident and reached maximum medical improvement on January 8, 2014. Having found that Petitioner's left shoulder condition is causally-related to the accident, the Commission finds that all treatment to the left shoulder was reasonable and necessary through maximum medical improvement on January 8, 2014.

The Commission supplements the Arbitrator's analysis of subsection (v) of §8.1b(b) to reflect that Petitioner also sustained traumatic left rotator cuff tendinitis for which he underwent left shoulder arthroscopic subacromial decompression and extensive glenohumeral debridement. The Commission otherwise agrees with the weight given to the five factors and agrees with the Arbitrator's award of 15% loss of use of the man as a whole for the cervical and lumbar injuries. Based upon the updated analysis involving the right shoulder, the Commission awards an additional 10% loss of use of the man as a whole for the right shoulder injury. The Commission modifies the last paragraph of the Decision pertaining to Issue (O) to read, "Based on the above, the Arbitrator finds that Petitioner is entitled to permanency to the extent of 25% loss of use of the man as a whole for injuries sustained. Decision, p. 12.

The Commission modifies the Arbitrator's Decision, changing the date in the second paragraph of Section B on page 9 of the Decision from 8/12/13 to 2/2/15.

The Commission modifies the Arbitrator's Decision, striking the entire third paragraph Section B on page 9 of the Decision, with the exception of the last sentence. The entirety of the third paragraph of Section B, shall read, "The Arbitrator finds that the treatment after 2/2/15 was <u>not causally related</u> to the 02-18-13 work accident and denies all benefits and medical charges after that date."

The Commission modifies the Findings section of the Arbitration Decision form to reflect, "Petitioner's injuries are causally related to the accident." The words "cervical and lumbar" are stricken from the Finding.

The Commission modifies the Order section of the Arbitration Decision form by striking the first paragraph in its entirety. The first paragraph of the Order shall read, "The Arbitrator finds Petitioner's left shoulder complaints are causally related to his 2/18/13 work accident, and finds all medical treatment to the left shoulder was reasonable and necessary through 1/8/14."

The Commission modifies the second paragraph of the Order section of the Arbitration Decision form, changing the maximum medical improvement for cervical and lower back complaints from 8/12/13 to 2/2/15.

The Commission modifies the third paragraph of the Order section of the Arbitration Decision form, striking the paragraph in its entirety. The third paragraph shall read, "The Arbitrator finds Petitioner was temporarily totally disabled from 2/28/13 through 4/17/13 and from 5/16/13 through 1/27/14, a total of 43-5/7 weeks. Respondent is entitled to a credit for TTD paid of $23,476.32."

The Commission modifies the weeks and parts thereof listed in the last line of page 11 of the Section pertaining to Issue (L) from 36 3/7 weeks to 36 5/7 weeks. Decision, p. 11.

The Commission further modifies the weeks and parts thereof listed in the first line of page 12 of the Section pertaining to Issue (L) from 43 3/7 weeks to 43 5/7 weeks. The dollar amount of the same sentence is stricken. The last sentence of the same paragraph, reading, "Petitioner is due $1,133.35 in TTD benefits." is stricken. Decision, p. 12.

Finally, the Commission modifies the last paragraph of the Order section of the Arbitration Decision form to read, "The Arbitrator finds that Petitioner sustained permanency to the right shoulder to the extent of 10% loss of use of the person as a whole and the cervical and lumbar spine to the extent of 15% loss of use of the person as whole, totaling 25% loss of use of the person as whole or 125 weeks at the rate of $510.00 per week."

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on August 22, 2022, is reversed in part and modified as stated herein.

IT IS FURTHER ORDERED that Petitioner's left shoulder condition is causally related to his February 18, 2013 work accident, and all treatment was reasonable and necessary through maximum medical improvement on January 8, 2014.

IT IS FURTHER ORDERED that Petitioner reached maximum medical improvement for his cervical and lower back complaints on February 2, 2015.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner temporary total disability benefits of $566.67 per week for 43-5/7 weeks, commencing February 28, 2013 through April 17, 2013, and from May 16, 2013 through January 27, 2014, as provided by §8(b) of the Act.

IT IS FURTHER ORDERD that Respondent shall receive a credit of $23,476.32 for temporary total disability benefits already paid.

IT IS FURTHER ORDERED that Respondent pay to Petitioner the sum of $510.00 per week for a period of 125 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 25% loss of Petitioner as a whole.

IT IS FURTHER ORDERED that the Respondent pay to Petitioner interest under §19(n)

of the Act, if any.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000. 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.

February 1, 2024
O: 12/12/23
AHS/kjj
051

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	13WC012416
Case Name	Roberto Suarez v. Arlington Lanes, Inc
Consolidated Cases	
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Charles Watts, Arbitrator

Petitioner Attorney	Michael Rolenc
Respondent Attorney	Matthew Amedeo

DATE FILED: 8/22/2022

/s/Charles Watts, Arbitrator

Signature

INTEREST RATE WEEK OF AUGUST 16, 2022 3.02%

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Roberto Suarez Case # **13** WC **12416**
Employee/Petitioner/ mrolenc@chnm-law.com
v.
Arlington Lanes, Inc.
Employer/Respondent/ matthew.amedeo@thehartford.com

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Charles Watts**, Arbitrator of the Commission, in the city of **Chicago**, on **04-20-22.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **02-18-13**, 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 cervical and lumbar injuries ***are*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**44,200.00**; the average weekly wage was $**850.00**.

On the date of accident, Petitioner was **48** 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 $**23,476.32 (41-4/7 weeks)** for TTD, $**0** for TPD, $**0** for maintenance, and **$0** for other benefits, for a total credit of $**23,476.32.**

ORDER

The Arbitrator finds that petitioner's left shoulder complaints are not causally related to his 02-18-13 work accident and therefore all medical treatment to the left shoulder was not reasonable and necessary. All benefits with respect to the left shoulder are denied.

The Arbitrator finds that petitioner had reached maximum medical improvement for his cervical and lower back complaints as of 08-12-13 and, as such, petitioner's complaints regarding the neck and back after that date are not causally related to petitioner's 2/18/13 work accident. All benefits and medical treatment and bills incurred after 08-12-13 are denied.

The Arbitrator finds that the total period of compensable lost time was 43-3/7 weeks or $24,609.67. Respondent is entitled to a credit for TTD paid of $23,476.32. Petitioner is due $1,133.35 in TTD benefits.

The Arbitrator finds that petitioner sustained permanency to the extent of 15% loss of use of the person as a whole or 75 weeks at the rate of $510.00 per week or $38,250.00.

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 22, 2022**

Roberto Suarez v. Arlington Lanes, Inc.

13 WC 12416

I. Findings of Fact

Petitioner, a maintenance man for Respondent, testified that on 2/18/13 he was fixing an overhead camera while standing on two tables when one when one table collapsed and he fell to the ground, hitting his head and neck and left side of his body, including his lower back. The accident was not questioned by Respondent.

Petitioner testified that he was taken by ambulance to the emergency room at NW Community Hospital with complaints of left-sided head pain, posterior neck pain and left forearm pain. He did not make any complaints regarding the left shoulder. (PX1). Physical examination showed full range of motion of all extremities. (PX1, p.13). X-rays and scans were done showing no acute abnormalities. (PX1, p.9). The arbitrator notes no x-rays of the left shoulder were done. Petitioner was discharged with a diagnosis of intractable back pain and directed to follow-up with his primary care physician. (PX1, pp. 16-17, 23).

Petitioner testified that he presented to his primary care physician, Dr. Myriam Otero-Yokana, on 2/28/13. (PX2). He complained of headaches and lower back pain. (PX2, p.2). X-rays were repeated and again showed no acute abnormalities. He was diagnosed with lower back muscles spasms and lumbago. He was directed to follow up in 4 weeks. (PX2, p.4). Petitioner followed up with Dr. Yokana on 3/18/13 who ordered a cervical MRI. (PX2, p. 8). The cervical MRI was done on 4/1/13 revealing disc protrusions at C4-7. (PX2, p. 18). Petitioner followed up on 4/5/13 for review of the cervical MRI and was diagnosed with lumbago, cervicalgia, cervical degenerative disc disease, left lower back spasms and headaches. He was given medications. He was released from care to follow-up as needed. (PX2, pp.10-11). He did see Dr. Yokana again on 4/9/13 with headache complaints. (PX2, p. 12-13). The arbitrator notes that throughout the medical records of Dr. Yokana, there were no complaints of left shoulder pain. (PX2). Further, she noted that "Patient's severity of symptoms do not relate to findings….." (PX2)

The records show that petitioner presented to Dr. Martin Herman at Center for Brain and Spine Surgery on 4/17/13. (PX3). He presented with headaches, neck, and lower back pain. Physical examination revealed that upper extremity bilaterally was normal and full strength. No shoulder complaints were noted. (PX3, p.7). He was diagnosed with headaches, neck, and lower back pain. Updated MRIs were ordered. (PX.3, p.9). Petitioner followed up with Dr. Martin on 5/16/13 who noted the brain MRI was normal and the cervical MRI revealed disk bulges from C4-7 and mild stenosis. (PX3, pp.11-15). The arbitrator notes that at no time during his examinations by Dr. Herman did petitioner report any left shoulder complaints. (PX3).

Petitioner then came under the care of Dr. Mehuk Garala as of 5/22/13 with complaints of neck pain. (PX5). Physical examination was normal for the cervical examination. There were no complaints of left shoulder pain or findings on physical examination. (PX5, pp.5-6). He was

diagnosed with a cervical strain and left cervical radiculitis. A cervical ESI was recommended. (PX5, p7). The cervical injection was done on 6/11/13. (PX5, p.9).

Petitioner followed up with Dr. Garala on 6/19/13 reporting little improvement with ongoing neck and upper back pain with radiculopathy into both arms and the left 4th and 5th fingers. He was diagnosed with a cervical strain with radiculopathy and possible left elbow ulnar neuropathy. (PX5, pp. 10-13).

An EMG/NCV was ordered and done on 6/25/13 revealing no evidence of left cervical radiculopathy nor any evidence of left ulnar nerve entrapment at the elbow. (PX5, p.14).

Dr. Garala ordered work conditioning which stated on 7/18/13. (PX5). Petitioner followed up with Dr. Garala who noted petitioner was doing well in work conditioning and was lifting over 70 pounds. As a result of his progress, the doctor ordered a functional capacity evaluation after which petitioner would likely be released from treatment. (PX5, p.20).

In the meantime, petitioner came under the care of Dr. Christos Giannoulias of G&T Orthopedics who first saw petitioner on 07-29-13. (PX4, p.2). The medical records indicate petitioner was referred to Dr. Giannoulias by Dr. Mark Strongin. Petitioner presented complaining of left shoulder pain. Apparently, petitioner had already had a left shoulder MRI done which was reviewed by Dr. Giannoulias. He diagnosed a partial left rotator cuff tear and ordered injections which were done in office. (PX4, p.2).

Petitioner underwent an independent medical examination by Dr. Bernstein on 08-12-13. (RX1). Petitioner denied any treatment to the neck or left shoulder prior to the alleged work accident on 08-12-13. After physical examination of petitioner and review of the medical records and films, Dr. Bernstein petitioner sustained cervical and lumbar spine contusions and strains as a result of the work accident as the MRI only revealed degenerative changes. He opined petitioner had reached maximum medical improvement and could return to work full duty as of 08-12-13. He commented that, after reviewing the MRIs and physical examination of petitioner, he did not believe petitioner sustained an permanent injury and the MRI findings were the result of chronic, pre-existing degenerative changes and not the result of a traumatic event. (RX1).

Petitioner followed up with Dr. Giannoulias on 08-21-13 reporting continued pain in the shoulder. Rotator cuff surgery was recommended. (PX4, p.3).

In the meantime, Dr. Garala ordered an FCE. (PX5, p.21-25). It was done on 10-02-13 at ATI, was valid and released petitioner to the "medium to heavy" level, nothing that petitioner's previous maintenance job was heavy. Dr. Garala saw petitioner again on 10-23-13 and diagnosed a cervical strain, partial thickness left RTC tear and ulnar neuropathy in the left elbow. (PX5, 22-23). Dr. Garala opined petitioner had reached maximum medical improvement, discharged him for his neck and released petitioner per the FCE subject to limitations set by Dr. Giannoulias. (PX5, p.22-25).

Petitioner underwent a left shoulder arthroscopic exploration on 10-30-13 by Dr. Giannoulias, who noted finding a partial thickness RTC tear. (PX4, p. 27). A bursectomy and decompression was done. He followed up on 11-13-13 when physical therapy was ordered. (PX4, p.4). Petitioner underwent physical therapy for his shoulder and was released by Dr. Giannoulias on 01-08-14 at maximum medical improvement for his left shoulder. (PX4, P.5).

Petitioner alleges that he continued to experience pain in the back of his head and neck and lower back, and as Dr. Garala had released him, was seen by Dr. Murtaza for a second opinion on 01-24-14. He noted neck and head pain and recommended a trial of nerve blocks. He also recommended updated lumbar and cervical MRIs. (PX4, p.6-7).

Petitioner was seen for an independent medical examination by Dr. Theodore Suchy on 01-27-14. (RX2, 3). Petitioner had neck and lower back pain, left shoulder pain with numbness to the fingers. Physical examination was unremarkable. After review of the records and films, Dr. Suchy diagnosed cervical myositis and RTC tendinopathy. He opined petitioner's symptoms had resolved and that petitioner could return to work full duty at maximum medical improvement. (RX2, 3).

Petitioner underwent a left occipital nerve block by Dr. Murtaza on 02-27-14 which led to significant improvement. (PX4, p.8). Dr. Murtaza saw petitioner again on 03-17-14 noting 90% pain relief and noted petitioner could return to work full duty. On 05-15-14 and 06-25-14 Dr. Murtaza performed left lumbar facet blocks and saw petitioner again on 5/28/14 noting improvement in petitioner's lower back pain. (PX4, pp. 9-15). Physical therapy and a thoracic MRI was ordered. Petitioner underwent the thoracic MRI on 07-02-14 which was interpreted as revealing small protrusions at T4-5 and T12-L1 without stenosis.

Petitioner reported some increased left shoulder pain and returned to Dr. Giannoulias who ordered an updated MRI of the left shoulder that was done on 08-06-14 and was interpreted as normal. (PX4, p.17-21). On 09-17-14 Dr. Giannoulias reviewed the MRI and stated that no left shoulder surgery was indicated and referred petitioner for pain management for the reported left shoulder pain. (PX4, p.21).

On 10-08-14 petitioner was seen again by Dr. Murtaza who noted radiofrequency ablation was order approved and advised petitioner to follow up on an as needed basis. However, petitioner did undergo the radiofrequency ablation at L3-S1 facet joints on 1/8/15 which was noted to have led to significant improvement. On 02-02-15 petitioner returned to Dr. Murtaza who noted "100% relief" of the left-sided lower back pain. He was released full duty. (PX4, pp.22-23).

There is no record of treatment by petitioner from 02-02-15 until over a year and a half later when petitioner again began treating as of 08-29-16.

On 08-29-16 and 09-26-16 petitioner presented to Dr. Brian Clay at Illinois Bone & Joint Institute with complaints of left shoulder, neck and back pain. He was given a left shoulder injection and referred for physical therapy. The doctor discussed with petitioner weening off opioids. (PX6, pp.1-6).

There is no record of treatment again until 01-23-17 when petitioner was seen by Dr. Clay this time with lower back pain and bilateral extremity pain. (PX6, pp.7-8). A lumbar injection was administered on 02-03-17. (PX6, p.9). Petitioner followed up on 02-17-17 and was declared at maximum medical improvement to follow-up with his primary care physician. (PX6, pp.10-11).

Petitioner did not seek treatment again until 07-21-17 when he presented to Dr. Clay reporting that his pain in his lower back and lower extremities had returned. Petitioner reported that his pain had returned since his last appointment. Physical examination was unremarkable. The doctor recommended a lumbar injection, which was administered. (PX6, pp.12-14).

Petitioner returned to Dr. Clay again on 10-09-17 with complaints of lower back, left lower extremity pain and neck pain. He reported that he had been in a motor vehicle accident the previous month when the issue began. He reported that the previous injection helped but he works manual labor [at Goodwill] and attributing his ongoing issues with his back to repetitive lifting and carrying heavy objects. The doctor suspected whiplash injury from the car accident and indicated that a cervical MRI would be ordered if his pain persisted. (PX6, pp.15-16).

Petitioner was seen again by Dr. Clay again on 01-16-18 and reported his chronic lower back pain and left lower extremity pain was worsening. Physical examination was normal. He was given another lumbar injection. (PX6, pp.17-19).

Petitioner was last seen by Dr. Clay on 03-13-18 with lower back pain, left extremity pain and more neck pain. He had had an MRI of the neck on 01-20-18 which revealed multilevel degenerative disc disease and stenosis with no evidence of disc herniation. He was given a cervical injection and directed to follow-up as needed.

Petitioner did not seek any medical treatment for more than a year when he presented to Northwest Suburban Pain Center on 03-27-19.

Petitioner came under the care of Dr. Megan Behave of Northwest Suburban Pain Center (PX7) on 03-27-19. He presented with neck and lower back pain. There was no mention of his 2013 work accident. He reported that his pain was due to car accidents in 2013 and 2017. After physical examination, he was diagnosed with myalgia and lower back pain with radiculopathy. In her assessment, Dr. Bhave notes that petitioner [reports a long history of chronic pain that started in 2013 with a car accident, after which [he] had multiple other injuries including additional car accidents the last being in 2017." He was given a trigger point injection (PX7, pp.55-58).

Petitioner followed up with Dr. Bhave with neck pain and lower back pain on 05-20-19, 06-11-19, 07-08-19, 10/24/19, 12-05-19 and 03-05-20 and was given injections at each visit. (PX7, pp.32-54).

Petitioner was next seen by Dr. Bhave on 07-14-20 and 07-30-20 with neck pain, reporting that he had been excessively busy at work and that and that although his lower back pain improved, he still had neck pain. Additional cervical injections were administered. (PX7, pp.26-31).

Petitioner was seen again 08-27-20 with continued neck pain that radiated to the left shoulder and had noticed a cracking/popping sensation in his left shoulder with movement. The arbitrator notes that petitioner testified to this left shoulder popping at trial and further notes that 08-27-20 was the first time in the medical records that petitioner reported this issue to his doctor). He was given another injection. (PX7, pp.22-25). He was seen again on 09-24-20 with continued neck and left shoulder pain. He was given injections. (PX7, pp.18-21). On 11-05-20 petitioner was seen by Dr. Bhave with right hip pain and was given a right hip injection. (PX7, pp.14-17).

Petitioner returned to Dr. Bhave again on 12-03-20 with neck and lower back pain on the right after doing a lot of lifting at work every day. The doctor noted that petitioner's job is "very labor-intensive and he frequently bends, pulls heavy objects and lifts. For this reason, he has constant and chronic pain that affects him day-to-day." He was given his series of injections. (PX.7, pp.9-13).

Petitioner testified that he was last seen by Dr. Bhave on 11-18-21 with lower back pain. He was given an L4-5 injection. (PX7, pp. 1-4).

Petitioner testified that he is currently working at Goodwill as an attendant, which he noted was a fairly heavy position. He testified that he had been working at Goodwill since at least January 2014. He testified that his still had popping in his shoulder. He also testified that he had continued back pain that he related to his work accident on 02-18-13.

II. Conclusions of Law

For his Decision relating to Issue (F), is Petitioner's current condition of ill-being causally related to the injury?, and (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 concludes as follows:

It is axiomatic that a petitioner bears the burden of proving *all* the elements of his claim to recover benefits under the Workers' Compensation Act. Illinois Bell Telephone Co. v. Industrial Commission, 638 N.E.2d 307 (1994) (Emphasis added). His burden includes proving a causal connection between the accident and his condition of ill-being. Lee v. Industrial Commission, 656 N.E.2d 1084 (1995). Liability cannot rest on imagination, speculation, or conjecture. Chicago Park District v. Industrial Commission, 263 Ill.App.3d 835 (1994). Even when evidence in the record might sustain a claim, such evidence is insufficient if it appears from all the testimony and circumstances shown in the record that such a finding is against the manifest weight of the evidence. Board of Educ. Of the City of Chicago v. Industrial Comm'n, 83 Ill. 2d 475; 416 N.E. 2d 237 (1981).

The Arbitrator finds that petitioner did sustain an accident on 02-18-13 when a table he was standing on collapsed and he fell to the ground. This was not disputed. However, the Arbitrator notes that there were several inconsistencies between petitioner's testimony at Hearing and petitioner's statements and complaints in the medical records that call into question the extent of petitioner's injuries and their causation and relation to the treatment he received.

At Hearing, petitioner explicitly testified that prior to the 02-18-13 accident, he had never had symptoms or treatment to his neck or his left shoulder. However, the records document that this statement was false. The medical records of petitioner's physician, Dr. Yokana, revealed that petitioner had undergone MRIs of both the neck and left shoulder on 06-14-10. When questioned about this treatment and why he denied any previous treatment, petitioner said he did not recall those MRIs but *may* have had a motor vehicle accident around then that led to the MRIs. The Arbitrator does not find this explanation credible. If treatment to the neck and left shoulder necessitated the need for MRIs to be taken, it can be inferred that the pain and complaints were significant at the time to warrant them; MRIs are not ordered if there are not significant complaints after basic conservative treatment is administered. The Arbitrator finds that even though the cervical MRI from 2010 was noted to be unremarkable, petitioner denied previous treatment to the neck and shoulder when it was clear he had in fact received treatment to those body parts as early as 2010. This misstatement of the facts indeed calls into the question petitioner's overall credibility as a historian and his truthfulness about his complaints at hearing.

A. Petitioner's left shoulder condition and treatment

With respect to petitioner's left shoulder complaints, after a review of the complete set of medical records and hearing petitioner's testimony at trial, the Arbitrator notes that petitioner did not have any left shoulder complaints until <u>almost six months</u> after the work accident. He did not make any mention of left shoulder complaints when he first presented to the emergency room at NW Community Hospital following the accident, nor 10 days later when he presented to Dr. Yokana on 02-28-13. (PX2, p.2). He followed up with Dr. Yokana again three weeks later on 03-18-13 and again on 04-05-13 or 04-09-13, petitioner was still without complaints or mention of left shoulder pain. (PX2, p.8). Petitioner made no mention of left shoulder pain when he presented to Dr. Martin on 04-17-13 or over a month later when petitioner came under the care of Dr. Garala on 05-22-13 with complaints of neck pain. (PX5). Petitioner followed up with Dr. Garala on 06-19-13 with ongoing neck pain, noting radiculopathy to the 4th and 5th digits with numbness, but no finding specifically at the left shoulder. (PX5, pp. 10-13). On 08-21-13 Dr. Garala noted petitioner had completed nine sessions of work conditioning and that he personally talked to the physical therapist who stated petitioner was "doing really well" and was lifting over 70 pounds (PX5, p18). He ordered a functional capacity evaluation and noted after which petitioner would likely be released. (PX5, p.20).

The Arbitrator notes that it was not until petitioner presented to Dr. Giannoulias on 07-29-13, *almost six months* after the initial accident that he complained of left shoulder issues. (PX4,p.3). The records show that petitioner was referred to Dr. Giannoulias by Dr. Mark Strongin, who had already ordered an MRI of the left shoulder. The records of Dr. Strongin were not put into evidence. This date is the first date petitioner had any complaints explicitly to the left shoulder. Dr. Giannoulias diagnosed a left partial rotator cuff tear. (PX4, p.3).

Additionally, petitioner was seen for an independent medical examination on 01-27-14 by Dr. Theodore Suchy at the request of Respondent. (RX2). After physical examination of petitioner and review of the medical records, CT scans and MRIs, Dr. Suchy diagnosed petitioner with resolved cervical and lumbar myositis and agreed with Dr. Bernstein that petitioner had reached

maximum medical improvement for his neck, back and shoulder as of 08-12-13. He opined petitioner could return to work full duty. (RX2).

The Arbitrator finds petitioner's left shoulder complaints and rotator cuff tear clearly were not related to petitioner's 02-18-13 work accident. The Arbitrator notes that petitioner was seen by at least four different physicians for his varied complaints in the six months that followed his accident and it was not until he presented to Dr. Giannoulias on 07-29-13 that he expressed left shoulder pain. The Arbitrator notes that when petitioner was seen for an independent medical examination by Dr. Bernstein on 08-12-13, only two weeks after initially seeing Dr. Giannoulias with his first complaints of left shoulder pain, petitioner told Dr. Bernstein that he "believes he also injured his left shoulder." (RX1). At hearing, when questioned about the lack of left shoulder complaints up to that point, petitioner testified that he thought the pain was coming from his neck. This is not consistent with the complaints, diagnoses and various normal physical examinations to the shoulder seen throughout the medical records to that point. Given the evidence and testimony at trial, the Arbitrator does not find petitioner's left shoulder complaints or treatment to causally related to petitioner's work accident.

The Arbitrator finds that, given petitioner's testimony and the medical records and reports introduced into evidence, petitioner's left shoulder complaints were not causally related to petitioner's 02-18-13 work accident. All benefits and medical bills regarding treatment to petitioner's left shoulder are denied.

B. Petitioner's neck and lower back condition and treatment

With respect to petitioner's neck and lower back complaints and injuries, the Arbitrator notes petitioner did report injuring his lower back at the time of the accident. However, petitioner was seen by Dr. Avi Bernstein for an independent medical examination on 08-12-13. (RX1). Petitioner explained his accident to Dr. Bernstein. After review of the medical records and the lumbar and cervical MRI films taken to that point, as well as a physical examination of petitioner, Dr. Bernstein opined that petitioner suffered contusions and strains to his cervical and lumbar strain as a result of the work accident. He did not believe petitioner suffered permanent injury to either of the areas as all of the findings on the MRIs that he reviewed only showed chronic, pre-existing degenerative changes and were not the result of a traumatic event. (RX1).

The Arbitrator also finds that, given petitioner's testimony and the medical records and reports introduced into evidence, petitioner had reached maximum medical improvement for his cervical and lower back complaints as of 08-12-13 and, as such, petitioner's complaints regarding the neck and back after that date were not causally related to petitioner's 02-18-13 work accident. All benefits and medical treatment and bills incurred after 08-12-13 are denied.

Assuming arguendo that petitioner's cervical and lumbar complaints and treatment after 08/12/13 were to be determined to be related to his work accident, the Arbitrator finds, based on petitioner's own testimony as well as the medical records submitted into evidence, that all treatment for the neck and lower back after he was in a series of well documented motor vehicle accidents, was incurred because of the motor vehicle accidents, not because of the work accident at question here. The question the Arbitrator needs to answer is, When did all treatment cease to

be related to the work accident? The Arbitrator finds that treatment after 2/2/15 was not causally related to the 02-18-13 work accident and denies all benefits and medical charges after that date.

The exact dates of Petitioner's motor vehicle accidents are unclear, but he did admit to being in the car accidents at trial. The first mention of any motor vehicle accident by petitioner in the medical records submitted at Hearing is dated 10-09-17 when petitioner presented to Dr. Clay with complaints of lower back, left lower extremity pain and neck pain. At that time, he reported that he had been in a motor vehicle accident the previous month when the issue began. The doctor noted "the patient states that he developed neck pain since the last visit. He states that he was in a MVC [motor vehicle collision] when the issue began." The doctor suspected whiplash injury from the car accident and indicated that a cervical MRI would be ordered if his pain persisted. (PX6, pp.15-16). When he followed up the Dr. Clay on 01-16-18, he reported that the pain had been worsening. (PX6, pp.17-18).

The Arbitrator notes there is solid evidence from the medical records of Dr. Clay that at least one motor vehicle accident was in sometime September 2017, as reported by petitioner. However, it appears the first motor vehicle accident was much sooner. In the medical records of Dr. Bhave, when petitioner first presented to her on 03/27/19 for an initial consultation, petitioner reported that his neck and back pain was due to car accidents in 2013 and 2017. *There was no mention of his 2013 work accident.* In her assessment, Dr. Bhave notes that petitioner [reports a long history of chronic pain that started in 2013 with a car accident, after which [he] had multiple other injuries including additional car accidents the last being in 2017." (PX7, pp.55-57). The Arbitrator notes that throughout the medical records of Dr. Bhave, there is no report of the 02-18-13 work accident that was so well documents in the previous records. The only causation opinion offered in her records was the multiple motor vehicle accidents petitioner reported to her. The arbitrator finds that clearly the treatment petitioner received from Dr. Bhave is not related to the work accident and denies all of the treatment and medical bills petitioner incurred from Dr. Bhave.

However, the treatment petitioner received *before* he presented to Dr. Bhave in 2018 must also be examined more closely. The medical records show that petitioner stopped treating after 02-02-15 when he was last seen by Dr. Murtaza reporting 100% relief in his left back and, although the doctor recommended possible treatment for the right side, petitioner only started treating again when presented to Dr. Brian Clay at Illinois Bone & Joint Institute on 08-26-16. The Arbitrator notes that at that point, this was the first stoppage of petitioner's treatment as there had been a year and a half gap in treatment and the medical records indicate that petitioner contributed that resumption in treatment to the car accidents he testified he had been involved in. The Arbitrator finds that treatment stopped being related to the 02-18-13 work accident and only resumed because of a motor vehicle accident (or some other cause) after 02-02-15.

Both Dr. Clay and Dr. Bhave both causally relate petitioner's need for treatment to his motor vehicle accidents and not to the work accident. The Arbitrator finds that the motor vehicle accidents constituted intervening accidents and all treatment after 02-02-15 was not causally related to petitioner's 02-18-13 work accident. All benefits and medical bills after 02-02-15 are denied.

For his Decision relating to Issue (K), is Petitioner due any prospective medical care?, the Arbitrator concludes as follows:

Per the findings for Issue (K), the Arbitrator finds that petitioner's current need for treatment is no longer due to the initial work accident on 02-18-13. Petitioner testified that he had been in a series of motor vehicle accidents after the work accident and the medical records in fact explicitly indicate that petitioner's current treatment by Dr. Clay and Dr. Bhave is related to the car accident(s) that petitioner was involved it.

As stated above, when petitioner presented to Dr. Clay on 10-09-17 with complaints of lower back, left lower extremity pain and neck pain, he reported that he had been in a motor vehicle accident the previous month when the issue began. The doctor noted "the patient states that he developed neck pain since the last visit. He states that he was in a MVC [motor vehicle collision] when the issue began." Dr. Clay saw petitioner again on 01-16-18 and last on 03-13-18 when he released petitioner at maximum medical improvement.

There is no further treatment in the records until petitioner came under the care of Dr. Megan Behave of Northwest Suburban Pain Center (PX7) on 03-27-19, <u>almost a year and a half later</u>. He presented with neck and lower back pain. He specifically reported that his pain was due to car accidents in 2013 and 2017. Dr. Bhave indicated that petitioner [reports a long history of chronic pain that started in 2013 with a car accident, after which [he] had multiple other injuries including additional car accidents the last being in 2017." Petitioner himself reported that "Since then, he has had various areas of rotating pain." He did not mention the 02-18-13 work accident – in fact, it is not mentioned in Dr. Bhave's records anywhere.

The Arbitrator finds that there is nothing in the medical records of Dr. Bhave causally relating petitioner's current treatment to his work accident on 02-18-13. Not only was there a half and a half gap from when petitioner was released by Dr. Clay and when he presented to Dr. Bhave, petitioner, by his own admission, reported to Dr. Bhave that he had been having pain since his motor vehicle accidents, most recently in 2017. Those accidents are the reason he continues to treat and thus petitioner is not entitled to prospective care as the need for medical treatment relates to well documented intervening accidents, not the 02-18-13 work accident and thus causation and the right to prospective medical treatment under Section 8(a) of the Act is severed. Any prospective medical care is denied.

For his Decision relating to Issue (L), what amount of compensation is due for temporary total disability?, the Arbitrator concludes as follows:

The medical records show petitioner was first taken off work as of 02-28-13 by Dr. Yokana until he followed up with a surgeon. The records show that petitioner was seen by Dr. Martin Herman for consultation on 04-17-13. This period is 7 weeks. A review of the records shows there was no off work slip from 04-17-13 until petitioner is seen again by Dr. Herman on 05-16-13 at which time petitioner is taken off work. The Arbitrator finds that petitioner could have returned to work full duty as of 01-27-14, the day that he was seen for an independent medical examination by Dr. Suchy who opined petitioner could return to work full duty for his shoulder, neck and back. By that time, petitioner had been off work for an additional 36-3/7 weeks. The

total period of lost time was 43-3/7 weeks or $24,609.67. Respondent is entitled to a credit for TTD paid of $23,476.32. Petitioner is due $1,133.35 in TTD benefits.

For his Decision relating to Issue (O), what is the nature and extent of petitioner's injuries?, the Arbitrator concludes as follows:

Petitioner testified as to the nature of his accident, alleged injuries and medical treatment. Petitioner testified that although he no longer works for Respondent, he is working at Goodwill in a fairly heavy capacity. He testified that he has continued pain. The last record of any medical treatment received was in November 2021. However, it does not appear petitioner has received any medical treatment since 02-02-15 as all treatment since has been related to motor vehicle accidents.

Per section §8.1b(b) of the Act, to determine 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…." 820 ILCS 305/§8.1b(b) With regards to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence by either party. Accordingly, the Arbitrator gives no weight to this factor.

With regards to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that petitioner himself testified that he returned to work in January 2014 and had been working a heavy and physically demanding job at Goodwill since. Therefore, the Arbitrator gives no weight to this factor.

With regards to subsection (iii) of §8.1b(b), the Arbitrator notes that the Petitioner was 48 years old at the time of the accident. The Arbitrator does not believe petitioner's age is a factor as he continues to work and is not considered young or old in the job market. The Arbitrator gives little weight to this factor.

With regards to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes Petitioner did not provide any evidence that his earnings were impacted by this accident. Accordingly, the Arbitrator gives no weight to this factor.

With regards to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator adopts the medical treatment records as though fully set forth herein. The medical records document a long and varied course of medical treatment. Petitioner sustained various cervical and lumbar strains, bulges, protrusions and an annual tear as a result of the work accident. However, the medical records from at least 2017 document at least one intervening accident such that treatment is no longer related to the initial 02-18-13 work accident. The Arbitrator gives much weight to this factor.

Based on the above, the arbitrator finds that petitioner is entitled to permanency to the extent of 15% loss of use the man as a whole for injuries sustained.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC005012
Case Name	William Candia v. The Lasalle Private Residences
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0064
Number of Pages of Decision	21
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Adam Karchmar
Respondent Attorney	Erica Levin

DATE FILED: 2/2/2024

/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: Down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

WILLIAM CANDIA,

Petitioner,

vs. NO: 19 WC 5012

THE LASALLE PRIVATE RESIDENCES
CONDO ASSOCIATION,

Respondent.

DECISION AND OPINION ON REVIEW

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

This matter proceeded to hearing on October 27, 2022, along with the consolidated case of 19 WC 5013. The Commission has issued a separate Decision in 19 WC 5013, which pertains to a lumbar injury sustained by Petitioner on June 22, 2018. The present Decision addresses only Petitioner's left arm injury sustained on the accident date of March 16, 2017.

Petitioner was employed by Respondent as a chief engineer with job duties that included maintaining the condo building, purchasing materials, arranging repairs, handling the heating and cooling systems, and performing any necessary physical labor. On March 16, 2017, Petitioner had to prep a board room for a meeting by moving some weightlifting equipment, including a squat rack. While moving and holding the squat rack, Petitioner felt a pop in his left arm followed by a burning sensation that thereafter worsened.

Petitioner initially sought treatment at Silver Cross Hospital on March 18, 2017 and complained of left arm pain after lifting a heavy object at work days prior. X-rays of the left forearm were obtained and revealed no acute fracture. Dr. Timothy Russell diagnosed Petitioner with a left elbow strain, partial tear of the common flexor tendon, and medial epicondyles. Dr.

Russell instructed Petitioner to limit his activity and prescribed Norco and naproxen.

A little over a month later, on April 24, 2017, Petitioner presented for a consultation with Dr. Steven Sclamberg at Chicago Pain & Orthopedic Institute. Dr. Sclamberg's impression was left forearm ecchymosis with a history of injury and likely muscle tearing. Dr. Sclamberg provided work restrictions of no use of the left upper extremity and ordered MRIs of the left elbow and forearm. The recommended MRIs were subsequently obtained on April 28, 2017. The MRI of the left forearm demonstrated findings suggestive of organized hematoma with blood in the subacute stage of evolution. There was also relatively well-defined collection observed in the superficial muscles of the anterior compartment in the proximal third of the forearm and soft tissue edema surrounding the collection in the muscles and subcutaneous fat. The left elbow MRI further revealed mild elbow joint effusion, irregular ill-defined collection in the muscles of the flexor compartments of the proximal third of the forearm suggestive of organized hematoma with blood in the subacute stage of evolution, and subcutaneous oedema in the posterior and anterior aspects of the elbow joint and proximal forearm.

On May 1, 2017, Dr. Sclamberg reviewed the MRIs and diagnosed Petitioner with hematoma along with a contusion and partial muscle tear of the flexor pronator mass. Dr. Sclamberg prescribed meloxicam and kept Petitioner on work restrictions of no use of the left arm. When Petitioner returned on June 12, 2017, Dr. Sclamberg reported that Petitioner was doing well and his forearm was not bothering him in any way. At that time, Dr. Sclamberg returned Petitioner to regular full duty work and released him from his care. Petitioner thereafter returned to work as a chief engineer and performed his full duty job without restrictions for his left arm.

Petitioner testified that after the accident, he missed a couple days of work in order to see his doctors and obtain MRIs. Petitioner testified that with the pain medication and time, his left forearm improved and recovered within three to four months. He described his left forearm as "okay" at the time of the hearing.

A little over one year after returning to his full duty job, Petitioner sustained a second work accident, which this time involved his low back, on June 22, 2018. As previously stated, Petitioner's lumbar injury stemming from the June 22, 2018 accident is the subject of 19 WC 5013 and addressed by the Commission in a separate Decision. As for his left arm injury covered by the present Decision, Petitioner required no further treatment after being released from Dr. Sclamberg's care on June 12, 2017.

Following a careful review of the entire record, the Commission modifies the Decision of the Arbitrator and finds that Petitioner sustained a 5% loss of use of the left arm in accordance with its analysis of the statutory factors set forth in §8.1b of the Illinois Workers' Compensation Act (hereinafter, the "Act").

In reviewing permanent partial disability, the Commission must consider the §8.1b enumerated criteria, including (i) the reported level of impairment pursuant to (a) [AMA "Guides to Evaluation of Permanent Impairment"]; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability as corroborated by treating medical records. 820 ILCS 305/8.1b(b).

However, "[n]o single enumerated factor shall be the sole determinant of disability." *Id*.

Regarding criterion (i), no AMA impairment rating was presented by either party. The Commission therefore assigns this factor no weight.

Regarding criterion (ii), Petitioner worked as a chief engineer for Respondent on the accident date. On April 24, 2017, Dr. Sclamberg placed Petitioner on work restrictions that included no use of the left upper extremity. Less than two months later, on June 12, 2017, Dr. Sclamberg returned Petitioner to his regular full duty work. After being released from Dr. Sclamberg's care without restrictions for his left arm in June of 2017, Petitioner returned to his regular pre-accident position as a chief engineer and was able to perform his full duty job. The Commission assigns this factor significant weight.

Regarding criterion (iii), Petitioner was 50 years old on the accident date. There was no evidence presented as to how Petitioner's age affected his disability. The Commission assigns this factor some weight.

Regarding criterion (iv), there was no evidence presented to suggest that the accident affected Petitioner's future earning capacity, as he returned to his regular pre-accident job as a chief engineer for Respondent in June of 2017. The Commission assigns this factor significant weight.

Regarding criterion (v), Petitioner treated for his left arm injury conservatively with medication and work restrictions. Petitioner testified that with the medication and time, his left arm steadily improved and he recovered within three to four months of the accident. Petitioner described his left forearm as "okay" at the time of the hearing. There was otherwise no testimony presented as to if or how Petitioner's left arm affected his life today. The Commission assigns this factor significant weight.

Upon consideration of the above factors, the Commission modifies the Decision of the Arbitrator to find that Petitioner has sustained a 5% loss of use of the left arm. In so finding, the Commission finds it significant that Petitioner recovered from his left arm injury after a few months of conservative treatment and returned back to his regular full duty job without further difficulty from his left arm. Petitioner did not otherwise testify as to any ongoing difficulties stemming from his left arm injury. The Commission modifies the Decision of the Arbitrator accordingly.

The Commission additionally corrects a clerical error contained on the first page of the Decision of the Arbitrator, in which the Arbitrator left blank and failed to identify the Respondent's name in the case caption. The Commission thus modifies the Decision of the Arbitrator to include the Respondent's name, The LaSalle Private Residences Condo Association, in the case caption.

In all other respects not specifically stated herein, the Commission affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 30, 2022, is modified as stated herein. For all other issues not specifically modified herein, the Commission affirms and adopts the Decision of the Arbitrator.

IT IS FURTHER ORDERED that Respondent shall pay to Petitioner permanent partial disability benefits in the sum of $672.00 per week for a period of 12.65 weeks, as provided in §8(e) of the Act, because the injuries sustained caused a 5% loss of use of the left arm.

IT IS FURTHER ORDERED that the clerical error on the first page of the Decision of the Arbitrator where the Respondent's name is left blank in the case caption is corrected to include the Respondent's name, The LaSalle Private Residences Condo Association.

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 $19,600. 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.

February 2, 2024

DLS/mek
O: 12/13/23
46

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC005012
Case Name	William Candia v. The Lasalle Private Residences
Consolidated Cases	19WC005013;
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	16
Decision Issued By	Antara Nath Rivera, Arbitrator

Petitioner Attorney	Adam Karchmar
Respondent Attorney	Erica Levin

DATE FILED: 12/30/2022

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

/s/Antara Nath Rivera, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

WILLIAM CANDIA
Employee/Petitioner

v.
Employer/Respondent

Case # **19** WC **005012**

Consolidated cases:

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

19 WC 00512 (LEFT ARM) 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 16, 2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $ **58,240.00**; the average weekly wage was $**1,120.00**.

On the date of accident, Petitioner was **50** 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 pay Petitioner temporary total disability benefits of $**746.67**/week for **1 6/7** weeks, commencing **3/19/2017** through **4/1/2017**, as provided in Section 8(b) of the Act.

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, specific to the left arm, pursuant to the medical fee scheduled and as outlined in PX 5012.A, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $746.67/week for 1 6/7 weeks, commencing March 19, 2017, through April 1, 2017, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $672.00/week for 20.24 weeks, because the injuries sustained caused the 8% loss of the left arm, as provided in Section 8(e) of the Act.

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

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

Signature of Arbitrator

December 30, 2022

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

WILLIAM CANDIA,	)	
	)	
Petitioner,	)	
v.	)	
	)	Case No. **19WC005012**
	)	**19WC005013**
THE LASALLE PRIVATE RESIDENCES CONDO ASSOCIATION,	)	
	)	
	)	
Respondent.	)	

This matter proceeded to hearing on October 27, 2022, in Chicago, Illinois before Arbitrator Antara Nath Rivera on Petitioner's Requests for Hearing for consolidated cases, 19WC005012 and 19WC005013. Issues in dispute, in both cases, include causation, reasonable and necessary medical services, temporary total disability ("TTD"), and nature and extent. (Arbitrator's Exhibit "AX" 1). The issues also in dispute, for case 19WC0005013, include accident and notice. (AX 1)

STATEMENT OF FACTS

19WC005012—March 16, 2017, Accident and Medical

William Candia ("Petitioner") is an employee of The LaSalle Private Residences Condominium Association ("Respondent") as chief engineer. Petitioner has been employed with Respondent since March 1998. Petitioner currently works for Respondent at 1212 North Lasalle, Chicago, Illinois. On March 16, 2017, Petitioner testified that his job duties included maintenance of the building, purchase materials, in charge of making repairs, janitorial work, and attend to the heating and cooling. Petitioner testified that he performed physical labor for all of these responsibilities.

Petitioner testified that on March 16, 2017, he injured his left forearm when he was prepping an exercise room for a board meeting. Petitioner testified that to make room for the meeting, he had to move weight-lifting equipment. Petitioner testified that as he was trying to lift the squat rack above his head, with another person assisting, the rack began to tip. Petitioner testified that he reached out to steady it with his left arm when he felt something "pop" and felt a burning sensation in his arm. Petitioner testified that moving this type of equipment was part of his job duty. Petitioner testified that his pain continued to worsen.

On March 18, 2017, Petitioner went to Silver Cross Hospital to receive treatment for his left arm. (Petitioner's Exhibit "PX" 5012.1) Petitioner was seen by Dr. Timothy Russell, D.O.. *Id*. The medical notes indicated that Petitioner reported that he "felt something pop in his left elbow near the medial epicondyles." (PX 5012.1 at 18) The notes also indicated that an exam of Petitioner's left arm showed moderate pain and

tenderness along the forearm, resolving ecchymosis and decreased ROM and strength. Petitioner was diagnosed with elbow strain and partial tear of the common flexor tendon, medial epicondyles. (PX 5012.1 at 20) He was discharged with prescriptions for Norco and naproxen sodium. (PX 5012.1) Petitioner was released to go back to work. (PX 5012.1 at 25)

On April 24, 2017, Petitioner presented to Dr. Steven Sclamberg, M.D., at Chicago Pain and Orthopedic Institute. (PX 5012.3) Petitioner testified that he began treatment with Dr. Sclamberg because his pain did not get better. Petitioner reported that he was injured at work when he lifted a tilting metal structure with a fully extended arm and felt tearing in his left forearm. (PX 5012.3 at 6) Petitioner complained of swelling, bruising, and pain in his left arm. Based on Dr. Sclamberg's initial impression of left forearm ecchymosis and muscle tearing, he recommended an MRI. (PX 5012.3 at 7)

On April 28, 2017, Petitioner underwent an MRI at Joliet Open MRI. (PX 5012.5) The MRI revealed mild elbow joint effusion with suggestion of hematoma and subcutaneous edema in the elbow joint and proximal forearm. *Id*.

On May 1, 2017, Petitioner returned to Dr. Sclamberg. Dr. Sclamberg reviewed the MRI and diagnosed Petitioner with "hematoma with contusion and partial muscle tear of flexor pronator compartment hematoma." (PX 5012.3 at 4) Petitioner testified that he was given pain medication and said time will heal.

On June 12, 2017, Petitioner returned to Dr. Slamberg. (PX 5012.3 at 2-3) Petitioner reported that his left arm was pain free. *Id.* Dr. Sclamberg released Petitioner to full duty without restrictions. *Id.*

Petitioner testified that he was initially able to work within the restrictions provided by Dr. Sclamberg. Petitioner testified that he missed a couple of days of work due to doctor appointments and to get MRIs. Petitioner testified that currently, his left forearm is okay. Petitioner testified that he has been working for Respondent continually since the March 16, 2017, accident.

19WC005013—June 22, 2018, Accident and Medical

Petitioner testified that he went to work on June 22, 2018. Petitioner testified that one of his jobs that day was to replace a pump. Petitioner testified that after he physically replaced the pump, he stepped on a pipe-fitting equipment called a "union." This action caused Petitioner to fall, twist his lower back, and falling backwards on to his right side. Petitioner testified that he hurt his lower back right side.

Petitioner testified that he immediately reported the incident to property manager, Michael Wayland, but did not receive any instruction or information from Mr. Wayland at that time. Petitioner testified that it was customary to report accidents to Mr. Wayland. Petitioner testified that he requested a claim number but did not get a response. Petitioner testified that he asked Mr. Wayland "several times" but gave up. He testified

that as chief engineer, replacing and fixing pumps was part of his job duties. Petitioner testified that he continued to work through the pain and discomfort.

Petitioner testified that he initially tried home treatment but four days later, he tried to get into physical therapy because his condition was getting worse. He testified that he asked Mr. Wayland for a claim number for physical therapy. Petitioner testified that, during his second physical therapy visit, he found out that Mr. Wayland gave the 22WC005012 claim number. Petitioner testified that he asked Mr. Wayland for another number several times and never received a response. Petitioner testified that he asked the adjuster, too, but was unable to get a new number. Petitioner testified that he told Mr. Wayland that if he didn't help Petitioner, that Petitioner would get a lawyer. Petitioner testified that Mr. Wayland was fired a few months after his back injury.

On October 29, 2018, Petitioner presented to Dr. Sclamberg. Petitioner reported that he injured his right hip when "he slipped on a wet floor and fell on a pipe." (PX 5013.1 at 49) Dr. Sclamberg diagnosed Petitioner with right hip pain and released him to continue working. *Id*.

On November 1, 2018, Petitioner underwent right hip x-rays at Home Glen Imaging. (PX 5013.3) The images showed degenerative osteoarthritis in the right hip with spur formation noted from the lateral acetabular margin. (PX 5013.3 at 4) Also on November 1, 2018, Petitioner underwent an MRI of the lumbar spine which showed multilevel moderate spondylosis with facet arthrosis and ligamentum flavum hypertrophy. (PX 5013.3) Circumferential disc bulges were noted at L3-L4 and L4-L5 with disc bulging also noted from L1-L3. (PX 5013.3 at 6)

On November 5, 2018, Petitioner presented again to Homer Glen Imaging for x-rays of the lumbar spine. (PX 5013.3) The MRI revealed mild levoscoliosis with degenerative changes but no fractures or dislocations. (PX 5013.3 at 2)

On December 10, 2018, Petitioner returned to Dr. Sclamberg. (PX 5013.1) Dr. Sclamberg noted the hip arthritis and multilevel neuroforaminal stenosis demonstrated on the imaging studies and noted tenderness over the right paraspinal muscles. *Id*. Dr. Sclamberg diagnosed Petitioner with mild arthritis and low back pain with stenosis. He was prescribed a Medrol Dosepak and was instructed to return in 4 weeks. (PX 5013.1 at 45)

On February 4, 2019, Petitioner presented to Dr. Rajesh Patel, M.D., at the Chicago Pain and Orthopedic Institute. (PX 5013.1 at 44) Petitioner reported that he fell on pipes that were laying on the floor and landed on the right side of his low back. (PX 5013.1 at 42) Petitioner complained of pain traveling from the "right posterior buttocks glut area and down the posterior thigh." *Id*. An exam revealed full range of motion with pain on internal and external rotation. Dr. Patel reviewed prior x-rays and MRIs and diagnosed Petitioner with right side lumbar radiculopathy as a result of the June 22, 2018, work related accident. (PX 5013.1 at 43) Dr. Patel recommended physical therapy. *Id*.

On March 27, 2019, Petitioner returned to Dr. Patel and reported that physical therapy made his pain worse. (PX 5013.1 at 39) Petitioner complained "low back pain radiating into the right lower extremity." *Id*. Dr. Patel opined that Petitioner failed conservative treatment including physical therapy, steroids, medications, and home exercise program. *Id*. Dr. Patel and recommended epidural steroid injection(s) ("ESI"). (PX 5013.1 at 40)

On April 10, 2019, Petitioner underwent a right L4 and L5 transforaminal ESI. (PX 5013.1 at 37; (PX 5013.5 at 8).

On May 22, 2019, Petitioner returned to Dr. Patel and reported 60% relief from the pain as a result of the injection. (PX 5013.1 at 35) Petitioner inquired about a second injection due to the pain he was experiencing while driving and sitting. *Id.*

On June 19, 2019, Petitioner underwent a second ESI based on Petitioner's complaint of existing pain. (PX 5013.5 at 6)

On July 3, 2019, Petitioner presented to Dr. Patel and complained of 30% relief after the second injection. (PX 5013.1 at 33) Petitioner complained of lower extremity pain when driving. *Id*. Dr. Patel noted that while Petitioner's pain improved with injections, Petitioner's pain while driving increased to a 7-8/10. *Id*. Dr. Patel recommended surgery and referred Petitioner for a surgical evaluation. *Id*.

On July 10, 2019, Petitioner presented to Dr. Geoffrey Dixon, M.D., at Chicago Pain and Orthopedic Institute. (PX 5013.1 at 31) Petitioner presented that he fell at work, landed on his right back and buttock, and has experienced pain radiating down his posterior buttocks and knee. *Id*. Dr. Dixon requested the MRI reports before assessing Petitioner and kept instructed Petitioner to continue working without restrictions. *Id*.

On August 28, 2019, Petitioner returned to Dr. Dixon with EMG results. (PX 5013.1 at 29) Dr. Dixon opined that the images demonstrated a right-sided radiculopathy affecting the L4 and L5 nerve roots. *Id.* Dr. Dixon instructed Petitioner to remain off work pending completion of his evaluation and treatment. *Id.*

On September 4, 2019, Dr. Dixon reviewed Petitioner's MRI and other tests, and noted that the MRI revealed "a large disc herniation at L4-L5" causing a nerve root compression in the lateral recess and extraforaminal area, confirming the L4 and L5 radiculopathy diagnosis. (PX 5013.1 at 27; 5013.7) Dr. Dixon noted that Petitioner failed conservative treatment and recommended a "micro lumbar decompression and diskectomy of L4-L5 with exploration and decompression of the far lateral disk herniation compression the right L4 nerve root." *Id*.

On November 27, 2019, Dr. Dixon performed Petitioner's surgery which included "1. Microlumbar decompression for lateral recess stenosis L4-L5. 2. Re-exploration of previous L4-L5 diskectomy. 3.

Extraforaminal disk herniation L4-L5, causing L4 radiculopathy." (PX 5013.5 at 4) Dr. Dixon's pre-op diagnosis of "1. Recurrent disk herniation L4-L5, causing lateral recess stenosis. 2. Extraforaminal disk herniation L4-L5, causing left L4 radiculopathy" was confirmed post-surgery. *Id*.

On December 4, 2019, Petitioner presented to Dr. Dixon for a post operative checkup. (PX 5013.1 at 23) Petitioner was ambulating with the assistance of a walker. *Id*. Dr. Dixon kept Petitioner off work pending completion of treatment and limited his activities for an additional two weeks. *Id*. Petitioner testified that he missed time from work during this time and used all his time from the union, vacation, sick, personal time, to make ends meet.

On January 8, 2020, Petitioner was walking without any assistance and Dr. Dixon recommended that Petitioner begin physical therapy. (PX 5013.1 at 18) Dr. Dixon limited Petitioner's activities to "no lifting, carrying, pushing, pulling anything greater than 10 pounds for an additional two weeks." *Id*.

On February 5, 2020, Dr. Dixon released Petitioner to work effective February 17, 2020, "with a strict 20-pound weight restriction in terms of lifting, carrying, pushing and pulling." (PX 5013.1 at 15)

Petitioner testified that he returned sooner than the Dr. Dixon's recommendation because he was not getting paid and because he needed money. Petitioner testified that he had to take extra care not to reinjure his back.

On March 18, 2020, Petitioner reported to Dr. Dixon that while he was able to perform his work duties without significant exacerbation of pain, he continued to have difficulty with bending and stooping. (PX 5013.1 at 13) Dr. Dixon recommended an additional month of therapy and work restrictions. *Id*.

On May 27, 2020, Petitioner returned to Dr. Dixon and complained of an episode of severe back pain after the past weekend. (PX 5013.1 at 8) Dr. Dixon recommended that Petitioner continue his pain medication, that physical therapy be discontinued therapy, and released Petitioner to return to work in his full duty capacity. *Id.*

Between November 18, 2020, and February 17, 2021, Petitioner presented to Dr. Dixon with complaints of pain, underwent an MRI which revealed a recurrent disk herniation at L4-L5 causing bilateral recess and foraminal stenosis, and was instructed to resume physical therapy. (PX 5013.1 at 6)

On February 24, 2021, Petitioner presented to Dr. Patel again. (PX 5013.1 at 3) Petitioner reported that the surgery resolved his right lower extremity pain but that he still had pain in his low back. (PX 5013.1 at 4) On March 24, 2021, Dr. Patel administered an ESI for his right lumbar radiculopathy. (PX 5013.1 at 3)

On March 31, 2021, Petitioner presented to Dr. Dixon and reported that the injections did not help. (PX 5013.1 at 2) Dr. Dixon recommended physical therapy, recommended that Petitioner continue to work with restrictions, and that the inflammation will improve over time. *Id*.

On June 16, 2021, medical records indicated that Dr. Patel performed a "[b]ilateral L4-L5 and L5 sacral ala radiofrequency ablation" due to a diagnosis of lumbar facet syndrome. (PX 5013.5 at 2)

Petitioner testified that currently, his back is better and that it does not limit him in his work activities. Petitioner testified that for at least six months prior to this incident, his lower back was pain-free. Petitioner further testified that he is still employed, as chief engineer, by Respondent and that there was no gap in employment. Petitioner testified that he suffered unrelated injuries since June 22, 2018, accident as he referred to his right wrist that was wrapped with medial tape. Petitioner testified that he wants to return to work for Respondent.

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 found him to be a credible witness. Petitioner was calm, well-mannered, composed, and spoke clearly. The Arbitrator compared Petitioner's testimony with the totality of the evidence submitted and did not find any material contradictions that would deem the witness unreliable.

***CASE 19WC005013*:**

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

The Arbitrator finds that an accident occurred in the course of Petitioner's employment. The Arbitrator notes that Petitioner testified that he has been employed by Respondent, as a chief engineer, since March 1998. The Arbitrator notes that Petitioner testified that as chief engineer, replacing and fixing pumps was part of his job duties. The Arbitrator notes that Petitioner testified that, on June 22, 2018, after he physically replaced the pump, he stepped on a pipe-fitting equipment called a "union." The Arbitrator notes that this action caused Petitioner to fall, twist his lower back, and falling backwards on to his right side.

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.*

Based on the Petitioner's credible testimony and medical records, the Arbitrator finds that the accident arose out of and in the course of Petitioner's employment by Respondent on June 22, 2018.

***CASE 19WC005013*:**
WITH RESPECT TO ISSUE (E), WAS TIMELY NOTICE OF THE ACCIDENT GIVEN TO RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that timely notice of the accident was given to Respondent. The Arbitrator notes that Petitioner testified that he immediately reported the incident to property manager, Michael Wayland, but did not receive any instruction or information from Mr. Wayland at that time. The Arbitrator notes that Petitioner testified that it was customary to report accidents to Mr. Wayland. The Arbitrator notes that Petitioner testified that, during his second physical therapy visit, he found out that Mr. Wayland gave the incorrect claim number. The Arbitrator notes that Petitioner testified that he asked Mr. Wayland for another claim number multiple times and never received a response. The Arbitrator notes that Petitioner testified that Mr. Wayland was fired a few months after his back injury.

A claim is only barred if no notice whatsoever has been given. *Silica Sand Transport, Inc. v. Industrial Comm'n,* 197 Ill. App. 3d 640, 651 (1990). "If some notice has been given, but the notice is defective or inaccurate, then the employer must show that he has been unduly prejudiced." *Id.* The purpose of the notice requirement is "both to protect the employer against fraudulent claims by giving him an opportunity to investigate promptly and ascertain the facts of the alleged accident and to allow him to minimize his liability by affording the injured employee immediate medical treatment." *United States Steel Corp. v. Industrial Comm'n,* 32 Ill. 2d 68, 75 (1964). The Arbitrator notes that there was no evidence contrary to Petitioner's testimony regarding the issue of notice.

As such, the Arbitrator finds that there was proof that timely notice was provided to Respondent of the June 22, 2018, work related injury.

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

Petitioner bears the burden of proving, by a preponderance of the evidence, every element of the claim. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980). To obtain compensation under the Illinois Workers' Compensation Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. A work-related injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. Causation between the work-related accident and condition of ill-being can be established by showing prior history of good health, followed by a work-related accident in which petitioner is unable to perform his physical duties. *Kawa v. Illinois Workers' Comp. Comm'n*, 991 N.E.2d 430, 448 (2013).

***CASE 19WC005012*:**

After hearing the testimony of Petitioner and reviewing Petitioner's medical records, the Arbitrator finds Petitioner's current condition of ill-being, with respect to his left forearm, is causally related to the accident of March 16, 2017. The Arbitrator notes that Petitioner testified that on March 16, 2017, he injured his left forearm when he was prepping an exercise room for a board meeting. The Arbitrator notes that in the emergency room, Petitioner was initially diagnosed with elbow strain and partial tear of the common flexor tendon, medial epicondyles. (PX 5012.1 at 20) The Arbitrator notes that Dr. Sclamberg diagnosed Petitioner with "hematoma with contusion and partial muscle tear of flexor pronator compartment hematoma." (PX 5012.3 at 4) The Arbitrator notes that Petitioner testified that he was able to work within the restrictions provided by Dr. Sclamberg. The Arbitrator notes that on June 12, 2017, Petitioner reported that his left arm was pain free and that Dr. Sclamberg released Petitioner to full duty. (PX 5012.3 at 2-3) The Arbitrator notes that Petitioner testified he never had left arm issues and that currently, his left forearm is okay.

The Arbitrator finds that Petitioner sustained a work related injury on March 16, 2017, and that Petitioner was released to full duty June 12, 2017. Thus, the Arbitrator finds that his current condition of ill-being with respect to his left forearm was casually related to the March 16, 2017, work-related accident.

***CASE 19WC005013*:**

After hearing the testimony of Petitioner and reviewing Petitioner's medical records, the Arbitrator finds Petitioner's current condition of ill-being, with respect to his lower back, is causally related to the accident of June 22, 2018. The Arbitrator notes that Petitioner testified that one of his jobs that day was to replace a pump. The Arbitrator notes that Petitioner testified that after he physically replaced the pump, he

stepped on a pipe-fitting equipment called a "union." The Arbitrator notes that this action caused Petitioner to fall, twist his lower back, and falling backwards on to his right side injuring his lower back right side.

The Arbitrator notes that Petitioner testified that for at least six months prior to this incident, his lower back was pain-free. The Arbitrator notes that Petitioner testified that he initially tried home treatment but four days later, he tried to get into physical therapy because his condition was getting worse. The Arbitrator notes that Dr. Sclamberg diagnosed Petitioner with mild arthritis and low back pain with stenosis. (PX 5013.1 at 45) The Arbitrator notes that Dr. Patel diagnosed Petitioner with right side lumbar radiculopathy as a result of the June 22, 2018, work related accident. (PX 5013.1 at 43)

The Arbitrator notes that when Petitioner returned to Dr. Patel and reported that physical therapy made his pain worse, Dr. Patel opined that Petitioner failed conservative treatment including physical therapy, steroids, medications, and home exercise program. (PX 5013.1 at 39) The Arbitrator notes that Dr. Patel recommended ESI and referred Petitioner to Dr. Dixon for a surgical consultation after Petitioner failed conservative treatment. (PX 5013.1)

The Arbitrator notes that Dr. Dixon diagnosed Petitioner with a disk herniation at L4-L5 causing a nerve root compression and L4 and L5 radiculopathy diagnosis. (PX 5013.1 at 27) The Arbitrator notes that Dr. Dixon noted that Petitioner failed conservative treatment and recommended a "micro lumbar decompression and diskectomy of L4-L5 with exploration and decompression of the far lateral disk herniation compression the right L4 nerve root." *Id*. The Arbitrator notes that Petitioner underwent said procedure. *Id*.

The Arbitrator notes that Petitioner was released to work full duty on May 27, 2020. *Id*. The Arbitrator notes that in June 2021, Petitioner underwent an ablation due to complaints of pain while working. (PX 5013.1; 5013.5) The Arbitrator notes that Petitioner testified that currently, his back is better and that it does not limit him in his work activities. The Arbitrator notes that Petitioner testified that he wants to return to work for Respondent.

As such, the Arbitrator finds that Petitioner's current condition of ill-being with respect to Petitioner's lower back is casually related to the June 22, 2018, work-related accident.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS, AS RELATED TO 19WC005012 AND 19WC005013:

Consistent with the Arbitrator's prior finding that Petitioner's current condition of ill-being was causally related to the injuries sustained on March 16, 2017, and on June 22, 2018, the Arbitrator finds that the medical treatment and services Petitioner received was reasonable and necessary. (PX 5012.1, 5012.3, 5012.5, 5013.1, 5013.3, 5013.5, 5013.9, 5013.11) 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)*.

***CASE 19WC005012*:**

The Arbitrator notes that Petitioner received medical care for injuries to his left arm from March 16, 2017, through June 12, 2017, and was seen by Dr. Russell and by Dr. Sclamberg. (PX 5012.1, 5012.3) The Arbitrator also notes that Petitioner credibly testified to his injuries, symptoms, pain, and treatment.

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 finds that Respondent shall pay reasonable and necessary medical services, specific to the left arm, pursuant to the medical fee scheduled and as outlined in PX 5012.A, as provided in Sections 8(a) and 8.2 of the Act.

***CASE 19WC005013*:**

The Arbitrator notes that Petitioner received medical care for injuries to his lower back from June 22, 2018, through June 16, 2021, and was seen by Dr. Sclamberg, Dr. Patel, and Dr. Dixon. (PX 5013.1-5013.15) The Arbitrator further notes that Petitioner credibly testified to his injuries, symptoms, pain, and treatment.

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 finds that Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee scheduled and as outlined in PX 5013.A, as provided in Sections 8(a) and 8.2 of the Act.

WITH RESPECT TO ISSUE (K), WHAT TEMPORARY BENEFITS ARE IN DISPUTE, THE ARBITRATOR FINDS AS FOLLOWS, AS RELATED TO 19WC005012 AND 19WC005013:

Under Illinois law, temporary total disability is awarded for the time period between when an injury incapacitates the petitioner to the date the petitioner's condition has stabilized or the petitioner has recovered to the amount the character of the injury will permit. *Whiteney Productions, Inc. v. Industrial Comm'n*, 274 Ill.App.3d 28, 30 (1995). In determining whether a claimant remains entitled to receiving TTD benefits, the primary consideration is whether the claimant's condition has stabilized and whether she is capable of a return to the workforce. *Interstate Scaffolding, Inc. v. Illinois Workers' Comp. Comm'n*, 236 Ill.2d 132, 148 (2010).

Based on the Arbitrator's finding that Petitioner's current condition of ill-being was causally related to the work accident, the Arbitrator finds that Petitioner is entitled to TTD benefits.

***CASE 19WC005012*:**

As to 19WC005012, Petitioner claims to be entitled to TTD for a period of March 19, 2017, through April 1, 2017. (AX 1 at line 8) Respondent claims that Petitioner had no compensable lost time. *Id.* The Arbitrator notes that Petitioner credibly testified that he testified that he missed a couple of days of work for doctors appointments and appointments for the MRI. There was no additional evidence to indicate otherwise. Thus, the Arbitrator finds that Respondent shall pay Petitioner temporary total disability benefits of $746.67/week for 1 6/7 weeks, commencing March 19, 2017, through April 1, 2017, as provided in Section 8(b) of the Act.

***CASE 19WC005013*:**

With respect to 19WC005013, Petitioner claims to be entitled to TTD for a period of November 6, 2019, through May 27, 2020. (AX 1 at line 8) Respondent claims that Petitioner had no compensable lost time. Id. The Arbitrator notes that On November 6, 2019, Dr. Dixon placed Petitioner off-work. (PX 5013.1 at 25) The Arbitrator notes that on February 17, 2020, Dr. Dixon placed Petitioner on light duty restrictions of no lifting/carrying greater than 20 pounds and no pulling/pushing greater than 20 pounds. (PX 5013.1 at 16) The Arbitrator notes that on May 27, 2020, Dr. Dixon released Petitioner to return to work in his full duty capacity. (PX 5013.1 at 8) The Arbitrator further notes that Petitioner credibly testified that he testified that he was off work per Dr. Sclamberg and Dr. Dixon during those dates.

Thus, the Arbitrator finds that Respondent shall pay Petitioner temporary total disability benefits of $746.67/week for 29 1/7 weeks, commencing November 6, 2019, through May 27, 2020, 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, AS RELATED TO 19WC005012 AND 19WC005013:

Pursuant to §8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability for accidental injuries occurring on or after September 1, 2011:

(b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors:

(i) the reported level of impairment pursuant to subsection (a);
(ii) the occupation of the injured employee;
(iii) the age of the employee at the time of the injury;
(iv) the employee's future earning capacity; and
(v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors

used in addition to the level of impairment as reported by the physician must be explained in a written order.

***CASE 19WC005012*:**

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that an American Medical Association ("AMA") impairment rating was not performed in this case. As such, the Arbitrator relies on the other four factors of permanent partial disability ("PPD").

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the records reveal that Petitioner was employed by Respondent as chief engineer at the time of the accident and consistently since the accident. The Arbitrator notes that, on June 12, 2017, Petitioner was released to full duty and in his prior capacity. As such, the Arbitrator therefore gives greater weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 50 years old, married, with two dependents, at the time of the accident. (AX 1 line 6) As such, the Arbitrator gives less weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that Petitioner returned to work as chief engineer for Respondent and that there was no impact on Petitioner's ability to earn the same wages upon his return to work. As such, the Arbitrator therefore gives greater weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner was diagnosed with "hematoma with contusion and partial muscle tear of flexor pronator compartment hematoma." (PX 5012.3 at 4) The Arbitrator notes that Petitioner testified that he was able to work within the restrictions provided by Dr. Sclamberg and that currently his left forearm is okay. Petitioner never had any problems of this type, pre-injury. The Arbitrator notes that Petitioner returned to work full duty as of June 12, 2017. As such, 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 Respondent shall pay Petitioner permanent partial disability benefits of $672.00/week for 20.24 weeks, because the injuries sustained caused the 8% loss of the left arm, as provided in Section 8(e) of the Act.

***CASE 19WC005013*:**

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that an American Medical Association ("AMA") impairment rating was not performed in this case. As such, the Arbitrator relies on the other four factors of permanent partial disability ("PPD").

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the records reveal that Petitioner was employed by Respondent as chief engineer at the time of the accident and consistently since the accident. The Arbitrator notes that, on May 27, 2020, Petitioner was released to full duty and in his prior capacity, however, Petitioner continued to receive medical treatment due to pain through June 2021. As such, the Arbitrator therefore gives greater weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 51 years old, married, with two dependents, at the time of the accident. (AX 1 line 6) As such, the Arbitrator gives less weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that Petitioner returned to work as chief engineer for Respondent and that there was no impact on Petitioner's ability to earn the same wages upon his return to work. As such, the Arbitrator therefore gives greater weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner was diagnosed with mild arthritis and low back pain with stenosis by Dr. Sclamberg. (PX 5013.1 at 45) Dr. Patel diagnosed Petitioner with right side lumbar radiculopathy as a result of the June 22, 2018, work related accident. (PX 5013.1 at 43) Dr. Dixon diagnosed Petitioner with a disk herniation at L4-L5 causing a nerve root compression and L4 and L5 radiculopathy diagnosis. (PX 5013.1 at 27) Dr. Dixon noted that Petitioner failed conservative treatment and recommended a "micro lumbar decompression and diskectomy of L4-L5 with exploration and decompression of the far lateral disk herniation compression the right L4 nerve root" which Petitioner underwent. *Id*. Petitioner never had any problems back problems before his injury. As such, 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 Respondent shall pay Petitioner PPD benefits of $672.00/week for 60 weeks, because the injuries sustained caused 12% loss of a man as a whole, as provided in Section 8(d)2 of the Act.

It is so ordered:

Arbitrator Antara Nath Rivera

December 30, 2022

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC005013
Case Name	William Candia v. The LaSalle Private Residences
Consolidated Cases	19WC005012;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0065
Number of Pages of Decision	19
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Adam Karchmar
Respondent Attorney	Erica Levin

DATE FILED: 2/2/2024

/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

William Candia,
Petitioner,

vs. NO: 19 WC 5013

The Lasalle Private Residences Condo Association,
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, notice, 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.

The Commission corrects a clerical error contained on the first page of the Decision of the Arbitrator, in which the Arbitrator incorrectly identified the Respondent in the case caption. The Commission thus modifies the Decision of the Arbitrator to include the proper Respondent's name, The LaSalle Private Residences Condo Association, in the case caption.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 30, 2022, is hereby affirmed and adopted.

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

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

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

February 2, 2024
o12/13/23

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

DLS/mek
046

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC005013
Case Name	CANDIA,WILLIAM v. THE LASALLE PRIVATE RESIDENCES
Consolidated Cases	19WC005012;
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	16
Decision Issued By	Antara Nath Rivera, Arbitrator

Petitioner Attorney	Adam Karchmar
Respondent Attorney	Erica Levin

DATE FILED: 12/30/2022

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

/s/Antara Nath Rivera, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

WILLIAM CANDIA
Employee/Petitioner

v.

WALMART, INC.
Employer/Respondent

Case # **19** WC **005013**

Consolidated cases:

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

19 WC 00513 (LOWER BACK) **DISPUTED ISSUES**

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

FINDINGS

On **June 22, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $ **58,240.00**; the average weekly wage was $**1,120.00**.

On the date of accident, Petitioner was **50** 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 pay Petitioner temporary total disability benefits of $**746.67**/week for **29 1/7** weeks, commencing **11/6/2019** through **5/27/2020**, as provided in Section 8(b) of the Act.

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

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

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee scheduled and as outlined in PX 5013.A, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $746.67/week for 29 1/7 weeks, commencing November 6, 2019, through May 27, 2020, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner PPD benefits of $672.00/week for 60 weeks, because the injuries sustained caused 12% loss of a man 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

December 30, 2022

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

WILLIAM CANDIA,	)	
	)	
Petitioner,	)	
v.	)	
	)	Case No. **19WC005012**
	)	**19WC005013**
THE LASALLE PRIVATE RESIDENCES CONDO ASSOCIATION,	)	
	)	
	)	
Respondent.	)	

This matter proceeded to hearing on October 27, 2022, in Chicago, Illinois before Arbitrator Antara Nath Rivera on Petitioner's Requests for Hearing for consolidated cases, 19WC005012 and 19WC005013. Issues in dispute, in both cases, include causation, reasonable and necessary medical services, temporary total disability ("TTD"), and nature and extent. (Arbitrator's Exhibit "AX" 1). The issues also in dispute, for case 19WC0005013, include accident and notice. (AX 1)

STATEMENT OF FACTS

19WC005012—March 16, 2017, Accident and Medical

William Candia ("Petitioner") is an employee of The LaSalle Private Residences Condominium Association ("Respondent") as chief engineer. Petitioner has been employed with Respondent since March 1998. Petitioner currently works for Respondent at 1212 North Lasalle, Chicago, Illinois. On March 16, 2017, Petitioner testified that his job duties included maintenance of the building, purchase materials, in charge of making repairs, janitorial work, and attend to the heating and cooling. Petitioner testified that he performed physical labor for all of these responsibilities.

Petitioner testified that on March 16, 2017, he injured his left forearm when he was prepping an exercise room for a board meeting. Petitioner testified that to make room for the meeting, he had to move weight-lifting equipment. Petitioner testified that as he was trying to lift the squat rack above his head, with another person assisting, the rack began to tip. Petitioner testified that he reached out to steady it with his left arm when he felt something "pop" and felt a burning sensation in his arm. Petitioner testified that moving this type of equipment was part of his job duty. Petitioner testified that his pain continued to worsen.

On March 18, 2017, Petitioner went to Silver Cross Hospital to receive treatment for his left arm. (Petitioner's Exhibit "PX" 5012.1) Petitioner was seen by Dr. Timothy Russell, D.O.. *Id*. The medical notes indicated that Petitioner reported that he "felt something pop in his left elbow near the medial epicondyles." (PX 5012.1 at 18) The notes also indicated that an exam of Petitioner's left arm showed moderate pain and

tenderness along the forearm, resolving ecchymosis and decreased ROM and strength. Petitioner was diagnosed with elbow strain and partial tear of the common flexor tendon, medial epicondyles. (PX 5012.1 at 20) He was discharged with prescriptions for Norco and naproxen sodium. (PX 5012.1) Petitioner was released to go back to work. (PX 5012.1 at 25)

On April 24, 2017, Petitioner presented to Dr. Steven Sclamberg, M.D., at Chicago Pain and Orthopedic Institute. (PX 5012.3) Petitioner testified that he began treatment with Dr. Sclamberg because his pain did not get better. Petitioner reported that he was injured at work when he lifted a tilting metal structure with a fully extended arm and felt tearing in his left forearm. (PX 5012.3 at 6) Petitioner complained of swelling, bruising, and pain in his left arm. Based on Dr. Sclamberg's initial impression of left forearm ecchymosis and muscle tearing, he recommended an MRI. (PX 5012.3 at 7)

On April 28, 2017, Petitioner underwent an MRI at Joliet Open MRI. (PX 5012.5) The MRI revealed mild elbow joint effusion with suggestion of hematoma and subcutaneous edema in the elbow joint and proximal forearm. *Id*.

On May 1, 2017, Petitioner returned to Dr. Sclamberg. Dr. Sclamberg reviewed the MRI and diagnosed Petitioner with "hematoma with contusion and partial muscle tear of flexor pronator compartment hematoma." (PX 5012.3 at 4) Petitioner testified that he was given pain medication and said time will heal.

On June 12, 2017, Petitioner returned to Dr. Slamberg. (PX 5012.3 at 2-3) Petitioner reported that his left arm was pain free. *Id.* Dr. Sclamberg released Petitioner to full duty without restrictions. *Id.*

Petitioner testified that he was initially able to work within the restrictions provided by Dr. Sclamberg. Petitioner testified that he missed a couple of days of work due to doctor appointments and to get MRIs. Petitioner testified that currently, his left forearm is okay. Petitioner testified that he has been working for Respondent continually since the March 16, 2017, accident.

19WC005013—June 22, 2018, Accident and Medical

Petitioner testified that he went to work on June 22, 2018. Petitioner testified that one of his jobs that day was to replace a pump. Petitioner testified that after he physically replaced the pump, he stepped on a pipe-fitting equipment called a "union." This action caused Petitioner to fall, twist his lower back, and falling backwards on to his right side. Petitioner testified that he hurt his lower back right side.

Petitioner testified that he immediately reported the incident to property manager, Michael Wayland, but did not receive any instruction or information from Mr. Wayland at that time. Petitioner testified that it was customary to report accidents to Mr. Wayland. Petitioner testified that he requested a claim number but did not get a response. Petitioner testified that he asked Mr. Wayland "several times" but gave up. He testified

that as chief engineer, replacing and fixing pumps was part of his job duties. Petitioner testified that he continued to work through the pain and discomfort.

Petitioner testified that he initially tried home treatment but four days later, he tried to get into physical therapy because his condition was getting worse. He testified that he asked Mr. Wayland for a claim number for physical therapy. Petitioner testified that, during his second physical therapy visit, he found out that Mr. Wayland gave the 22WC005012 claim number. Petitioner testified that he asked Mr. Wayland for another number several times and never received a response. Petitioner testified that he asked the adjuster, too, but was unable to get a new number. Petitioner testified that he told Mr. Wayland that if he didn't help Petitioner, that Petitioner would get a lawyer. Petitioner testified that Mr. Wayland was fired a few months after his back injury.

On October 29, 2018, Petitioner presented to Dr. Sclamberg. Petitioner reported that he injured his right hip when "he slipped on a wet floor and fell on a pipe." (PX 5013.1 at 49) Dr. Sclamberg diagnosed Petitioner with right hip pain and released him to continue working. *Id*.

On November 1, 2018, Petitioner underwent right hip x-rays at Home Glen Imaging. (PX 5013.3) The images showed degenerative osteoarthritis in the right hip with spur formation noted from the lateral acetabular margin. (PX 5013.3 at 4) Also on November 1, 2018, Petitioner underwent an MRI of the lumbar spine which showed multilevel moderate spondylosis with facet arthrosis and ligamentum flavum hypertrophy. (PX 5013.3) Circumferential disc bulges were noted at L3-L4 and L4-L5 with disc bulging also noted from L1-L3. (PX 5013.3 at 6)

On November 5, 2018, Petitioner presented again to Homer Glen Imaging for x-rays of the lumbar spine. (PX 5013.3) The MRI revealed mild levoscoliosis with degenerative changes but no fractures or dislocations. (PX 5013.3 at 2)

On December 10, 2018, Petitioner returned to Dr. Sclamberg. (PX 5013.1) Dr. Sclamberg noted the hip arthritis and multilevel neuroforaminal stenosis demonstrated on the imaging studies and noted tenderness over the right paraspinal muscles. *Id*. Dr. Sclamberg diagnosed Petitioner with mild arthritis and low back pain with stenosis. He was prescribed a Medrol Dosepak and was instructed to return in 4 weeks. (PX 5013.1 at 45)

On February 4, 2019, Petitioner presented to Dr. Rajesh Patel, M.D., at the Chicago Pain and Orthopedic Institute. (PX 5013.1 at 44) Petitioner reported that he fell on pipes that were laying on the floor and landed on the right side of his low back. (PX 5013.1 at 42) Petitioner complained of pain traveling from the "right posterior buttocks glut area and down the posterior thigh." *Id*. An exam revealed full range of motion with pain on internal and external rotation. Dr. Patel reviewed prior x-rays and MRIs and diagnosed Petitioner with right side lumbar radiculopathy as a result of the June 22, 2018, work related accident. (PX 5013.1 at 43) Dr. Patel recommended physical therapy. *Id*.

On March 27, 2019, Petitioner returned to Dr. Patel and reported that physical therapy made his pain worse. (PX 5013.1 at 39) Petitioner complained "low back pain radiating into the right lower extremity." *Id*. Dr. Patel opined that Petitioner failed conservative treatment including physical therapy, steroids, medications, and home exercise program. *Id*. Dr. Patel and recommended epidural steroid injection(s) ("ESI"). (PX 5013.1 at 40)

On April 10, 2019, Petitioner underwent a right L4 and L5 transforaminal ESI. (PX 5013.1 at 37; (PX 5013.5 at 8).

On May 22, 2019, Petitioner returned to Dr. Patel and reported 60% relief from the pain as a result of the injection. (PX 5013.1 at 35) Petitioner inquired about a second injection due to the pain he was experiencing while driving and sitting. *Id.*

On June 19, 2019, Petitioner underwent a second ESI based on Petitioner's complaint of existing pain. (PX 5013.5 at 6)

On July 3, 2019, Petitioner presented to Dr. Patel and complained of 30% relief after the second injection. (PX 5013.1 at 33) Petitioner complained of lower extremity pain when driving. *Id*. Dr. Patel noted that while Petitioner's pain improved with injections, Petitioner's pain while driving increased to a 7-8/10. *Id*. Dr. Patel recommended surgery and referred Petitioner for a surgical evaluation. *Id*.

On July 10, 2019, Petitioner presented to Dr. Geoffrey Dixon, M.D., at Chicago Pain and Orthopedic Institute. (PX 5013.1 at 31) Petitioner presented that he fell at work, landed on his right back and buttock, and has experienced pain radiating down his posterior buttocks and knee. *Id*. Dr. Dixon requested the MRI reports before assessing Petitioner and kept instructed Petitioner to continue working without restrictions. *Id*.

On August 28, 2019, Petitioner returned to Dr. Dixon with EMG results. (PX 5013.1 at 29) Dr. Dixon opined that the images demonstrated a right-sided radiculopathy affecting the L4 and L5 nerve roots. *Id.* Dr. Dixon instructed Petitioner to remain off work pending completion of his evaluation and treatment. *Id.*

On September 4, 2019, Dr. Dixon reviewed Petitioner's MRI and other tests, and noted that the MRI revealed "a large disc herniation at L4-L5" causing a nerve root compression in the lateral recess and extraforaminal area, confirming the L4 and L5 radiculopathy diagnosis. (PX 5013.1 at 27; 5013.7) Dr. Dixon noted that Petitioner failed conservative treatment and recommended a "micro lumbar decompression and diskectomy of L4-L5 with exploration and decompression of the far lateral disk herniation compression the right L4 nerve root." *Id*.

On November 27, 2019, Dr. Dixon performed Petitioner's surgery which included "1. Microlumbar decompression for lateral recess stenosis L4-L5. 2. Re-exploration of previous L4-L5 diskectomy. 3.

Extraforaminal disk herniation L4-L5, causing L4 radiculopathy." (PX 5013.5 at 4) Dr. Dixon's pre-op diagnosis of "1. Recurrent disk herniation L4-L5, causing lateral recess stenosis. 2. Extraforaminal disk herniation L4-L5, causing left L4 radiculopathy" was confirmed post-surgery. *Id*.

On December 4, 2019, Petitioner presented to Dr. Dixon for a post operative checkup. (PX 5013.1 at 23) Petitioner was ambulating with the assistance of a walker. *Id*. Dr. Dixon kept Petitioner off work pending completion of treatment and limited his activities for an additional two weeks. *Id*. Petitioner testified that he missed time from work during this time and used all his time from the union, vacation, sick, personal time, to make ends meet.

On January 8, 2020, Petitioner was walking without any assistance and Dr. Dixon recommended that Petitioner begin physical therapy. (PX 5013.1 at 18) Dr. Dixon limited Petitioner's activities to "no lifting, carrying, pushing, pulling anything greater than 10 pounds for an additional two weeks." *Id*.

On February 5, 2020, Dr. Dixon released Petitioner to work effective February 17, 2020, "with a strict 20-pound weight restriction in terms of lifting, carrying, pushing and pulling." (PX 5013.1 at 15)

Petitioner testified that he returned sooner than the Dr. Dixon's recommendation because he was not getting paid and because he needed money. Petitioner testified that he had to take extra care not to reinjure his back.

On March 18, 2020, Petitioner reported to Dr. Dixon that while he was able to perform his work duties without significant exacerbation of pain, he continued to have difficulty with bending and stooping. (PX 5013.1 at 13) Dr. Dixon recommended an additional month of therapy and work restrictions. *Id*.

On May 27, 2020, Petitioner returned to Dr. Dixon and complained of an episode of severe back pain after the past weekend. (PX 5013.1 at 8) Dr. Dixon recommended that Petitioner continue his pain medication, that physical therapy be discontinued therapy, and released Petitioner to return to work in his full duty capacity. *Id.*

Between November 18, 2020, and February 17, 2021, Petitioner presented to Dr. Dixon with complaints of pain, underwent an MRI which revealed a recurrent disk herniation at L4-L5 causing bilateral recess and foraminal stenosis, and was instructed to resume physical therapy. (PX 5013.1 at 6)

On February 24, 2021, Petitioner presented to Dr. Patel again. (PX 5013.1 at 3) Petitioner reported that the surgery resolved his right lower extremity pain but that he still had pain in his low back. (PX 5013.1 at 4) On March 24, 2021, Dr. Patel administered an ESI for his right lumbar radiculopathy. (PX 5013.1 at 3)

On March 31, 2021, Petitioner presented to Dr. Dixon and reported that the injections did not help. (PX 5013.1 at 2) Dr. Dixon recommended physical therapy, recommended that Petitioner continue to work with restrictions, and that the inflammation will improve over time. *Id*.

On June 16, 2021, medical records indicated that Dr. Patel performed a "[b]ilateral L4-L5 and L5 sacral ala radiofrequency ablation" due to a diagnosis of lumbar facet syndrome. (PX 5013.5 at 2)

Petitioner testified that currently, his back is better and that it does not limit him in his work activities. Petitioner testified that for at least six months prior to this incident, his lower back was pain-free. Petitioner further testified that he is still employed, as chief engineer, by Respondent and that there was no gap in employment. Petitioner testified that he suffered unrelated injuries since June 22, 2018, accident as he referred to his right wrist that was wrapped with medial tape. Petitioner testified that he wants to return to work for Respondent.

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 found him to be a credible witness. Petitioner was calm, well-mannered, composed, and spoke clearly. The Arbitrator compared Petitioner's testimony with the totality of the evidence submitted and did not find any material contradictions that would deem the witness unreliable.

***CASE 19WC005013*:**

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

The Arbitrator finds that an accident occurred in the course of Petitioner's employment. The Arbitrator notes that Petitioner testified that he has been employed by Respondent, as a chief engineer, since March 1998. The Arbitrator notes that Petitioner testified that as chief engineer, replacing and fixing pumps was part of his job duties. The Arbitrator notes that Petitioner testified that, on June 22, 2018, after he physically replaced the pump, he stepped on a pipe-fitting equipment called a "union." The Arbitrator notes that this action caused Petitioner to fall, twist his lower back, and falling backwards on to his right side.

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.*

Based on the Petitioner's credible testimony and medical records, the Arbitrator finds that the accident arose out of and in the course of Petitioner's employment by Respondent on June 22, 2018.

***CASE 19WC005013*:**
WITH RESPECT TO ISSUE (E), WAS TIMELY NOTICE OF THE ACCIDENT GIVEN TO RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that timely notice of the accident was given to Respondent. The Arbitrator notes that Petitioner testified that he immediately reported the incident to property manager, Michael Wayland, but did not receive any instruction or information from Mr. Wayland at that time. The Arbitrator notes that Petitioner testified that it was customary to report accidents to Mr. Wayland. The Arbitrator notes that Petitioner testified that, during his second physical therapy visit, he found out that Mr. Wayland gave the incorrect claim number. The Arbitrator notes that Petitioner testified that he asked Mr. Wayland for another claim number multiple times and never received a response. The Arbitrator notes that Petitioner testified that Mr. Wayland was fired a few months after his back injury.

A claim is only barred if no notice whatsoever has been given. *Silica Sand Transport, Inc. v. Industrial Comm'n,* 197 Ill. App. 3d 640, 651 (1990). "If some notice has been given, but the notice is defective or inaccurate, then the employer must show that he has been unduly prejudiced." *Id.* The purpose of the notice requirement is "both to protect the employer against fraudulent claims by giving him an opportunity to investigate promptly and ascertain the facts of the alleged accident and to allow him to minimize his liability by affording the injured employee immediate medical treatment." *United States Steel Corp. v. Industrial Comm'n,* 32 Ill. 2d 68, 75 (1964). The Arbitrator notes that there was no evidence contrary to Petitioner's testimony regarding the issue of notice.

As such, the Arbitrator finds that there was proof that timely notice was provided to Respondent of the June 22, 2018, work related injury.

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

Petitioner bears the burden of proving, by a preponderance of the evidence, every element of the claim. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980). To obtain compensation under the Illinois Workers' Compensation Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. A work-related injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. Causation between the work-related accident and condition of ill-being can be established by showing prior history of good health, followed by a work-related accident in which petitioner is unable to perform his physical duties. *Kawa v. Illinois Workers' Comp. Comm'n*, 991 N.E.2d 430, 448 (2013).

***CASE 19WC005012*:**

After hearing the testimony of Petitioner and reviewing Petitioner's medical records, the Arbitrator finds Petitioner's current condition of ill-being, with respect to his left forearm, is causally related to the accident of March 16, 2017. The Arbitrator notes that Petitioner testified that on March 16, 2017, he injured his left forearm when he was prepping an exercise room for a board meeting. The Arbitrator notes that in the emergency room, Petitioner was initially diagnosed with elbow strain and partial tear of the common flexor tendon, medial epicondyles. (PX 5012.1 at 20) The Arbitrator notes that Dr. Sclamberg diagnosed Petitioner with "hematoma with contusion and partial muscle tear of flexor pronator compartment hematoma." (PX 5012.3 at 4) The Arbitrator notes that Petitioner testified that he was able to work within the restrictions provided by Dr. Sclamberg. The Arbitrator notes that on June 12, 2017, Petitioner reported that his left arm was pain free and that Dr. Sclamberg released Petitioner to full duty. (PX 5012.3 at 2-3) The Arbitrator notes that Petitioner testified he never had left arm issues and that currently, his left forearm is okay.

The Arbitrator finds that Petitioner sustained a work related injury on March 16, 2017, and that Petitioner was released to full duty June 12, 2017. Thus, the Arbitrator finds that his current condition of ill-being with respect to his left forearm was casually related to the March 16, 2017, work-related accident.

***CASE 19WC005013*:**

After hearing the testimony of Petitioner and reviewing Petitioner's medical records, the Arbitrator finds Petitioner's current condition of ill-being, with respect to his lower back, is causally related to the accident of June 22, 2018. The Arbitrator notes that Petitioner testified that one of his jobs that day was to replace a pump. The Arbitrator notes that Petitioner testified that after he physically replaced the pump, he

stepped on a pipe-fitting equipment called a "union." The Arbitrator notes that this action caused Petitioner to fall, twist his lower back, and falling backwards on to his right side injuring his lower back right side.

The Arbitrator notes that Petitioner testified that for at least six months prior to this incident, his lower back was pain-free. The Arbitrator notes that Petitioner testified that he initially tried home treatment but four days later, he tried to get into physical therapy because his condition was getting worse. The Arbitrator notes that Dr. Sclamberg diagnosed Petitioner with mild arthritis and low back pain with stenosis. (PX 5013.1 at 45) The Arbitrator notes that Dr. Patel diagnosed Petitioner with right side lumbar radiculopathy as a result of the June 22, 2018, work related accident. (PX 5013.1 at 43)

The Arbitrator notes that when Petitioner returned to Dr. Patel and reported that physical therapy made his pain worse, Dr. Patel opined that Petitioner failed conservative treatment including physical therapy, steroids, medications, and home exercise program. (PX 5013.1 at 39) The Arbitrator notes that Dr. Patel recommended ESI and referred Petitioner to Dr. Dixon for a surgical consultation after Petitioner failed conservative treatment. (PX 5013.1)

The Arbitrator notes that Dr. Dixon diagnosed Petitioner with a disk herniation at L4-L5 causing a nerve root compression and L4 and L5 radiculopathy diagnosis. (PX 5013.1 at 27) The Arbitrator notes that Dr. Dixon noted that Petitioner failed conservative treatment and recommended a "micro lumbar decompression and diskectomy of L4-L5 with exploration and decompression of the far lateral disk herniation compression the right L4 nerve root." *Id*. The Arbitrator notes that Petitioner underwent said procedure. *Id*.

The Arbitrator notes that Petitioner was released to work full duty on May 27, 2020. *Id*. The Arbitrator notes that in June 2021, Petitioner underwent an ablation due to complaints of pain while working. (PX 5013.1; 5013.5) The Arbitrator notes that Petitioner testified that currently, his back is better and that it does not limit him in his work activities. The Arbitrator notes that Petitioner testified that he wants to return to work for Respondent.

As such, the Arbitrator finds that Petitioner's current condition of ill-being with respect to Petitioner's lower back is casually related to the June 22, 2018, work-related accident.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS, AS RELATED TO 19WC005012 AND 19WC005013:

Consistent with the Arbitrator's prior finding that Petitioner's current condition of ill-being was causally related to the injuries sustained on March 16, 2017, and on June 22, 2018, the Arbitrator finds that the medical treatment and services Petitioner received was reasonable and necessary. (PX 5012.1, 5012.3, 5012.5, 5013.1, 5013.3, 5013.5, 5013.9, 5013.11) 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)*.

***CASE 19WC005012*:**

The Arbitrator notes that Petitioner received medical care for injuries to his left arm from March 16, 2017, through June 12, 2017, and was seen by Dr. Russell and by Dr. Sclamberg. (PX 5012.1, 5012.3) The Arbitrator also notes that Petitioner credibly testified to his injuries, symptoms, pain, and treatment.

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 finds that Respondent shall pay reasonable and necessary medical services, specific to the left arm, pursuant to the medical fee scheduled and as outlined in PX 5012.A, as provided in Sections 8(a) and 8.2 of the Act.

***CASE 19WC005013*:**

The Arbitrator notes that Petitioner received medical care for injuries to his lower back from June 22, 2018, through June 16, 2021, and was seen by Dr. Sclamberg, Dr. Patel, and Dr. Dixon. (PX 5013.1-5013.15) The Arbitrator further notes that Petitioner credibly testified to his injuries, symptoms, pain, and treatment.

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 finds that Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee scheduled and as outlined in PX 5013.A, as provided in Sections 8(a) and 8.2 of the Act.

WITH RESPECT TO ISSUE (K), WHAT TEMPORARY BENEFITS ARE IN DISPUTE, THE ARBITRATOR FINDS AS FOLLOWS, AS RELATED TO 19WC005012 AND 19WC005013:

Under Illinois law, temporary total disability is awarded for the time period between when an injury incapacitates the petitioner to the date the petitioner's condition has stabilized or the petitioner has recovered to the amount the character of the injury will permit. *Whiteney Productions, Inc. v. Industrial Comm'n*, 274 Ill.App.3d 28, 30 (1995). In determining whether a claimant remains entitled to receiving TTD benefits, the primary consideration is whether the claimant's condition has stabilized and whether she is capable of a return to the workforce. *Interstate Scaffolding, Inc. v. Illinois Workers' Comp. Comm'n*, 236 Ill.2d 132, 148 (2010).

Based on the Arbitrator's finding that Petitioner's current condition of ill-being was causally related to the work accident, the Arbitrator finds that Petitioner is entitled to TTD benefits.

***CASE 19WC005012*:**

As to 19WC005012, Petitioner claims to be entitled to TTD for a period of March 19, 2017, through April 1, 2017. (AX 1 at line 8) Respondent claims that Petitioner had no compensable lost time. *Id.* The Arbitrator notes that Petitioner credibly testified that he testified that he missed a couple of days of work for doctors appointments and appointments for the MRI. There was no additional evidence to indicate otherwise. Thus, the Arbitrator finds that Respondent shall pay Petitioner temporary total disability benefits of $746.67/week for 1 6/7 weeks, commencing March 19, 2017, through April 1, 2017, as provided in Section 8(b) of the Act.

***CASE 19WC005013*:**

With respect to 19WC005013, Petitioner claims to be entitled to TTD for a period of November 6, 2019, through May 27, 2020. (AX 1 at line 8) Respondent claims that Petitioner had no compensable lost time. Id. The Arbitrator notes that On November 6, 2019, Dr. Dixon placed Petitioner off-work. (PX 5013.1 at 25) The Arbitrator notes that on February 17, 2020, Dr. Dixon placed Petitioner on light duty restrictions of no lifting/carrying greater than 20 pounds and no pulling/pushing greater than 20 pounds. (PX 5013.1 at 16) The Arbitrator notes that on May 27, 2020, Dr. Dixon released Petitioner to return to work in his full duty capacity. (PX 5013.1 at 8) The Arbitrator further notes that Petitioner credibly testified that he testified that he was off work per Dr. Sclamberg and Dr. Dixon during those dates.

Thus, the Arbitrator finds that Respondent shall pay Petitioner temporary total disability benefits of $746.67/week for 29 1/7 weeks, commencing November 6, 2019, through May 27, 2020, 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, AS RELATED TO 19WC005012 AND 19WC005013:

Pursuant to §8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability for accidental injuries occurring on or after September 1, 2011:

(b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors:

(i) the reported level of impairment pursuant to subsection (a);
(ii) the occupation of the injured employee;
(iii) the age of the employee at the time of the injury;
(iv) the employee's future earning capacity; and
(v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors

used in addition to the level of impairment as reported by the physician must be explained in a written order.

***CASE 19WC005012*:**

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that an American Medical Association ("AMA") impairment rating was not performed in this case. As such, the Arbitrator relies on the other four factors of permanent partial disability ("PPD").

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the records reveal that Petitioner was employed by Respondent as chief engineer at the time of the accident and consistently since the accident. The Arbitrator notes that, on June 12, 2017, Petitioner was released to full duty and in his prior capacity. As such, the Arbitrator therefore gives greater weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 50 years old, married, with two dependents, at the time of the accident. (AX 1 line 6) As such, the Arbitrator gives less weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that Petitioner returned to work as chief engineer for Respondent and that there was no impact on Petitioner's ability to earn the same wages upon his return to work. As such, the Arbitrator therefore gives greater weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner was diagnosed with "hematoma with contusion and partial muscle tear of flexor pronator compartment hematoma." (PX 5012.3 at 4) The Arbitrator notes that Petitioner testified that he was able to work within the restrictions provided by Dr. Sclamberg and that currently his left forearm is okay. Petitioner never had any problems of this type, pre-injury. The Arbitrator notes that Petitioner returned to work full duty as of June 12, 2017. As such, 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 Respondent shall pay Petitioner permanent partial disability benefits of $672.00/week for 20.24 weeks, because the injuries sustained caused the 8% loss of the left arm, as provided in Section 8(e) of the Act.

***CASE 19WC005013*:**

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that an American Medical Association ("AMA") impairment rating was not performed in this case. As such, the Arbitrator relies on the other four factors of permanent partial disability ("PPD").

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the records reveal that Petitioner was employed by Respondent as chief engineer at the time of the accident and consistently since the accident. The Arbitrator notes that, on May 27, 2020, Petitioner was released to full duty and in his prior capacity, however, Petitioner continued to receive medical treatment due to pain through June 2021. As such, the Arbitrator therefore gives greater weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 51 years old, married, with two dependents, at the time of the accident. (AX 1 line 6) As such, the Arbitrator gives less weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that Petitioner returned to work as chief engineer for Respondent and that there was no impact on Petitioner's ability to earn the same wages upon his return to work. As such, the Arbitrator therefore gives greater weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner was diagnosed with mild arthritis and low back pain with stenosis by Dr. Sclamberg. (PX 5013.1 at 45) Dr. Patel diagnosed Petitioner with right side lumbar radiculopathy as a result of the June 22, 2018, work related accident. (PX 5013.1 at 43) Dr. Dixon diagnosed Petitioner with a disk herniation at L4-L5 causing a nerve root compression and L4 and L5 radiculopathy diagnosis. (PX 5013.1 at 27) Dr. Dixon noted that Petitioner failed conservative treatment and recommended a "micro lumbar decompression and diskectomy of L4-L5 with exploration and decompression of the far lateral disk herniation compression the right L4 nerve root" which Petitioner underwent. *Id*. Petitioner never had any problems back problems before his injury. As such, 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 Respondent shall pay Petitioner PPD benefits of $672.00/week for 60 weeks, because the injuries sustained caused 12% loss of a man as a whole, as provided in Section 8(d)2 of the Act.

It is so ordered:

Arbitrator Antara Nath Rivera

December 30, 2022

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC023328
Case Name	Ralph Ignas v. Atkore International (Allied Tube)
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0066
Number of Pages of Decision	13
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Kyle Tulley
Respondent Attorney	Christopher Jarchow

DATE FILED: 2/2/2024

/s/ Amylee Simonovich, Commissioner

Signature

DISSENT: /s/ Amylee Simonovich, Commissioner

Signature

24IWCC0066

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

Ralph Ignas,

Petitioner,

vs. NO: 20 WC 023328

Atkore International (Allied Tube),

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission agrees with the Arbitrator's analysis and finding of Petitioner's COVID-19 diagnosis as causally related to his work exposure. However, the Commission disagrees with the Arbitrator's determination that Petitioner's current condition of ill-being was causally related to his COVID-19 diagnosis. Petitioner tested positive for COVID-19 on September 16, 2020. He had one medical treatment appointment with Dr. Kevin on November 4, 2020 and sought no further medical treatment thereafter. The pulmonary examination at the time of the November 4, 2020 appointment showed that pulmonary effort was normal and he had normal breath sounds. (T. 49). Petitioner's only symptom complaint at the Arbitration hearing was, "sometimes I have shortness of breath". (T. 18). In addition, there is no expert opinion relating Petitioner's current complaints/condition to the COVID-19 diagnosis.

Thus, the Commission modifies the fifth paragraph of the Findings section of the Arbitrator's Decision form to read, "Petitioner's current condition of ill-being is not causally related to the accident."

The Commission further modifies the Arbitrator's Decision as to permanent partial disability, vacating the Arbitrator's award of benefits and striking the section of the Decision addressing issue "L". Decision, p. 4-5.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on October 18, 2022, is modified as stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED that the Arbitrator's award of permanent partial disability benefits is hereby vacated.

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $1,860.00. 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.

February 2, 2024

O: 12/12/23
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 and would affirm the Decision of the Arbitrator. After carefully considering the totality of the evidence, I believe Petitioner met his evidentiary burden of proving his condition of ill-being is causally related to his injury of September 15, 2020.

Causation between the work-related accident and condition of ill-being can be established by showing prior history of good health, followed by a work-related accident in which petitioner is unable to perform his physical duties. *Kawa v. Ill. Workers' Comp. Comm'n*, 991 N.E.2d 430, 448 (2013). In this case, Petitioner provided credible testimony that he was not feeling ill prior to September 15, 2020, and began exhibiting symptoms of the COVID-19 virus on September 15, 2020, after being exposed to a co-worker who had tested positive for COVID-19. Petitioner was definitively diagnosed with COVID and was advised to quarantine for 14 days by the doctor providing him with the results and by his employer. Petitioner's credible testimony, alone, is sufficient to establish causation under a chain of event analysis. *Ford Motor Co. v. Ill. Workers' Comp. Comm'n*, 2022 IL App (1st) 211218WC-U, citing *International Harvester v. Ill. Indus. Comm'n,* 93 Ill. 2d 59, 63-64 (1982). As Petitioner provided testimony that was supported by the medical evidence, Petitioner has met his burden of proof with regard to causal connection.

I disagree with the majority that an expert opinion was required to provide causal connection in this case. While Petitioner had a myriad of pre-existing health conditions, he was not claiming

that any of them were aggravated or accelerated by his COVID-19 disease. The Commission is not precluded from finding against claimant on the issue of causation of her disability where the claimant and the employer choose not to offer medical opinions on the issue. *Nunn v. Ill. Indus. Comm'n*, 157 Ill. App. 3d 470, 477 (1987). However, medical testimony as to causation is not necessarily required. *Nunn,* at 478, citing *Westinghouse Electric Co. v. Ill. Indus. Comm'n*, 64 Ill. 2d 244 (1976). A chain of events analysis may justify a finding of causation without an expert medical opinion. *Price v. Ill. Indus. Comm'n,* 278 Ill. App. 3d 848, 853 (1996); See also *Corn Belt Energy Corporation v. Ill. Workers' Comp. Comm'n,* 2016 Ill. App. 3d 150311WC.

The medical records also support a continued causal connection between Petitioner's initial COVID-19 diagnosis and his condition of ill-being. This is demonstrated in the November 4, 2020 office note wherein Dr. Kevin noted Petitioner had "residual symptoms of fatigue". PX 2, p. 12. This provides direct medical causal connection between the fatigue and Petitioner's contraction of COVID-19.

Respondent did not refute Petitioner's testimony nor Dr. Kevin's assessment of residual fatigue with any medical opinion. Without an expert medical opinion, Respondent argues Petitioner's pre-existing health conditions better explain his fatigue. While the record does support a history of multiple preexisting conditions, those conditions appear to have been addressed with medication and lifestyle changes, which resulted in a lack of fatigue complaints since December 26, 2017, almost three years prior.

For the forgoing reasons, I would affirm the Decision of the Arbitrator with regard to causal connection. Petitioner met his burden of proving causal connection through his credible testimony and the supporting medical evidence.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC023328
Case Name	Ralph Ignas v. Atkore International (Allied Tube)
Consolidated Cases	
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	9
Decision Issued By	Charles Watts, Arbitrator

Petitioner Attorney	Ian Elfenbaum
Respondent Attorney	Christopher Jarchow

DATE FILED: 10/19/2022

THE INTEREST RATE FOR THE WEEK OF OCTOBER 18, 2022 4.24%

/s/Charles Watts, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Ralph Ignus
Employee/Petitioner

v.

Atkore International (Allied Tube)
Employer/Respondent

Case # **20** WC **23328**

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 **Watts**, Arbitrator of the Commission, in the city of **Chicago**, on **9/19/22**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **9/15/20**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**68,640.00**; the average weekly wage was $**1,320.00**.

On the date of accident, Petitioner was **62** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**0.00** 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 be given a credit of $**0.00** for medical benefits that have been paid.

Respondent shall pay Petitioner temporary total disability benefits of $**880.00**/week for **2.000** weeks, commencing **9/16/20** through **9/29/20**, as provided in Section 8(b) of the Act.

Pursuant to Section 8.1b(b) of the Act, for accidental injuries occurring after September 1, 2011, permanent partial disability shall be determined using the following five enumerated criteria, with no single factor being the sole determinant of disability: (i) the reported level of impairment pursuant to subsection (a) [AMA "Guides to the Evaluation of Permanent Impairment"]; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records.

With regard to subsection (i) of Section 8.1b(b), the Arbitrator notes an AMA impairment rating was not performed on this case. Therefore, the Arbitrator gives *no* weight to this factor.
With regard to subsection (ii) of Section 8.1b(b), the occupation of the employee, the Arbitrator notes the record reveals Petitioner was employed with Respondent for 30+ years. (Tx p. 7). Petitioner testified his job duties consist of, but not limited to, prepping mills for different products, repairing damaged mills, and assisting operators, welders, and cutoffs. (Tx p. 7-8). The Arbitrator also notes Petitioner works 8-12 hour days. (Tx p. 8). Moreover, the Arbitrator notes Petitioner's working conditions consist of a hot temperature atmosphere that may be difficult to breath in. (Tx p. 13). Petitioner testified he still experiences having shortness of breath. (Tx p. 18). Petitioner clarified his issues pertaining to shortness of breath were not common prior to him contracting COVID-19 on September 15, 2020. (Tx p. 18). Therefore, the Arbitrator gives *considerable* weight to this factor.

With regard to subsection (iii) of Section 8.1b(b), the age of the employee at the time of injury, the Arbitrator notes Petitioner was 62 years old at the time of the accident. He is currently 64 years old and has been working for Respondent for 30+ years. (Tx p. 7). Although neither party presented direct evidence as to how Petitioner's age impacts any disability, the Arbitrator notes Petitioner may reasonably be expected to live and work with the effects of his injury, specifically his shortness of breath within a hot temperature work environment. Therefore, Petitioner's permanent partial disability may be greater than that of an older individual. Thus, the Arbitrator gives *considerable* weight to this factor.

With regard to subsection (iv) of Section 8.1b(b), Petitioner's future earnings capacity, Petitioner testified he has returned to work in his same job position. Therefore, the Arbitrator gives *some* weight to this factor.

With regard to subsection (v) of Section 8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes Petitioner tested positive for COVID-19. (Px 1). The Arbitrator also notes Petitioner missed two weeks of work as a result of his positive COVID-19 test. (Tx p. 12). Moreover, the Arbitrator notes Petitioner credibly testified battle with COVID-19 did not feel like a minor case of COVID-19. (Tx p. 20). and that Petitioner. Additionally, the Arbitrator notes Petitioner had a follow up appointment with his primary care physician on November 4, 2020, for feeling weak and tired. (Px 2, p. 12). Furthermore, the Arbitrator notes Petitioner credibly testified he still experiences having shortness of breath. (Tx p. 18). Petitioner clarified his issues pertaining to shortness of breath were not common prior to him contracting COVID-19 on September 15, 2020. (Tx p. 18). Therefore, the Arbitrator gives *great* 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 2.50% loss of use of 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

October 19, 2022

State of Illinois)
)
County of Cook)

BEFORE THE
ILLINOIS WORKERS' COMPENSATION COMMISSION

Ralph Ignus,	)	
Petitioner,	)	
	)	
v.	)	**IWCC No. 20 WC 23328**
	)	
Atkore International (Allied Tube),	)	
Respondent,	)	

FINDINGS OF FACT

At the time of injury on September 15, 2020, Ralph Ignus (hereinafter "Petitioner") was a 62-year-old employee at Atkore International (Allied Tube) (hereinafter "Respondent"). He has been working for Respondent for approximately 30+ years. (Tx p. 7). His current job title is "Setup Man." (Tx p. 7). Petitioner testified his job duties consist of, but not limited to, prepping mills for different products, repairing damaged mills, and assisting operators, welders, and cutoffs. (Tx p. 7-8). Each of Petitioner's shifts last about 8-12 hours. (Tx p. 8). During his shifts, Petitioner constantly stands in close proximity with his co-workers at an approximate distance of one arm's length. (Tx p. 8). He works with about 15 to 20 co-workers per shift. (Tx p. 8-9). Petitioner testified he did not feel ill prior to arriving at his shift on September 15, 2020. (Tx p. 9).

Executive Order

On March 20, 2020, the Governor of Illinois, JB Pritzker, issued Executive Order 2020-10 in response to the outbreak of COVID-19. (Px 3). This Executive Order is also referred to as COVID-19 Executive Order No. 8. (Px 3). The Executive Order supported a "stay at home" order, and required all businesses and operations in the State, except Essential Businesses and Operations, to cease all activities. (Px 3, p. 2-3). Pursuant to Section 1, Subsection 12(t), Essential Businesses and Operations included the following:

> "Manufacture, distribution, and supply chain for critical products and industries. Manufacturing companies, distributors, and supply chain companies producing and supplying essential products and services in and for industries such as pharmaceutical, technology, biotechnology, healthcare, chemicals and sanitation, waste pickup and disposal, agriculture, food and beverage, transportation, energy, steel and steel products, petroleum and fuel, mining, construction, national defense, communications, as well as products used by other Essential Businesses and Operations." (Px 3, p. 11).

Essential Worker

Petitioner was labeled and considered to be an essential worker at the time he became ill on September 15, 2020. (Tx p. 13). Respondent's supervisors handed the employees a piece of paper to put in their vehicles in the event the employees were stopped on the road. (Tx p. 13). The piece of paper indicated each employee was an essential worker.

Accident/Exposure

On September 15, 2020, Petitioner began his shift at 7:00 AM. (Tx p. 9). Prior to his shift, Petitioner was not feeling ill. (Tx p. 9). His shift was supposed to end at 3:00 PM. (Tx p. 9). However, at about 1:00 PM, Petitioner started developing symptoms consistent with a sore throat and headache. (Tx p. 9-10). Petitioner immediately notified his supervisor, Michael Reams. (Tx p. 10). Michael Reams then directed Petitioner to the on-site EMTs. (Tx p. 11). The on-site EMTs advised Petitioner to go home and submit to a COVID-19 test. (Tx p. 11).

Respondent attempted to implement the following COVID-19 safety policies: masks, hand sanitizer, and social distancing. (Tx p. 13-14). The mask policy was difficult to follow because of the temperature within the work area. (Tx p. 13). Additionally, the mask made it extremely difficult to breath within the hot work area. (Tx p. 13). The mask also caused Petitioner's safety glasses to fog up which made it difficult to work. (Tx p. 15). The social distancing policy was also difficult to follow because Petitioner and his co-workers constantly worked in close proximity with one another. (Tx p. 14). While working in close proximity of one another, many co-workers had their masks down. (Tx p. 14).

Prior to contracting COVID-19, Petitioner's co-worker, David Fonseca, tested positive for COVID-19. (Tx p. 15, 18-19, 24). Petitioner and Mr. Fonseca routinely worked in close proximity with one another. (Tx p. 15-16). Petitioner and Mr. Fonseca also shared the same locker room. (Tx p. 16).

Petitioner does not visit any heavily populated areas (eg: grocery stores, movie theatres, concerts, etc.) (Tx p. 17). He does not take public transportation. (Tx p. 17). Petitioner did not socialize with any individuals outside of work, except for his wife, prior to contracting COVID-19. (Tx p. 17). Petitioner's wife was not showing any signs of COVID-19 symptoms prior to September 15, 2020. (Tx p. 18).

Medical Treatment

Petitioner presented to Franciscan Health for a COVID-19 test on September 16, 2020. (Px 1). Petitioner's COVID-19 test came back positive. (Px 1). Petitioner presented to his primary care physician on November 4, 2020. (Px 2, p. 11). It was noted Petitioner continued to feel weak and tired since testing positive for COVID-19. (Px 2, p. 12). Since being diagnosed with COVID-19, Petitioner sometimes experience shortness of breath. (Tx p. 18). It was uncommon for Petitioner to experience shortness of breath prior to September 15, 2020. (Tx p. 18).

ANALYSIS

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

The parties stipulated Petitioner's contraction of COVID-19 arose out of the course and scope of his employment. (Arbitrator's Exhibit 1).

To establish causation a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injury. 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, P 1, 11 N.E.3d 453. An injury arises out of a claimant's employment where it "had it's origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and accidental injury." *Sisbro, Inc. v. Industrial Comm'n* 207 Ill. 2d 193, 203 (2003). Additionally, causation in a workers' compensation case may be established by a chain of events showing prior good health, an accident and a subsequent injury. *Gano Electric Contracting v. Industrial Comm'n*, 260 Ill. App. 3d 92, 96-97, 631 N.E.2d 724 (1994); *see also Darling v. Industrial Comm'n*, 176 Ill. App. 3d 186, 193, 530 N.E.2d 1135 (1988).

The Arbitrator found Petitioner's testimony to be credible. Additionally, the Arbitrator found Petitioner to be truthful, straight forward, and consistent throughout his testimony.

Petitioner credibly testified he was not feeling ill prior to his shift on September 15, 2020. (Tx p. 9). However, toward the end of his shift, Petitioner started developing symptoms consistent with a sore throat and headache. (Tx p. 9-10). Respondent's EMTs directed Petitioner to go home and submit to a COVID-19 test. (Tx p. 11). Petitioner tested positive for COVID-19 on September 16, 2020. (Px 1).

Petitioner gave unrebutted testimony that although Respondent attempted to implement COVID-19 safety guidelines, Respondent did not enforce said guidelines. Specifically, the mask policy was not enforced because (1) the temperature was too hot within the work area and (2) the mask made it extremely difficult to breath within the hot work. (Tx p. 13). Additionally, the social distancing policy was not enforced because Petitioner's job required both he and his co-workers to constantly work within arm's length of one another. (Tx p. 8, 14). Lastly, Petitioner's co-worker, David Fonseca, also tested positive for COVID-19. (Tx p. 15, 18-19, 24). Petitioner and Mr. Fonseca routinely worked in close proximity with one another while also sharing the same locker room. (Tx p. 15-16).

Petitioner also testified he does not visit any heavily populated areas (eg: grocery stores, movie theatres, concerts, etc.). (Tx p. 17). He further testified he does not take public transportation nor does he socialize with any individuals outside of work. (Tx p. 17). Additionally, although Petitioner lives with his wife, she was not showing any signs of COVID-19 related symptoms prior to September 15, 2020. (Tx p. 18).

The Arbitrator notes the parties stipulated to Petitioner's contraction of COVID-19 arose out of the course and scope of his employment. The Arbitrator also notes there is no medical evidence submitted that indicates Petitioner's current condition of ill-being is from any source other than his original COVID-19 related illness. Additionally, the Arbitrator finds Petitioner satisfied the "chain of events" analysis by Petitioner being in good health prior to his shift on September 15, 2020, then developing symptoms toward the end of his shift, and then testing positive for COVID-19 the following day. Therefore, the Arbitrator finds Petitioner's condition of ill-being related to his contraction of the COVID-19 virus to be causally related to his exposure at work on September 15, 2020.

With respect to issue "K," whether Petitioner is entitled to temporary total disability benefits, the Arbitrator finds as follows:

Having found Petitioner sustained a compensable condition of ill-being arising out of and in the course and scope of his employment, and that Petitioner's condition of ill-being is causally related to his exposure to COVID-19 virus at work, any and all periods of temporary total disability incurred is the responsibility of Respondent.

Petitioner testified he began experiencing a sore throat and headaches while at work on September 15, 2020. (Tx p. 9-10). Petitioner's supervisor, Michael Reams, and the on-site EMTs advised Petitioner be sent home and submit to a COVID-19 test. (Tx p. 10-11). Petitioner tested positive for COVID-19 on September 16, 2020. (Px 1). Petitioner notified Respondent's Human Resource Department representative, Cheryl Walker, of his positive COVID-19 test. (Tx p. 12). Both Petitioner's doctor and Respondent advised Petitioner to remain off work pursuant to CDC guidelines. (Tx p. 12). At the time, CDC guidelines required COVID-19 positive individuals to quarantine for 14 days or two weeks. Respondent failed to pay Petitioner any TTD benefits for the 14 days Petitioner was off of work. Respondent did not introduce any evidence indicating Petitioner was able to return to work during those 14 days because Petitioner was off work pursuant to CDC guidelines.

Therefore, the Arbitrator finds Petitioner is owed (2) two weeks of TTD benefits from September 16, 2020 through September 29, 2020.

With respect to issue "L," as to the nature and extent of Petitioner's injuries, the Arbitrator finds as follows:

Pursuant to Section 8.1b(b) of the Act, for accidental injuries occurring after September 1, 2011, permanent partial disability shall be determined using the following five enumerated criteria, with no single factor being the sole determinant of disability: (i) the reported level of impairment pursuant to subsection (a) [AMA "Guides to the Evaluation of Permanent Impairment"]; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records.

With regard to subsection (i) of Section 8.1b(b), the Arbitrator notes an AMA impairment rating was not performed on this case. Therefore, the Arbitrator gives *no* weight to this factor.

With regard to subsection (ii) of Section 8.1b(b), the occupation of the employee, the Arbitrator notes the record reveals Petitioner was employed with Respondent for 30+ years. (Tx p. 7). Petitioner testified his job duties consist of, but not limited to, prepping mills for different products, repairing damaged mills, and assisting operators, welders, and cutoffs. (Tx p. 7-8). The Arbitrator also notes Petitioner works 8-12 hour days. (Tx p. 8). Moreover, the Arbitrator notes Petitioner's working conditions consist of a hot temperature atmosphere that may be difficult to breath in. (Tx p. 13). Petitioner testified he still experiences having shortness of breath. (Tx p. 18). Petitioner clarified his issues pertaining to shortness of breath were not common prior to him contracting COVID-19 on September 15, 2020. (Tx p. 18). Therefore, the Arbitrator gives *considerable* weight to this factor.

With regard to subsection (iii) of Section 8.1b(b), the age of the employee at the time of injury, the Arbitrator notes Petitioner was 62 years old at the time of the accident. He is currently 64 years old and has been working for Respondent for 30+ years. (Tx p. 7). Although neither party presented direct evidence as to how Petitioner's age impacts any disability, the Arbitrator notes Petitioner may reasonably be expected to live and work with the effects of his injury, specifically his shortness of breath within a hot temperature work environment. Therefore, Petitioner's permanent partial disability may be greater than that of an older individual. Thus, the Arbitrator gives *considerable* weight to this factor.

With regard to subsection (iv) of Section 8.1b(b), Petitioner's future earnings capacity, Petitioner testified he has returned to work in his same job position. Therefore, the Arbitrator gives *some* weight to this factor.

With regard to subsection (v) of Section 8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes Petitioner tested positive for COVID-19. (Px 1). The Arbitrator also notes Petitioner missed two weeks of work as a result of his positive COVID-19 test. (Tx p. 12). Moreover, the Arbitrator notes Petitioner credibly testified battle with COVID-19 did not feel like a minor case of COVID-19. (Tx p. 20). and that Petitioner. Additionally, the Arbitrator notes Petitioner had a follow up appointment with his primary care physician on November 4, 2020, for feeling weak and tired. (Px 2, p. 12). Furthermore, the Arbitrator notes Petitioner credibly testified he still experiences having shortness of breath. (Tx p. 18). Petitioner clarified his issues pertaining to shortness of breath were not common prior to him contracting COVID-19 on September 15, 2020. (Tx p. 18). Therefore, the Arbitrator gives *great* weight to this factor.

Based on the above, the Arbitrator finds Respondent shall pay Petitioner permanent partial disability benefits of $792.00/week for 12.50 weeks because the injuries sustained caused 2.50% loss of use of Petitioner's body or man as a whole as provided in Section 8(d)2 of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC019970
Case Name	Barbara Ann Williams v. Air Wisconsin Airlines
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0067
Number of Pages of Decision	12
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Michael E. Mahay
Respondent Attorney	Mark Vizza

DATE FILED: 2/2/2024

/s/Marc Parker, Commissioner

Signature

24IWCC0067

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

BARBARA WILLIAMS,

Petitioner,

vs. NO: 19 WC 19970

AIR WISCONSIN AIRLINES,

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 right knee condition is causally related to the undisputed September 24, 2018 work accident, entitlement to temporary disability benefits, entitlement to medical expenses, and the nature and extent of Petitioner's permanent disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below, but otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

CONCLUSIONS OF LAW

Temporary Disability

On the Request for Hearing form, Petitioner alleged entitlement to Temporary Total Disability ("TTD") benefits from July 8, 2019 through January 20, 2021. ArbX1. Noting Petitioner's testimony that she was off work from the date of her first surgery until January 20, 2021, after completing physical therapy following the second surgery, is supported by the records of her treating physician, Dr. John McConnell, the Arbitrator awarded TTD for the claimed period. The Commission views the evidence differently.

Petitioner's exhibits reflect subpoenas were issued to Dr. McConnell and Arrow Physical Therapy ("Arrow") on November 20, 2019. PX3, PX5. On November 22, 2019, Dr. McConnell's office forwarded treating records through October 14, 2019 and charges incurred through

September 20, 2019. Dr. McConnell's October 14, 2019 office note indicates Petitioner is limited to "minimal weightbearing" and there was a "work form completed," however there is no corresponding form in the record. The Commission observes the last work note from Dr. McConnell included in the transcript is the September 24, 2019 work status report, which reflects Petitioner "is excused from work until 01/2020." PX3. As such, there is a 12-month period of claimed temporary total disability which lacks documentation of the associated restrictions imposed by Petitioner's treating physician.

Moreover, while the Decision also references Petitioner's testimony of being released to return to work "after the second surgery and completing the follow up physical therapy on January 20, 2021," our review of the testimony reveals Petitioner simply agreed she underwent post-operative rehabilitation at Arrow and Dr. McConnell "ultimately released you to return to work full duty as of January 21st of 2021." T. 23. Further, even if the Commission was to award TTD predicated on Petitioner's participation in physical therapy, we emphasize the Arrow records end well before the claimed TTD end date. In response to Petitioner's November 20, 2019 subpoena, Arrow forwarded treatment notes and charges through October 31, 2019. PX5. There is evidence Petitioner obtained updated records from Arrow, as included in the bills exhibit (PX6) is a February 11, 2020 note for "Visit #3" of 12 planned visits. We emphasize, however, this isolated note is the only treatment record from 2020 offered into evidence, and we find it is insufficient to establish Petitioner's entitlement to TTD benefits continuing for an additional 11 months.

Having considered the treating records, our analysis turns to the opinions of Respondent's §12 examiner, Dr. Lawrence Lieber, and we note Dr. Lieber concluded Petitioner would not be released to full duty for an additional three months beyond January 2020. In his October 16, 2019 report, although opining there was no causal relationship between Petitioner's condition and her work accident, Dr. Lieber nonetheless confirmed Petitioner "is unable to return to full-duty work at this time"; Dr. Lieber concluded Petitioner would remain under significant restrictions for six months, explaining Petitioner needed to complete the non-weightbearing protocol, then undergo aggressive physical therapy for up to six weeks before being able to return to full duty. RX1. Based on Dr. Lieber's six-month timeline as set forth in his October 16, 2019 report, the Commission finds Petitioner was temporarily and totally disabled through April 16, 2020.

Petitioner's average weekly wage of $399.83 yields a Temporary Total Disability rate of $266.55, which falls below the minimum as calculated pursuant to Section 8(b)1. *820 ILCS 305/8(b)1*. As the statutory minimum benefit rate for a claimant with two dependents on Petitioner's date of accident is $286.00, the Commission finds Petitioner is entitled to TTD benefits of $286.00 per week for 40 4/7 weeks, representing July 8, 2019 through April 16, 2020. As we further find there is no evidentiary support for further TTD benefits, the Commission vacates the award of TTD benefits from April 17, 2020 through January 20, 2021.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 22, 2022, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $286.00 per week for a period of 40 4/7 weeks, representing July 8, 2019 through April 16, 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 award of Temporary Total Disability benefits from April 17, 2020 through January 20, 2021 is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the sum of $26,347.00 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 $286.00 per week for a period of 37.625 weeks, as provided in §8(e)12 of the Act, for the reason that the injuries sustained caused the 17.5% loss of use of the right leg.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $49,000.00. 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.

February 2, 2024

MP/mck

O: 1/24/24

68

/s/ *Marc Parker*
Marc Parker

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC019970
Case Name	WILLIAMS,BARBARA ANN v. AIR WISCONSIN AIRLINES
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	Charles Watts, Arbitrator

Petitioner Attorney	Michael E. Mahay
Respondent Attorney	Mark Vizza

DATE FILED: 12/22/2022

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

/s/Charles Watts, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Barbara Williams
Employee/Petitioner

v.

Air Wisconsin Airlines
Employer/Respondent

Case# **19 WC 019970**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Charles Watts**, Arbitrator of the Commission, in the city of **Chicago**, on **May 19, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **September 24, 2018,** Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$20,791.16;** the average weekly wage was **$399.83.**

On the date of accident, Petitioner was **46** 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 **$2,925.04** for other benefits, for a total credit of **$2,925.04.**

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

ORDER

- Respondent shall pay reasonable and necessary medical services of $26,347.00, as provided in Sections 8(a) and 8.2 of the Act.
- Respondent shall be given a credit of $0 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 $266.55/week for 80 2/7ths weeks, commencing July 8, 2019 through January 20, 2021, as provided in Section 8(b) of the Act.
- Respondent shall pay Petitioner permanent partial disability benefits of $286.00/week for the 37.625 weeks, because the injuries sustained caused the 17.5% loss of the Right Leg, as provided in Section 8(e) of the Act.
- Respondent shall be given a credit of **$2,925.04** for other benefits, for a total credit of **$2,925.04.**

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 22, 2022

Findings of Fact

Petitioner's undisputed testimony was that on September 24, 2018, she finished a flight that landed in Columbia, South Carolina. She and her flight crew were picked up at the airport by a hotel shuttle bus and taken to the Double Tree hotel for overnight lodging. Petitioner testified that as she exited the shuttle at the hotel she was required to jump down approximately 3 feet from the shuttle to the ground. [TR. 9] When she landed, she felt her right knee buckle. [Tr. 8] She further testified that her right knee instantly started hurting and she noticed swelling [Tr. 8] Once she got to her room, she took some Tylenol.

Petitioner next testified that she did not seek immediate medical care but, in fact, tried to self-medicate and continued working. She testified that although she was experiencing pain in the knee, it wasn't to the point that she couldn't work. [Tr. 16] Petitioner continued to work in this condition through December 2018, stating that the pain would come and go and last 4 to 5 days. [Tr. 17]

In January 2019, her pain increased, sometimes lasting up to a week before subsiding. [Tr.18] She continued using over the counter pain medicine and ice when her knee was swollen. In February 2019, petitioner took a leave of absence from Respondent to attend a real estate class. During that time she noticed less swelling and pain because she, "wasn't in the air, the air pressure always makes your legs swell". [Tr. 18.] In March 2019, after petitioner returned to work, She noticed increased swelling. [Tr. 18, 19] In April 2019, Petitioner emailed her supervisor, Amber, requesting the contact information for the workers' compensation coordinator for medical treatment. [Tr. 19] Petitioner testified that she contacted Jenny Voight, the workers' compensation coordinator, and spoke with her once regarding medical treatment. [Tr. 19] Jenny did not follow up with the petitioner after that time and Petitioner began treatment with her PCP, Dr. Wanid in June 2019 Wherein she gave a history of jumping off a shuttle and suspected she twisted her knee. [Px-1 and Tr. 20]

Dr. Wanid ordered an MRI and referred Petitioner to Dr. McConnell with Ortho Virginia. [Px-1, 3 and Tr. 22] Petitioner gave Dr. McConnell a consistent history that her right knee pain began in September 2018 when she was getting out of a shuttle and landed hard on her right knee. [Px-3] The doctor evaluated the her and performed an arthroscopic removal of a loose body in Petitoner's right knee on July 8, 2019. [Px-3] Subsequent to that surgery, Petitioner undertook a course of physical Therapy at Arrow Physical Therapy. [Px-5]

Petitioner continued to follow up with Dr. McConnell in August and September 2019. [Px-3] On September 17, 2019, due to Petitioner's continued complaints, Dr. McConnell recommended she undergo an osteochrondral allograft. [Px-3] This procedure was performed on September 18, 2019. [Px-3] Petitioner followed up this second surgery with another course of physical therapy at Arrow Physical Therapy and was ultimately released from care and returned to work with no restrictions on January 20, 2021.

The medical report of Lawrence Lieber MD (RX 1) shows he performed a Section 12 examination of Petitioner on October 16, 2019. She gave a history of jumping down 1 to 2 feet onto the ground. She states she injured her right knee. She told Dr. Lieber that at times she had no discomfort and no problems with activities. She told Dr. Lieber she had an MRI which showed a loose body. At the examination, she complained of consistent swelling and stiffness of the right knee. Dr. Lieber reviewed the MRI which showed an osteochondral lesion of the medial femoral condyle with associated edema. Dr. Lieber's opinion was that the petitioner's current condition of ill-being has no relationship to the alleged September 24, 2018 injury. He finds that Petitioner sustained, at most, a minor strain to her right knee. He is of the opinion that if she had suffered a significant osteochondral injury as indicated on the MRI dated June 14, 2019, she would have had severe pain and difficulty with any activity. His opinion is that the mechanism of injury as described was not significant enough to cause the subsequent abnormalities that required surgical intervention. He finds no evidence that the isolated September 24, 2018 event caused the underlying abnormality within Petitioner's right knee area. It is his opinion that the treatment rendered to Petitioner has no relationship to the September 24, 2018 incident.

CONCLUSIONS OF LAW

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

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

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

The Arbitrator finds, after observing Petitioner testify at trial and a review of the records, that Petitioner was completely credible. Petitioner's demeanor at trial and manner in which she answered questions exhibited forthrightness because her answers were easily and quickly made. Petitioner never seemed to search for answers or appear rehearsed. Dr. McConnell's records

completely back up Petitioner's account of the injury and gives a clear causal opinion linking the misstep off of the shuttle bus to the need for the surgeries. Dr. Lieber's IME report essentially takes the position that the misstep could not have caused the injury for which surgery was performed and that Petitioner could not have physically performed he job if the condition of her knee was the same right after the accident as it was months later when she had the MRI. The Arbitrator finds the combination of Petitioner's credible testimony and clear opinions found in the records of Dr. McConnell to be more persuasive than the opinions of Dr. Lieber.

In Support of the Arbitrator's Decision relating to F, whether the petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds:

Petitioner's undisputed testimony was that on September 24, 2018, she finished a flight that landed in Columbia, South Carolina. She and her flight crew were picked up at the airport by a hotel shuttle bus and taken to the Double Tree hotel for overnight lodging. Petitioner testified that as she exited the shuttle at the hotel she was required to jump down approximately 3 feet from the shuttle to the ground. [TR. 9] When she landed, she felt her right knee buckle. [Tr. 8] She further testified that her right knee instantly started hurting and she noticed swelling [Tr. 8] Once she got to her room, she took some Tylenol.

Petitioner next testified that she did not seek immediate medical care but, in fact, tried to self-medicate and continued working. She testified that although she was experiencing pain in the knee, it wasn't to the point that she couldn't work. [Tr. 16] Petitioner continued to work in this condition through December 2018, stating that the pain would come and go and last 4 to 5 days. [Tr. 17]

In January 2019, her pain increased, sometimes lasting up to a week before subsiding. [Tr.18] She continued using over the counter pain medicine and ice when her knee was swollen. In February 2019, petitioner took a leave of absence from Respondent to attend a real estate class. During that time she noticed less swelling and pain because she, "wasn't in the air, the air pressure always makes your legs swell". [Tr. 18.] In March 2019, after petitioner returned to work, She noticed increased swelling. [Tr. 18, 19] In April 2019, Petitioner emailed her supervisor, Amber, requesting the contact information for the workers' compensation coordinator for medical treatment. [Tr. 19] Petitioner testified that she contacted Jenny Voight, the workers' compensation coordinator, and spoke with her once regarding medical treatment. [Tr. 19] Jenny did not follow up with the petitioner after that time and Petitioner began treatment with her PCP, Dr. Wanid in June 2019 Wherein she gave a history of jumping off a shuttle and suspected she twisted her knee. [Px-1 and Tr. 20]

Dr. Wanid ordered an MRI and referred Petitioner to Dr. McConnell with Ortho Virginia. [Px-1, 3 and Tr. 22] Petitioner gave Dr. McConnell a consistent history that her right knee pain began in September 2018 when she was getting out of a shuttle and landed hard on her right knee. [Px-3] The doctor evaluated the her and noted on June 19, 2019, that "[a]t the time of her injury stepping off of the shuttle, Ms. Williams sustained an osteochondral fracture of the medial femoral condyle as a direct result." . [Px-3] He performed an arthroscopic removal of a loose body in Petitoner's right knee on July 8, 2019. [Px-3] Subsequent to that surgery, Petitioner undertook a course of physical Therapy at Arrow Physical Therapy. [Px-5]

Petitioner continued to follow up with Dr. McConnell in August and September 2019. [Px-3] On September 17, 2019, due to Petitioner's continued complaints, Dr. McConnell recommended she undergo an osteochrondral allograft. [Px-3] This procedure was performed on September 18, 2019. [Px-3] Petitioner followed up this second surgery with another course of physical therapy at Arrow Physical Therapy and was ultimately released from care and returned to work with no restrictions on January 20, 2021.

The Arbitrator notes Petitioner testified that testified that she had consistent pain since the September 24, 2018 accident and further testified she had not injured her right knee prior to or subsequent to this injury.

The Arbitrator finds that based upon the treating medical records and Petitioner's credible testimony, Petitioner's condition of ill-being with regard to her right knee injury is causally related to the September 24, 2018 accident while in the employ of Respondent.

In Support of the Arbitrator's decision relating to J, medical expenses, the Arbitrator finds:

Petitioner submitted Px-2 Medical bill from Dr Wanid ($600.00); Px-4 Medical bill from Dr. McConnell ($16,272.00); and Px-5 Medical bill from Arrow Physical Therapy ($9,475.00).

Based upon Petitioner's credible testimony and the treating medical records, the Arbitrator finds the aforementioned medical bills reasonable, necessary and related the September 24, 2018 injury.

In Support of the Arbitrator's decision relating to K, TTD, the Arbitrator finds:

Petitioner credibly testified she was off work from the date of her first surgery on July 8, 2019 and was released to return to work after the second surgery and completing the follow up physical therapy on January 20, 2021. Her testimony is supported by the treating medical records of Dr. McConnell.

Based upon Petitioner's credible testimony and the treating records of Dr. McConnell, the Arbitrator finds petitioner was temporarily totally disabled for the period od July 8, 2019 through January 20, 2021.

In Support of the Arbitrator's decision relating to L, nature and extent of the injury, the Arbitrator finds:

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 Flight Attendant at the time of the accident and that she is able to return work in her prior capacity as a result of said injury. The Arbitrator therefore gives *greater* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 46 years old at the time of the accident. Because of Petitioner age, the petitioner has a 21 year work life expectancy. The Arbitrator therefore gives *greater* weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes the Parties provided no evidence on Petitioner's behalf. The Arbitrator therefore gives *no* weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that petitioner testified that her knee currently gives out occasionally and is sometimes still painful and swells. 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 17.5% loss of use of right leg pursuant to §8(e) of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	13WC037831
Case Name	Kathleen Groves v. Northern Illinois University
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0068
Number of Pages of Decision	25
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Muriel Collison
Respondent Attorney	Drew Dierkes

DATE FILED: 2/2/2024

/s/Maria Portela, Commissioner

Signature

24IWCC0068

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KATHLEEN GROVES,

Petitioner,

vs. NO: 13 WC 37831

NORTHERN ILLINOIS UNIVERSITY,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses, temporary total disability benefits and nature and extent, and being advised of the facts and law, modifies the Decision of the Arbitrator regarding temporary total disability benefits as explained below, vacates the award of permanent total disability, awards 45% loss of use of a person as a whole, and with the corrections to the Findings of Fact outlined below, otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission adopts the Findings of Fact with corrections to the following scrivener's errors:

On page 3 of the Arbitration Decision, in the first sentence of the 3rd paragraph, we strike "6/22/15" and replace with "6/12/15".

On page 3 of the Arbitration Decision, we transpose paragraphs 2 and 3, so the paragraph beginning "On 6/12/15" precedes the paragraph beginning "On 6/19/15…"

On page 5 of the Arbitration Decision, in the first sentence of the last paragraph, we insert a comma after "P.A." and decapitalize "'Secondary."

On page 8 of the Arbitrator's Decision after the first paragraph, we add the following paragraph:

Dr. Zelby conducted a records review on July 12, 2019, at Respondent's request. Dr. Zelby opined that as it related to the nervous system and spine, the medical

records did not support any causal relationship between her cervical condition or lumbar conditions and Petitioner's reported September 21, 2013 work injury. In regard to the cervical spine, Dr. Zelby found that after Petitioner's initial complaints of neck and arm symptoms, there were no neck or arm symptoms relating to the cervical spine or any treatment to the cervical spine for nearly two years. Dr. Zelby further stated that had the herniated disc arisen as a result of the reported work injury on September 21, 2013, Petitioner would have had the symptoms she complained of in 2015 back in 2013, and not two years subsequent to the work incident. Similarly, Dr. Zelby also opined that had Petitioner's back complaints been causally related to the incident at work, Petitioner would have had low back pain within the same time frame she developed the neck, shoulder and upper extremity symptoms and they would have been ongoing complaints. Such back complaints would not have been masked by any condition in her cervical spine. Consequently, Dr. Zelby opined Petitioner's cervical and lumbar conditions were not caused, exacerbated, aggravated or made symptomatic as a result of her reported work injury on September 21, 2013. Dr. Zelby's deposition testimony elicited on March 7, 2022 was consistent with the opinions expressed in his report.

The Commission affirms the Decision of the Arbitrator with respect to causal connection and medical expenses. However, the Commission modifies the award of temporary total disability benefits and awards temporary partial disability and maintenance benefits as set forth below. Additionally, the Commission vacates the award of permanent total disability benefits and awards 45% loss of use of the person as a whole for the reasons explained below.

Regarding Issue (K), whether Petitioner is entitled to temporary total disability or maintenance benefits, the Arbitrator awarded Petitioner temporary total disability benefits for the period beginning on September 22, 2013, the date after the work accident, through August 16, 2017, the date on which the Arbitrator deemed Dr. Chudik placed Petitioner at maximum medical improvement (hereinafter "MMI").

The Commission views the evidence differently. Accordingly, the Commission modifies the Arbitrator's award of temporary total disability and finds Petitioner is entitled to an award of temporary total disability benefits for the following periods:

- 10/9/13 (the date on which Dr. Killian imposed restrictions and Respondent could not accommodate) through 4/20/14 = 27-5/7 weeks x TTD rate of $423.80 = $11,745.31
- 10/2/14 through 3/9/15 = 22-5/7 weeks x TTD rate of $423.80 = 9,626.31
- 10/17/15 through 9/14/16 = 47-5/7 weeks x TTD rate of $423.80 = $20,221.31
- 9/29/16 through 2/7/17 = 18-6/7 weeks x TTD rate of $423.80 = $7,991.66

Accordingly, the total amount of temporary total disability benefits awarded is $49,584.59.

The Commission finds Petitioner's entitlement to temporary total disability benefits terminated on February 7, 2017. On January 25, 2017 Dr. Chudik found Petitioner to be at MMI

for the right shoulder injury. On February 7, 2017 Dr. Lorenz released Petitioner to return to work with restrictions and indicated she was to return on a "p.r.n. basis." (PxC)

The Commission further finds that during certain periods between 2013 and 2016 Petitioner was working as a motorcycle instructor for ChiTown Harley Davidson and Calumet Harley Davidson. (Rx6, Rx7)

820 ILCS 305/8(a) states in pertinent part:

> When the employee is working light duty on a part-time basis or full-time basis and earns less than he or she would be earning if employed in the full capacity of the job or jobs, then the employee shall be entitled to temporary partial disability benefits. Temporary partial disability benefits shall be equal to two-thirds of the difference between the average amount that the employee would be able to earn in the full performance of his or her duties in the occupation in which he or she was engaged at the time of accident and the gross amount which he or she is earning in the modified job provided to the employee by the employer or in any other job that the employee is working.

Accordingly, the Commission further modifies the Arbitrator's temporary total disability award and finds Petitioner is entitled to temporary partial disability benefits (as opposed to temporary total disability benefits) for the following periods and amounts as per Rx6 and Rx7 as calculated below:

- 4/21/14-10/1/14 = 23-3/7 weeks x $635.70 = $14,893.54 - $2,331.60 (ChiTown earnings) - $4791.00 (Calumet earnings) = $14,893.54-$7,122.60=$7,770.94 x 2/3 = $5,180.63

- 3/10/15-10/16/15 = 31-4/7 weeks x $635.70 = $20,069.96 - $2,965.00 (ChiTown earnings) - $5537.00 (Calumet earnings) = $20,069.96 - $8,502.00 = $11,567.96 x 2/3 = $7,711.97

- 9/15/16-9/28/16 = 2 x $635.70 = $1271.40 – $959.50 (Calumet) = $311.90 x 2/3 = $207.93

- TOTAL: 57 weeks

The Commission finds Petitioner is entitled to temporary partial disability benefits in the amount of $13,100.53.

Having found that Petitioner reached MMI on February 7, 2017, the Commission awards no benefits for the period beginning February 8, 2017 through September 30, 2018.

During periods of time that fell within this time frame, Petitioner worked at ChiTown Harley as a motorcycle instructor from April 7, 2017 through December 1, 2017 and May 4, 2018 through August 24, 2018 (Rx7). This was an arrangement already in place as Petitioner had taught motorcycle classes at ChiTown Harley prior to the date of her work injury and this employment was not a result of a job search conducted by Petitioner.

Petitioner testified she first began a job search in October 2018 and submitted job logs with a start date of October 1, 2018. (PxI) Petitioner further testified that in November 2019 she obtained employment within her restrictions at Four Winds Casino. Although Petitioner did not specifically testify as to her start date, the Commission's best estimate was November 1, 2019.

The Commission therefore finds Petitioner is entitled to maintenance benefits commencing on October 1, 2018 through October 31, 2019, a period of 56 4/7 weeks. Based on a rate of $423.80 per week, the award of maintenance benefits equals $23,974.97.

Petitioner testified that in her job at Four Winds Casino she was a valet and coat check. (T. 40). She testified this was a sitting job but that she did not work there longer than four days because there was a lot of running and walking to cars and it was hard to get in and out of the cars. (T. 41) Petitioner never stated the job exceeded her restrictions or that she was terminated from this position.

The Commission finds that Petitioner is not entitled to maintenance benefits or vocational rehabilitation subsequent to her leaving her position at Four Winds Casino as this job fell within her restrictions and the evidence supports the conclusion that Petitioner quit the job of her own volition.

Regarding Issue (L), the Nature and Extent of Petitioner injury, the Commission vacates the Arbitrator's permanent total disability award and finds Petitioner's permanent disability to be 45% loss of use of the person as a whole.

Subsequent to the Commission having found that Petitioner was at MMI on February 7, 2017, Petitioner demonstrated she was capable of working at ChiTown Harley Davidson as a motorcycle instructor during 2017 and 2018. Although Petitioner was unable to perform the physical aspects of the job given her FCE restrictions, she was successfully able to teach motorcycle classes. Petitioner was also able to work at Four Winds Casino, a job that fell within her restrictions and which she left voluntarily.

In determining Petitioner's level of permanent partial disability pursuant to §8.1b(b) of the Act, the Commission bases its determination on the following factors:

i) The reported level of impairment pursuant to subsection 8(a): No AMA impairment rating was submitted. Therefore, the Commission gives this factor no weight.

ii) The occupation of the injured employee: Petitioner's occupation was a motorcycle instructor. She testified that her job consisted of teaching courses on a range and in the classroom as well as moving motorcycles out of a trailer, setting up motorcycles, fueling motorcycles, lifting motorcycles when they fell and moving motorcycles back to the trailer. (T. 15) The physical therapy records noted Petitioner's job was at the heavy physical demand level (PxF-1). The FCE Petitioner underwent on January 12, 2017 was found to be valid and noted Petitioner's lifting/carrying capabilities as 30.2 lbs occasional above shoulder, 41.2 lbs occasional desk to chair, 50.6 lbs occasional chair to floor, 42.0 lbs/47.0 lbs occasional carry right/left. The FCE placed no

restriction on workday sitting, standing or walking. Petitioner tested at the medium physical demand level. (PxF-4) The Commission finds that although Petitioner continued to be able to perform the teaching aspects of her job as a motorcycle instructor, her physical restrictions prevent her from performing the physical components of the job to which she testified. Accordingly, the Commission finds that Petitioner is precluded from pursuing the entirety of her usual and customary line of employment resulting in a loss of trade. The Commission assigns this factor significant weight.

iii) The age of the employee at the time of the injury: Petitioner was 53 years of age at the time of her accident. Notwithstanding her age and medium level work restrictions, Petitioner was able to find a job at Four Winds Casino which she quit voluntarily. The Commission gives this factor little weight.

iv) The employee's future earning capacity: Although the Commission finds Petitioner can still perform the teaching component of her job as a motorcycle instructor, the Commission further finds Petitioner is precluded from performing the physical aspects of her job as a motorcycle instructor given the FCE restrictions, thereby resulting in a loss of trade. However, Petitioner did not introduce her earnings at Four Winds Casino into evidence. Petitioner's own vocational counselor, Lisa Helma, opined that although Petitioner had lost access to her usual and customary line of occupation, her most probable earning potential was $14.00-$18.00 per hour. At the time of the accident, Petitioner's average weekly wage was $635.70. Based on the probable wage-earning potential assessed by her own vocational counseling, earnings at the upper range (based on a 40-hour work week) would exceed Petitioner's earnings at the time of the accident. Accordingly, the Commission gives this factor little weight.

v) Evidence of disability corroborated by the medical records: We find there is evidence of Petitioner's disability that is corroborated by the treating medical records. Petitioner underwent significant treatment for injuries to her right shoulder and cervical spine, including a cervical discectomy and fusion and right shoulder arthroscopy. Petitioner underwent significant treatment with multiple physicians for her work-related injuries between 2013 and 2017. Upon her release at MMI for her cervical spine and right shoulder, she continued to present physical deficits as outlined in her FCE. The Commission assigns this factor significant weight.

Based on the foregoing analysis, we find that Petitioner sustained the loss of use of 45% of the person-as-a-whole (225 weeks) under §8(d)2 of the Act based on a loss of trade. As Petitioner's Average Weekly Wage (AWW) in the year preceding the injury was $635.70, the corresponding permanent partial disability rate is $381.42, resulting in a permanent partial disability award in the amount of $85,819.50 (225 weeks x $381.42).

The Arbitrator found Respondent was entitled to a credit in the amount of $167,040.06 for benefits paid. The Commission has found Petitioner to be entitled to an award of temporary total disability benefits in the amount of $49,584.59, an award of temporary partial disability benefits in the amount of $13,100.53 and maintenance benefits in the amount of $23,974.97. Additionally,

the Commission has found Petitioner entitled to a permanent disability award in the amount of $85,819.50. Accounting for the overpayment in benefits by Respondent, after the offsets, Petitioner is to receive an award of $5,439.53.

Finally, the Commission corrects the following scrivener's errors:

On page 1 of the Arbitration Decision form, we strike 12/20/21 and replace with 12/15/21.

In the last sentence of the second full paragraph on page 9 of the Arbitrator's Decision, we strike "casually" and replace with "causally."

In the seventh line of the tenth page of the Arbitrator's Decision, we strike "6/22/15" and replace with "6/12/15."

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $423.80 per week for a period of 117 weeks, from October 9, 2013 through April 20, 2014, October 2, 2014 through March 9, 2015, October 17, 2015 through September 14, 2016, and September 29, 2016 through February 7, 2017, which equals $49,584.59, that being the amount of temporary total disability benefits awarded under §8(b) of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $5,180.63 in temporary partial disability benefits for the period beginning April 21, 2014 through October 1, 2014 (23-3/7 weeks); the sum of $7,711.97 in temporary partial disability benefits for the period beginning March 10, 2015 through October 16, 2015 (31-4/7 weeks); and the sum of $207.93 for the period beginning September 15, 2016 through September 28, 2016 (2 weeks), which equals $13,100.53, that being the total amount of temporary partial disability benefits awarded under §8(a) of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $423.80 per week for a period of 56 4/7 weeks, from October 1, 2018 through October 31, 2019, in the amount of $23,974.97, that being the total amount of maintenance benefits awarded under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $381.42 per week for a period of 225 weeks, which equals $85,819.50, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused permanent partial disability of 45% loss of use of the person as a whole. Applying the credit in the amount of $167,040.06 to which Respondent was entitled for benefits paid, based on the offsets of the temporary total disability award of $49,584.59, the temporary partial disability award of $13,100.53, the maintenance award of $23,074.97, and the permanent partial disability award of $85,819.50, the Respondent shall pay Petitioner $5,439.53.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $18,479.12 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.

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.

February 2, 2024

MEP/dmm
O: 121223
49

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	13WC037831
Case Name	Kathleen Groves v. Northern Illinois University
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	17
Decision Issued By	Frank Soto, Arbitrator

Petitioner Attorney	Muriel Collison
Respondent Attorney	Drew Dierkes

DATE FILED: 7/11/2022

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

/s/ Frank Soto, Arbitrator

Signature

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

July 11, 2022

/s/ Michele Kowalski

Michele Kowalski, Secretary

Illinois Workers' Compensation Commission

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

KATHLEEN GROVES
Employee/Petitioner

v.

NORTHERN ILLINOIS UNIVERSITY
Employer/Respondent

Case # **13** WC **037831**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **FRANK SOTO**, Arbitrator of the Commission, in the city of **Geneva**, on **12/20/21 and 4/13/22**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **9/21/13**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**33,056.40**; the average weekly wage was $**635.70**.

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 $**149,108.52** for TTD, $ for TPD, $**17,931.54** for maintenance, and $ for other benefits, for a total credit of $**167,040.06**.

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

ORDER

Respondent shall pay Hinsdale Orthopedics $276.00; Metro South Medical Center $2,493.00; Orland Primary Care Specialist $535.00; Chicago ridge Radiology $1,206.15 and ATI $13,968.97 pursuant to Sections 8.2 and 8 (a) of the Act, and subject to the fee schedule. Respondent shall hold Petitioner harmless of medical bills which Respondent claims a credit pursuant to Section 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits commencing 9/22/2013 through 8/16/2017, the date Petitioner reached maximum medical improvement, for 203 and 4/7th weeks, as provided in Section 8(b) of the Act. Respondent is entitled to a credit of $167,040.06 for TTD and maintenance benefits paid.

Respondent shall pay Petitioner permanent and total disability benefits for life, commending 8/17/2017, as provided in Section 8(f) of the Act.

Commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in Section 8(g) of the Act.

Respondent shall pay Petitioner compensation that has accrued from September 21, 2013 through April 13, 2022 and shall pay the remainder of the award, if any, in weekly payments.

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

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

By: /o/ Frank J. Soto **July 11, 2022**

Arbitrator

PROCEDURAL HISTORY

This case proceeded to trial on December 15, 2021 and was completed on April 13, 2022. The issues in dispute were whether Petitioner's current condition of ill-being causally connected to her injury, whether Respondent is liable for outstanding medical expenses, whether Petitioner is entitled to TTD benefits and maintenance and the nature and extent of Petitioner's injury. (Arb. Ex. #1).

FINDINGS OF FACT

Kathleen Groves (hereinafter referred to as "Petitioner") is a 61-year-old unemployed former motorcycle instructor. (T 10) On 9/21/13, Petitioner was working for Northern Illinois University (hereinafter referred to as "Respondent") as a motorcycle instructor. She worked for Respondent since 2012. (T 14) Her job duties including removing motorcycles out of a trailer, setting up the motorcycles, fueling the motorcycles and teaching courses on the range and in the classroom. Her job involved heavy lifting of components and lifting motorcycles when they fell and returning the motorcycles to the trailer. Petitioner's worked from 8 a.m. to 5 p.m. (T 14)

Prior to 9/21/13 Petitioner had no issues with her back, neck, hands, or shoulders nor had she received prior medical treatment for these body parts. (T 13) On 9/21/13, Petitioner was teaching a class when a student went the wrong way, popped the throttle, and while accelerating struck Petitioner causing her to lose consciousness and fall to the ground. (T 17) Petitioner hit her head, neck, arms, and elbows. (T 17) Petitioner contacted her wife, who is a paramedic, before being taken to Metro South Emergency Room. (T 17)

Petitioner presented at Metro South Medical Center on 9/21/13, complaining of right upper arm pain and severe neck stiffness. (Px. A pg. 19) Petitioner was assessed with arm pain, neck strain and concussion from a pedestrian motor vehicle accident. (Px. A pg. 20) X-rays were taken of the right wrist, right humerus and right elbow which were negative for fractures. (Px. A pg. 21) Petitioner was discharged with hydrocodone and told to follow up with a physician. (Px. A pg. 20)

A Supervisor's Report of Injury or Illness and an Employees Notice of Injury were completed on 9/30/2013. These reports detail the accident and indicate Petitioner injured her head, elbows, right hand, right shoulder, and lower left back. (Px. K)

Petitioner testified upon returning home, she felt electric shocks going through her body and that she did not return to work the following day. (T 19) Petitioner testified that she felt

"electric shocks going through her body," and her arm constantly was falling asleep and her neck pain was getting worse. (T 61-62)

On 10/9/13, Petitioner presented to her primary care physician, Dr. Killon. At that time, Petitioner described the accident and experiencing a "weird sensation when she moves her head, feels like little electric shocks" as well as right shoulder pain with decreased range of motion. Petitioner also reported pain in both elbows, right upper arm and limited range of motion in the right shoulder. Petitioner stated to Dr. Killon that when she was hit, she struck her head, both elbows and right upper arm. (Px. B pg. 37) Dr. Killion opined Petitioner may need an MRI if her pain doesn't improve. Dr. Killion issued work restrictions of no lifting over 20lbs and no motorcycle riding for the next month. (Px. B pg. 40)

Petitioner testified she was not paid from 9/21/13-10/31/13 while off work with restrictions. Petitioner testified was unable to return to her job because of the restrictions issued by Dr. Killion. (T 20)

On 11/4/13 Petitioner returned to Dr. Killion reporting more shoulder pain and decreased range of motion. At that time, Petitioner could not raise her arms and could not reach back to close her bra, increased pain in her hands, weakness and swelling, being unable to grip, and left elbow discomfort. (Px. B pg. 43) Dr. Killion ordered an MRI of the right shoulder, x-rays of the hand, and an orthopedic consultation. (Px. B pg. 44, 66)

The MRI of the right shoulder performed on 11/23/13 identified the follows:

1. Mild tendinosis in the substance and articular surface of distal supraspinatus tendon.
2. Mild to moderate degenerative changes of the acromioclavicular joint with a small inferior spur formation from the distal end of the clavicle, abutting the musculotendinous junction of supraspinatus and producing positional impingement.
3. Mild subacromial/subdeltoid and sub coracoid bursitis.
4. Mild glenohumeral joint effusion. (Pet. Ex. B pg. 111)

On 12/18/13, Dr. Killion authored a letter instructing Petitioner to see an orthopedic surgeon and that she would defer any further recommendations relating to Petitioner's work restrictions and clearance to the orthopedic surgeon. (Px. B pg. 52)

On February 5, 2014, Petitioner saw Dr. Verma pursuant to Section 12 of the Act. Dr. Verma diagnosed right shoulder post-traumatic arthrofibrosis or adhesive capsulitis and he determined Petitioner's condition was consistent with MRI and work related. (Rx. 2 pg. 4) Dr. Verma anticipated a time frame of 12-24 weeks for maximum medical improvement and 24

weeks if there is a failure to respond to conservative care and surgical intervention is required. If conservative care fails, the surgery should be an arthroscopic capsular release with manipulation under anesthesia. (Px. 2 pg. 5) Dr. Verma opined that Petitioner was capable of performing left-handed work only at a sedentary position. (Px. 2 pg. 6)

Treatment was approved by Respondent and Petitioner saw Dr. Chudik on June 5, 2015. Petitioner provided a consistent history of the accident and reported right shoulder and right wrist pain. Petitioner rated her pain level as 10 out of 10. Dr. Chudik noted Petitioner's pain occurs when moving, reaching, lifting, carrying, weight-bearing. Petitioner reported pain along her whole right side, specifically her right shoulder, right wrist, and low back. (Px. 2 pg. 32) Dr. Chudik's impression possible occulant fracture of the right wrist and possible right rotator cuff tear. Dr. Chudik recommendation an MRI of shoulder and wrist and he referred Petitioner to Dr. Fajardo for the wrist. Petitioner was also referred to Dr. Bardfield for her low back complaints. Petitioner underwent the right wrist MRI which showed no evidence of a fracture with minimal effusion. (Px. C pg. 79).

On 6/19/15 Petitioner underwent the right shoulder MRI which showed a partial thickness tear in the common distal tendons of supraspinatus and infraspinatus, small sub coracoid bursitis, mild degenerative changes of the acromioclavicular joint with small spur and the MRI report also noted the acromion process effacing the fat over the musculotendinous junction of the supraspinatus may produce positional impingement. (Px. C pg. 81)

On 6/22/15 Petitioner was involved in a motor vehicle accident and taken to Palos Community Hospital. Petitioner reported right wrist and right rib pain. No swelling or bruising was noted in either area. The medical records state "*PT was stopped when a car re-ended her prior to arrival. Pt states she had a seat belt on, and the air bags did not deploy. She has pain to her right wrist and rib area. No headache, no neck or back pain, no chest or abdominal pain. No Lower ext. pain. No LOC, she did not hit her head."* Rib and right wrist x-rays were performed and found to be unremarkable. Petitioner was diagnosis with wrist pain and rib a contusion. (Rx. 5)

On 6/24/15 Petitioner was seen by Dr. Fajardo for her right wrist for a referral from Dr. Chudik. Petitioner described her pain as constant, affecting the dorsal radial aspect of the wrist. (Px. C pg. 35) Petitioner was given an injection, advised to purchase a cmc push brace, and to modify activity and to return as needed. (Px. C pg. 37)

On 7/15/15 Dr. Chudik to review the MRI. Petitioner reported pain along her whole right side, specifically her right shoulder, right wrist, and low back. Dr. Chudik found the MRI to be abnormal showing a significant/high-grade partial thickness supraspinatus rotator cuff tear. At this time, Dr. Chudik recommended surgical intervention consisting of right shoulder arthroscopic rotator cuff repair. Dr. Chudik reissued work restrictions consisting of no lifting greater than 15-20 pounds. (Px. C pg. 38-41)

On 7/15/15 Petitioner presented to Dr. Bardfield. At that time, Petitioner reported mid and upper back and neck with pain radiating down the right arm since injury at work. Dr. Bardfield noted thoracic tenderness in the upper thoracic region, mid thoracic region, and lower thoracic region. Dr. Barfield also noted Petitioner's lumbar range of motion was limited by 25% and tenderness over the paraspinal area. Petitioner indicated she was a motorcycle riding instructor who was injured in September 2013 when she was standing and was struck by one of her students who was on a motorcycle and suffered injuries to her shoulder, right wrist, neck mid and low back. Dr. Bardfield diagnosed possible right cervical radiculitis with thoracolumbar strain injury and paraspinal myofascial pain. Dr. Bardield ordered a cervical MRI and physical therapy to address Petitioner's dorsal spine soft tissue area. Dr. Bardfield indicated that if the MRI can't account for the numbness in the right arm, he would consider ordering an EMG nerve conduction study to the right arm. (Px. C pg. 42-45)

On 7/24/15 Petitioner underwent a cervical MRI which identified the following:

Loss of normal cervical lordosis

C2-C3 subtle broad based disc bulge that abuts the thecal sac
C3-C4 mild, right foraminal stenosis due to disc osteophyte complex
C4-C5 moderate spinal canal stenosis and moderate bilateral foraminal stenosis due to mild to moderate broad based disc bulge with posterior disc slip associated with focal central disc fragment extrusion dissecting caudally measuring approximately 5.8mm in anteroposterior and 3.1 mm in caudal dimension, osteophyte and uncinate processes and facet joints hypertrophy.
C5-C6 moderate spinal canal stenosis and moderate bilateral foraminal stenosis due to mild to moderate broad based disc bulge with posterior disc slip associated with right paracentral dis fragment extrusion pointing caudally associated with right paracentral disc fragment extrusion pointing caudally with osteophyte, uncinate processes and facet joints hypertrophy.
C6-C7 minimal spinal canal stenosis and minimal bilateral foraminal stenosis due to broad based disc bulge associated with focal central disc

fragment extrusion dissecting craniocaudally measuring approximately 3.9mm in anteroposterior and 9.1mm in craniocaudal dimensions with osteophyte and uncinate process hypertrophy.

C7-T1 mild to moderate right and mild left foraminal stenosis due to mild broad based disc bulge associated with right paracentral dis fragment extrusion dissecting cranially measuring approximately 3.0mm in cranial dimension with osteophyte and facet joints hypertrophy. (Pet. Ex. C pg.68)

On 8/5/15 Petitioner returned to Dr. Fajardo reporting the injection helped significantly until being involved in a motor vehicle accident. At that time, Patient reported scaphoid pain. Dr. Fajardo ordered a right wrist MRI and thumb spica splint. (Px. C pg. 46-48)

On 8/12/15 Petitioner followed up with Dr. Barfield to review the MRI results. Dr. Bardfield believed the MRI showed reveals significant pathology. At the C4-5 level there was evidence for a central disc fragment extrusion, causing moderate compression of the spinal cord and moderate bilateral foraminal stenosis. At the C5-6 level there was a right paracentral disc fragment extrusion causing moderate compression of the cervical cord and moderate compression of the bilateral foraminal canals. At the C6-7 level there was a focal central disc fragment causing minimal compression to the spinal cord and minimal compression of both existing nerve roots. At the C7-T1 level there was a right paracentral disc fragment extrusion abutting the cervical cord causing mild to moderate right stenosis. Dr. Bardfield noted that Petitioner's still involve pain numbness and weakness in the right arm as well as neck pain but she had not had physical therapy for this problem. Dr. Bardfield referred Petitioner to Dr. Mark Lorenz for possible surgical intervention due to the scope and degree of pathology found on the cervical MRI and Petitioner's associated neurologic symptoms. (Px. C pg. 49-50)

On 9/3/15 Petitioner presented to Dr. Lorenz, a board-certified neurosurgeon, who determined that Petitioner had a disc herniation at C4-C5 which significantly impinged the spinal cord. Dr. Lorenz also identified a second disc herniation at L5-S1. (Px. C pg. 54) At this time, Dr. Lorenz recommended an EMG/Nerve Conduction Velocity Test. (Px. C pg. 54, 56)

On 9/9/15 Petitioner followed up with Dr. Bardfield and underwent the EMG nerve conduction study of the right arm. The EMG revealed evidence of C5 and C6 radiculopathy as well as mild right carpel tunnel syndrome.

On 10/22/15 Petitioner was examined by Jennifer Silva PA. Secondary to MRI and EMG findings with positive physical exam findings along the C5 nerve root. At that time, it was felt

that Petitioner is a candidate for ACDF C4-C5 and she was referred to Dr. Fronczak for evaluation and second opinions regarding surgical intervention. (Px. C pg. 58)

On 10/28/15 Dr. Chudik, examined Petitioner and decided to proceed with the shoulder surgery after she undergoes the c-spine fusion surgery. (Px. C pg. 60, 61, 63)

On 2/15/16 Dr. Fronczak, a neurologist, examined Petitioner and also recommended surgery. (Px. D pg. 13-17)

On 2/17/16 Petitioner underwent a C4-C5 discectomy, C4-C5 anterior cervical fusion with cage insertion and anterior cervical plating and an osteoprogenitor stem cell allograft transplant with Dr. Mark Lorenz. (Px. C pg. 95-96)

After surgery Petitioner started physical therapy. On 4/6/16 Petitioner followed up with Dr. Chudik who ordered another course of PT to restore motion to the right shoulder prior to surgery. (Px. C pg. 105, 107)

On 5/10/16 Petitioner underwent the right arthroscopy to repair her right rotator cuff. The surgery consisted of a right subacromial decompression, labral debridement, and biceps tenodesis. (Px., C pg. 113, 115, 116) 10/5/16 Dr. Chudik recommended work conditioning. (Px. C pg. 131, 133, 134)

On 10/17/16 Petitioner was reexamined by Dr. Verma, pursuant to Section 12 of the Act. Dr. Verma recommended a MR arthrogram due to Petitioner's persistent pain and functional deficits status post-surgery. Dr. Verma placed Petitioner at light duty with a 5-pound lifting restriction and no overhead work or activity. (Rx. 3 pg. 3-4)

On 1/12/17 Petitioner underwent an FCE which was found to be valid. The FCE placed Petitioner's capabilities as 30.2 lbs. occasional above shoulder, 41.2 lbs. occasional desk to chair, 50.6lbs. occasional chair to floor, 42.0lbs./47.0 lbs. occasional carry right/left. The FCE placed no restriction on workday, sitting, standing, or walking. Petitioner tested at medium physical demand level. Petitioner indicated her job requires her to load, unload and lift motorcycles. (Px. F pg. 380-386)

On 1/25/17 Dr. Chudik cleared Petitioner to return to work based upon the FCE limitations for her right shoulder but he recommended Petitioner to follow up with Dr. Lorenz for her neck pain. (Px. C pg. 147, 148)

Petitioner returned to Dr. Lorenz on 2/7/17 who released Petitioner to return to work for her neck the restriction of occasional 30lb lift for overhead lift. (Px. C pg.182)

Petitioner returned to Dr. Chudik on 8/16/17. At that time, Petitioner indicated she was working parttime but her shoulder does not tolerate this level of activity. Petitioner reported that she has other staff members help her move and unload motorcycles because she is unable. Dr. Chudik ordered an MRI arthrogram based upon the request of the insurance company which he does not believe is medically necessary. Dr. Chudik placed Petitioner at MMI and released her to return to work based upon the FCE guidelines. (Px. C pg. 190) Petitioner underwent the MRI arthrogram which Dr. Chudik reviewed on 9/13/17 and found to show no abnormalities. (Px. C pg. 194)

Petitioner testified Respondent refused to accommodate her restrictions. (T 35) Petitioner testified that she reached out to NIU in August of 2017 when she was given permanent restrictions but was told by Mr. Haas that she could not return to work for Respondent because they do not employ people with restrictions as motorcycle instructors. (T 51) Respondent presented no evidence to contradict Petitioner's testimony. Petitioner's TTD benefits were terminated on 10/28/18. Respondent did not obtain a vocational assessment.

Petitioner, at her own cost, obtained a vocational assessment and Rehabilitation Plan. (Px. J) On February 22, 2019, an interview was conducted by Vocamotive. Petitioner was found to be fully cooperative with all aspects of the interview. Petitioner reported that she had applied for jobs at stores, gas stations and restaurants. (Px. J and I) Lisa Helma, a certified rehabilitation counselor, opined the following: (a) Petitioner has lost access to her usual and customary line of occupation. (Px. J pg. 10); (b) Petitioner is a person of, "advanced age" according to the Social Security Administration. She was 58 years old at the time of the interview and is now 61. "If an induvial is of advanced age, age significantly affects a person's ability to adjust to other work." (Px. J pg.8); (c) Petitioner has a high school education and no marketable keyboarding or software skills. (Px. J pg.8); Vocational testing is recommended in this matter in order to determine where Petitioner's interests, abilities and aptitude lie. Testing would be beneficial in determining other career and training opportunities available for her. (Px. J pg. 8) Vocational testing was not approved by Respondent; (d) Petitioner is employable and should be able to locate employment in any position congruent with her previous experiences and physical capabilities. Positions would include: Car Wash Supervisor, Sales Representative, Customer Service Representative, Office Clerk, Dispatcher along with other occupations. "*It is noted that marketable keyboarding skills would be required for many of the above occupations."* (Px. J pg.

10); (e) Petitioner's most probable wage-earning potential is between $14.00-$18.00 per hour. (Px. J pg. 10); (f) Petitioner is a viable rehabilitation candidate and rehabilitation services should be provided to her. "Services should include: vocational testing, computer training to a level of marketable skill, job seeking skills instruction and placement related activities as soon as possible.' (Pet. Ex. J pg. 10). Respondent did not provide vocational testing or computer training recommended by Lisa Helma.

Petitioner testified that she tried to find employment on her own. Petitioner applied online and in person. She tried to be a life coach and had an interview. Petitioner did not get the job and was told it was due to her restrictions. (T 36-37) Petitioner applied to almost 250 jobs and provided job search logs. These jobs were a wide variety and included online and in person applications. (Px. I) Petitioner found a job in November of 2019 at Four Winds Casino as a valet and coat check. She was only able to work for four days. There was a lot of running and walking to get cars and Petitioner testified it was difficult for her to get in and out of cars. (T 41) Petitioner testified that she continued to look for jobs in New Buffalo including other casinos, local businesses, grocery stores and fruit stands but in March of 2020 everything shut down due to COVID. (T 41-42) Petitioner testified after having no luck finding any employment, Petitioner's wife purchased a hotdog cart. Unfortunately, business was slow and Petitioner lost money. (T 42-43)

Petitioner testified she is currently unemployed. Petitioner testified she does not have any current job opportunities and she is unable to be a motorcycle instructor due to her restrictions. Petitioner testified she cannot turn her neck fully to the left and her shoulder still bothers her on occasion.

The Arbitrator found Petitioner's testimony to be credible.

CONCLUSIONS OF LAW

The Arbitrator adopts the finding of fact in support of the Conclusions of Law as Set forth below.

WITH RESPECT TO ISSUE (F) WHETHER PETITIONER'S CURRENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE JANUARY 6, 2012 INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

In pre-existing condition cases, recovery will depend on the employee's ability to show that a work related accidental injury aggravated or accelerated the pre-existing disease such that

the employee's current condition of ill-being can be said to have been causally connected to the work related injury and not simply the result of a normal degenerative process of a pre-existing condition. Caterpillar Tractor Co. v, Industrial Comm'n, 92. Ill.2d 30, 36-37. When a worker's physical structures, diseased or not, give way under the stress of their usual tasks, the law views it as an accident arising out of and in the course of employment. *General Electric Co. v. Industrial Comm'n,* 89. Ill.2d 432, 60 Ill. Dec. 629, 433 N.E.2d 671 (1982). When an employee with a preexisting condition in injured in the course and of his employment the Commission must decide whether there was an accidental injury which arose out of the employment. *Sisbro, Inc. v. Industrial Comm'n,* 207 Ill.2d 193, 278 Ill. Dec. 70. 797 N.E.2d 665, (2003). Even though an employee has a preexisting condition which may make him more vulnerable to injury, recovery for an accidental injury will not be denied as long as it can be shown that the employment was also a causative factor. *Caterpillar Tractor Co., v. Industrial Comm'n.,* 129 Ill.2d 52, 133 Ill. Dec. 454, 541 N.E.2d 665 (1989). When 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. *Shafer v. Illinois Workers' Compensation Comm'n,* 2011 Ill.App. (4th) 100505 WC. The chain of events principles has been applied where an accident is claimed to have aggravated a preexisting condition. See *Schroeder v. Illinois Workers' Compensation Comm'n*, 2017 IL. App. (4th) 160192WC.

The Arbitrator has carefully reviewed and considered all the evidence and finds Petitioner has proven by the preponderance of the credible evidence that her current conditions are causally related to her September 21, 2013 work accident, as set forth more fully below.

Prior to her work accident, Petitioner did not have any issues performing her job duties. (T. 13). Petitioner had not undergone any medical treatment to her neck, back, wrist or shoulder prior to her work accident. (T 13) Petitioner presented to the emergency room on the date of the accident reporting neck stiffness, right upper arm pain and wrist pain after being run over by a student while instructing a class. All of the physicians Petitioner saw for her injuries documented the same history of the accident although some of the records list a different of accident. Petitioner's treating physicians and Respondent's Section 12 examiner, Dr. Verma, casually related Petitioner's injuries to her work accident.

The Arbitrator does not find the opinions of Dr. Zelby, who performed a records review, to be persuasive. Dr. Zelby did not exam Petitioner. Dr. Zelby did not review on of the medical

records which indicated Petitioner did not have issues preforming her job duties prior to her work accident nor did Dr. Zelby review the accident reports. Dr. Zelby based his opinions, in part, upon the belief Petitioner did not have low back pain complaints until 6 months after her work accident and that she did not have cervical complaints until after Petitioner's motor vehicle accident of June 12, 2015. The Arbitrator finds the medical records and the accident report conflict Dr. Zelby's beliefs. The Arbitrator further finds that the motor vehicle accident of 6/22/15 was not an intervening act breaking the causation chain. Petitioner was already engaged in active care and the time of the motor vehicle and her symptoms did not significantly change after the motor vehicle accident.

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

Under Section 8(a) of the Act, claimant is entitled to recover reasonable medical expenses, the incurrence of which are causally related to an accident arising our or and in the scope of employment and which are necessary to diagnose, relieve, or cure the effects of the claimant's injury. *Absolute Cleaning/SVMBC v. Illinois Workers' Compensation Comm'n,* 409 Ill.App.3d 463, 470 (4th Dist. 2011).

Respondent disputed the payment of the outstanding medical bills based upon a lack of causation. Respondent did not dispute the reasonableness and necessity of the outstanding medical bills. As stated above, the Arbitrator found Petitioner's current condition to be causally related to her September 32, 2013 work accident. The Arbitrator finds Petitioner has proven by the preponderance of the evidence the outstanding medical bills were for treatment that was causally related to her work accident and necessary to diagnose, relieve or cure her from the effects of her injury. As such, Respondent shall pay Hinsdale Orthopedics $276.00; Metro South Medical Center $2,493.00; Orland Primary Care Specialist $535.00; Chicago ridge Radiology $1,206.15 and ATI $13,968.97 pursuant to Sections 8.2 and 8 (a) of the Act, and subject to the fee schedule. Respondent shall hold Petitioner harmless of medical bills which Respondent claims a credit pursuant to Section 8(j) of the Act.

WITH RESPECT TO ISSUE (K) WHETHER PETITIONER IS ENTITLED TO TTD OR MAINTENANCE BENEFITS, THE ARBITRATOR FINDS AS FOLLOWS:

The period of temporary total disability encompasses the time from which the injury incapacitates the claimant until such time as the claimant has recovered as much as the character of the injury will permit, *"i.e., until the condition has stabilized." Gallentine v., Industrial Comm'n,* 201 Ill.App.3d 880, 886 (2nd Dist. 1990). The dispositive test is whether the claimant's condition has stabilized (i.e., reached M.M.I.). *Sunny Hill of Will County v. Ill. Workers' Comp Comm's* 2014 IL App (3d) 130028WC at 28 (June 26, 2014, Opinion filed); *Mechanical Devices v. Industrial Comm'n*, 344 Ill.App.3fd 752, 760 (4th Dist. 2003). To show entitlement to temporary total disability benefits, a claimant must prove not only that he did not work, but also that he was unable to work. *Gallentine,* 201 Ill.App. 3d at 887; see also *City of Granite City v. Industrial Comm'n*, 279 Ill.App. 3d 1087, 1090 (5th Dist. 1996).

Petitioner was released from all medical care and found reached maximum medical improvement by Dr. Chudik on 8/16/2017. Because Petitioner's condition had not stabilized until that date, Respondent shall pay Petitioner temporary total disability benefits commencing 9/22/2013 through 8/16/2017, the date Petitioner reached maximum medical improvement, for 203 and 4/7th weeks, as provided in Section 8(b) of the Act. Respondent is entitled to a credit of $167,040.06 for TTD and maintenance benefits paid.

WITH RESPECT TO ISSUE "L" THE NATURE AND EXTENT OF PETITIONER'S INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

Section 8.lb of the Illinois Workers' Compensation Act ("Act") addresses the factors that must be considered in determining the extent of permanent partial disability for accidents occurring on or after September 1, 2011. 820 ILCS 305/8.1b (LEXIS 2011). Specifically, Section 8.1b states:

> For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the following criteria:
>
> (a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American

> Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.
>
> (b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors:
>
> (i) the reported level of impairment pursuant to subsection (a);
>
> (ii) the occupation of the injured employee;
>
> (iii) the age of the employee at the time of the injury;
>
> (iv) the employee's future earning capacity; and
>
> (v) evidence of disability corroborated by the treating medical records.

No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order. *Id.*

Considering these factors in light of the evidence submitted at trial, the Arbitrator addresses the factors delineated in the Act for determining permanent partial disability.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report was submitted into evidence and, therefore, the Arbitrator gives no weight to this factor in determining permanent partial disability.

With regard to subsection (ii) of §8.lb(b), the occupation of the employee. Petitioner was employed as a motorcycle instructor. Petitioner was unable to return to her prior occupation due to her work restrictions. As such, the Arbitrator gives significant weight to this factor in determining permanent partial disability.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 53 years old at the time of the accident. The Arbitrator views Petitioner as an older individual near the end of her work life. Based upon her advanced age, it will be difficult for Petitioner to secure subsequent employment and her ability to work. This factor was identified as a factor making it difficult for Petitioner to find work. As such, the Arbitrator gives significant weight to this factor in determining permanent partial disability.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity. Petitioner is unable to return to work as a motorcycle instructor. Petitioner applied for a number for jobs with no success. Petitioner has significant work restrictions and she would require vocational

training, which Respondent denied, to reenter the workforce. As such, the Arbitrator gives significant weight to this factor in determining permanent partial disability.

With regard to subsection (v) of §8.lb(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner underwent a valid FCE which identified Petitioner's various restrictions. Dr. Chudik released Petitioner from care based on the FCE limitations for the right shoulder and Dr. Lorenze issued additional overhead lifting work restrictions. As such, the Arbitrator gives significant weight to this factor in determining permanent partial disability.

Petitioner believes she is permanently and totally disabled under the "Odd-lot" category because of her work accident. "an employee is totally and permanently disabled when he is unable to make some contribution to the work force to justify the payment of wages. *Ceco Corp. v. Industrial Comm'n,* 447 N.E. 2d 842, 845 (Ill. 1985). A person is totally disabled when he or she is incapable of performing services except those for which there is no reasonable stable market. *Id*. If the disability is limited but not obvious, they may still be entitled to PTD benefits by proving they fit into the "odd-lot" category if they can demonstrate they will not be employed regularly in any well-known branch of the labor market. *Id*.; *Valley Mound & Iron Co. v. Industrial Comm'n*, 419 N.E.2d 1159 (Ill. 1981). An employee can prove they fall into the odd-lot category by either (1) showing a diligent but unsuccessful job search or (2) demonstrating that their disability coupled with their age, training, education and experience does not permit the employee to find gainful employment. *ABB C-E Serv. V. Industrial Comm'n*, 737 N.E.2d 682 (5th Dist. 2000). Once the employee makes this showing, the burden shifts to the employer. The employer must show more than a theoretical possibility of an available job and cannot rely on speculative testimony that the employee has the potential for employment. *Walliser v. Waste Mgmt. East,* 12 ILWC 2451 (Sept. 29, 2017).

The Arbitrator finds Petitioner has proven by the preponderance of the evidence that she is entitled to permanent total disability benefits within the "odd lot" category because of her age, skills, training, diligent but unsuccessful job search, work history, and that she is not regularly employable in a well-known branch of the labor market. *See* also *Westin Hotel v IC*, 372 Ill.App.3d 527, 544 (2007). Once Petitioner made her *prima facia* showing, the burden shifted to Respondent to show that Petitioner could be regularly employed in a well-known branch of the labor market. The Arbitrator finds that Respondent failed to sustain its burden. As such,

Respondent shall pay Petitioner permanent and total disability benefits weekly for life, commencing 8/16/2017, as provided in Section 8(f) of the Act.

By: /o/ Frank J. Soto July 8, 2022

Arbitrator Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC009413
Case Name	Daniel Ramirez v. Mighty Movers, Inc. & National Van Lines, Inc.
Consolidated Cases	
Proceeding Type	19(b) Petition Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0069
Number of Pages of Decision	17
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Randall Manoyan
Respondent Attorney	Peter Havighorst

DATE FILED: 2/5/2024

/s/Carolyn Doherty, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DANIEL RAMIREZ,
Petitioner,

vs. NO: 22 WC 9413

MIGHTY MOVERS, INC. &
NATIONAL VAN LINES, INC.,
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, causal connection, benefit rates, medical expenses, prospective medical care, penalties and fees and vocational rehabilitation 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).

I. Average Weekly Wage and Benefit Rates and TTD Award

a. Average Weekly Wage

The Arbitrator concluded that Petitioner's average weekly wage was $412.50. However, the Arbitration Decision does not provide a wage calculation or evidentiary basis to support that conclusion. Rather, the Arbitrator merely cites to *Walker v. Industrial Comm'n*, stating that Respondent is bound by the figure of $412.50, which it placed on the Request for Hearing form. Walker v. Industrial Comm'n, 345 Ill.App.3d 1084, 1087-1088 (4th Dist. 2004); *see also* AX 1. On review, Petitioner raised the issue of AWW arguing again for an AWW of $840.00 as asserted at trial. Accordingly, the Commission reviewed the record in its entirety and based on the data in evidence, including the payroll records, finds the proper average weekly wage is $341.92. The Commission's calculation is based in part on the third method in Section 10, "the number of weeks and parts thereof," and in part on the calculation reasoning provided in the *Smith* case[1].

[1] Because the *Smith* Court was unable to determine the parts of weeks the employee had worked, it divided the employee's earnings by the number of weeks in which he had worked any hours at all. The only proof as to the

In this case, the payroll documentation provides wages for the pay periods of 02/28/22 to 03/13/22 and 03/14/2022 to 03/27/22. The payroll documentation shows Petitioner was paid bi-weekly and Petitioner's gross earnings for both pay periods totaled $1,221.00. The payroll information also indicates Petitioner worked 37.5 hours for the period of 02/28/22 to 03/13/2022 and 18 hours for the period of 03/04/22 to 03/27/2022. However, the number of days Petitioner worked during those periods is not indicated on the payroll documentation. Further, there was no testimony offered at trial regarding the number of days worked.

Because the record does not provide evidence of the parts of weeks worked, the Commission relying on the *Smith* case, counts the weeks preceding the accident as full weeks. However, with respect to the week of the work accident, the medical records and Petitioner's testimony confirm that after the accident, Petitioner did not return to work that week. As such, the the "parts thereof" can be determined for the week of the injury. As such, the Commission finds that the period of February 28, 2022 through March 24, 2022 (date of accident) represents 3-4/7th weeks or 3.571 weeks. Next, the Commission divides the total earnings of $1,221.00 by 3.571, which results in an average weekly wage of $341.92. Based on the totality of evidence introduced at trial on the disputed issue of AWW, the Commission concludes the proper average weekly wage to be $341.92.

Notwithstanding the foregoing calculations which are based on the evidence and testimony introduced at trial on the clearly disputed issue of AWW, the Commission finds it is unable to modify the Arbitrator's decision to reflect the correct average weekly wage of $341.92 because of the holding in *Walker.* Accordingly, the Commission affirms the Arbitrator's decision which applies an AWW of $412.50. *See* AX 1.

b. Benefit Rates and TTD Award

While the Arbitrator correctly determined temporary total disability benefits (hereinafter "TTD benefits") were owed from March 25, 2022 through April 3, 2023, representing 53-4/7 or 53.571 weeks, the Arbitrator incorrectly used a TTD rate of $275.00 to calculate benefits for that period. As such, the Commission writes to modify the TTD rate and TTD award. The Commission notes Petitioner is single, with no dependents. The Commission finds that 2/3 of $412.50 is $275.00, which is less than the applicable statutory minimum TTD rate of $320.00. Accordingly, the Commission calculates the TTD benefits as follows: the minimum TTD rate of $320.00 x 53.571 weeks, results in a total of $17,142.72 TTD benefits. The Request for Hearing form, AX 1 indicates the parties stipulated that Respondent is entitled to a TTD credit of $12,646.07 for benefits paid. After application of the credit, the Commission awards $4,496.65 in TTD benefits.

II. Penalties and Fees

The Arbitrator found that Respondent had no reasonable basis to deny or delay payment of benefits and awarded penalties and fees pursuant to Sections 19(l), 19(k) and Section 16. The Commission after reviewing the entirety of the evidence, reaches a different conclusion. The

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precise number of weeks or parts thereof worked by claimant was shown on the pay stubs submitted for the weeks between September 10, 1984, and the pay period during which the injury occurred on October 16, 1984. Accordingly, the Commission recomputed the claimant's average weekly wage during this period to be $232.32 ($ 1,194.26 total earnings divided by 5 1/7 weeks). *Smith v. Industrial Com.*, 170 Ill. App. 3d 626, 629, 525 N.E.2d 81, 83 (3rd Dist. 1988).

Commission finds the Respondent did not act unreasonably or vexatiously in delaying and suspending benefits because Respondent was in possession of positive drug test at the time the payments were suspended.

Regarding drug testing, Section 11 states, "[a]ny testing that has not been performed by an accredited or certified testing laboratory shall not be admissible in any hearing under this *Act to determine whether the employee was intoxicated at the time the employee incurred the accidental injury*. 820 ILCS 305/11 (LexisNexis, Lexis Advance through P.A. 103-569 of the 2023 Regular Session of the 103rd General Assembly)(emphasis added); *see also* John Chamnik v. Illinois Constructors, 2018 Ill. Wrk. Comp. LEXIS 898, 18 IWCC 693 (2018)(excluding from evidence a drug testing report that did not conform to the specific requirements of Section 11 and the Rules of the Commission, Section 9140). The Commission finds the drug testing report offered by Respondent in RX 1, RX 3 and RX 5 does not conform to the requirements set forth in Section 11 and the Commission Rules. Therefore, the report is not admissible as evidence of intoxication, nor can it be used to determine intoxication. However, Section 11 and the Rules of the Commission do not explicitly prohibit the Commission from admitting and/or considering the drug test report for the limited purpose of determining whether penalties and fees are appropriate.

With regard to RX 3, the commission notes that RX 3 is a subpoenaed copy of the drug test report completed at Concentra and offered pursuant to Section 16 of the Act. The Commission finds that the Arbitrator erred in sustaining Petitioner's hearsay objection to RX3 as it was obtained and offered pursuant to Section 16 of the Act. However, as with RX 1 and RX 5, the Commission notes that the drug testing report was not admissible for the truth of the matter asserted (i.e., Petitioner was intoxicated), but rather as evidence of the reasonableness of Respondent's conduct regarding the delay and suspension of benefits.

Accordingly, the Commission finds the positive drug test was a reasonable basis for Respondent to delay and suspend benefits in this case. Further, the Commission finds Respondent did not act vexatiously, noting over $12,000 in TTD benefits were paid by Respondent. Therefore, the Commission vacates the Arbitrator's award of Section 19(k) penalties in the amount of $19,878.00, vacates the award of Section 19(l) penalties in the amount of $10,000.00, and vacates the award of Section 16 fees in the amount of $3,975.00.

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 12, 2023, is modified as stated herein. The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $320.00 per week commencing from March 25, 2022 through April 3, 2023, a period of 53-4/7 weeks of temporary total incapacity for work under Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of Section 19(k) penalties in the amount of $19,878.00, the award of Section 19(l) penalties in the amount of $10,000.00, and the award of Section 16 fess in the amount of $3,975.00 are hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired

without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, including but not limited to the stipulated TTD credit of $12,646.07, on behalf of Petitioner on account of said accidental injury.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $42,300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

February 5, 2024

o: 01/18/23
CMD/jjm
045

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

/s/ *Marc Parker*
Marc Parker

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC009413
Case Name	Daniel Ramirez v. Mighty Movers, Inc. & National Van Lines, Inc.
Consolidated Cases	
Proceeding Type	19(b)/8(a) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	Ana Vazquez, Arbitrator

Petitioner Attorney	Randall Manoyan
Respondent Attorney	Peter Havighorst

DATE FILED: 7/12/2023

THE INTEREST RATE FOR THE WEEK OF JULY 11, 2023 5.27%

/s/ Ana Vazquez, Arbitrator

Signature

STATE OF ILLINOIS)
)SS
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)/8(a)

Daniel Ramirez
Employee/Petitioner

v.

Mighty Movers, Inc. & National Van Lines, Inc.
Employer/Respondent

Case # **22** WC **009413**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Ana Vazquez**, Arbitrator of the Commission, in the city of **Chicago**, on **February 3, 2023 and April 3, 2023**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **March 24, 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 $**1,221.00**; the average weekly wage was $**412.50**

On the date of accident, Petitioner was ***25*** 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 $**12,646.07** for TTD, $**0** for TPD, $**0** for maintenance, and $**0,** for other benefits, for a total credit of $**12,646.07**.

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

ORDER

After considering the entire record, Respondent's Exhibit 1 is rejected.

Respondent shall pay for the reasonable and necessary medical services, as provided in Px6 and Px7, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act.

Respondent shall authorize and is liable for the prospective medical treatment plan recommended by Dr. Jonathan Watson, including a work conditioning program, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of **$275.00/week** for **53 4/7** weeks, commencing **March 25, 2022** through **April 3, 2023**, the date of arbitration, as provided in Section 8(b) of the Act. Per the Parties' stipulation, Respondent is entitled to a credit in the amount of **$12,646.07** for temporary total disability benefits paid by Respondent to Petitioner. Ax1.

The Arbitrator finds that the issue of whether Petitioner is entitled to a vocational assessment is premature for resolution.

Respondent shall pay **$19,878.00** in penalties pursuant to Section 19(k) of the Act, **$10,000.00** in penalties pursuant to Section 19(l) of the Act, and **$3,975.60** in attorneys fees pursuant to Section 16 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.

Ana Vazquez

Signature of Arbitrator

JULY 12, 2023

PROCEDURAL HISTORY

This matter proceeded to arbitration on February 3, 2023 in Chicago, Illinois before Arbitrator Ana Vazquez, pursuant to Sections 19(b) and 8(a) of the Illinois Workers' Compensation Act ("the Act"). Proofs were closed on April 3, 2023. The issues in dispute include (1) accident, (2) causal connection, (3) earnings/AWW, (4) unpaid medical bills, (5) prospective medical treatment, (6) temporary total disability ("TTD") benefits and maintenance benefits, (7) penalties/attorney's fees under Sections 19(k), 19(l) and 16 of the Act, and (8) whether Petitioner is entitled to a vocational assessment. Arbitrator's Exhibit ("Ax") 1. All other issues have been stipulated, including that Respondent is entitled to a credit in the amount of $12,646.07 for TTD benefits paid to Petitioner by Respondent. Ax1.

FINDINGS OF FACT

Petitioner testified that as of March 24, 2022, his employer was Mighty Movers, Inc. ("Respondent"). Transcript of Proceedings on Arbitration ("Tr.") at 15. Robert Seidel was Petitioner's main supervisor, and Mr. Seidel's brother, Mike, was Mr. Seidel's assistant. Tr. at 15. Petitioner testified that Respondent was a new company, that he was its first truck driver with a Class C license, and that he helped bring all the rental trucks in and out until Respondent got its own truck. Tr. at 16-17. Petitioner testified that his duties consisted of going to different locations to move furniture. Tr. at 17. Petitioner testified that the addresses of the moves were on an estimate that he would pick up from Respondent's Elk Grove, Illinois office, and sometimes there was two or three moves a day. Tr. at 17-18. Petitioner also helped move furniture. Tr. at 24. Petitioner explained that he was also responsible for making sure that the customer's furniture was safe, that all the paperwork was done, and that his coworkers were safe. Tr. at 23.

Petitioner testified that he was not suffering from any other injuries to his right leg or right foot before March 24, 2022, and that he had not been involved in any car accidents, fights, or any other issues that would have affected his right leg. Tr. at 75, 90.

Accident

Petitioner testified that he was asked to come into work on March 24, 2022. Tr. at 21-22. Petitioner testified that he knew he had two moving jobs on March 24, 2022, and that the first location he was directed to appear at was 2206 W. Erie Street. Tr. at 22. Petitioner testified that there was precipitation on the ground. Tr. at 26. Petitioner testified that there was a light drizzle, and that the floor was damp. Tr. at 94.

Petitioner testified that he appeared at 2206 W. Erie Street at 9 a.m. on March 24, 2022. Tr. at 24, 25. The location of the move was on the third floor and the only way to move the furniture was using stairs in the backyard. Tr. at 25. Petitioner testified that about two hours into the move, he slipped down the stairs. Tr. at 26, 27. Petitioner testified that he was going down the stairs when he slipped and that he tried to catch himself. Tr. at 28, 29. Petitioner testified that he fell forward and that his ankle went inward. Tr. at 31. Petitioner testified that he was carrying two crates that weighed 30 pounds each. Tr. at 29. The crates belonged to the customer. Tr. at 30. Petitioner testified that when he landed on the ground, he rolled, and dropped the crates. Tr. at 32. Petitioner testified that he slipped on the third or fourth step from the bottom of the staircase. Tr. at 32. Petitioner testified that he continued to move things back and forth and that he had to stop when his foot turned purple. Tr. at 33, 73. On cross examination, Petitioner testified that he did not keep moving for more than 10 minutes after the accident, that he had to place the stuff he had in his hands somewhere, and then make his way to the truck to call Mr. Seidel. Tr. at 73.

Petitioner testified that he contacted Mr. Seidel after the accident. Tr. at 34. Petitioner testified that he told Mr. Seidel that he thought that he broke his leg and asked if Mr. Seidel could send someone to take him to the hospital. Tr. at 34. Petitioner testified that Mr. Seidel "told me to call my own people to get myself to the hospital." Tr. at 34-35. Petitioner testified that he then called his sister to pick him up. Tr. at 35. Petitioner testified that his sister intended to take him to NorthShore Immediate Care. Tr. at 35-36. Petitioner testified that on his way to the hospital, he received a call from Mr. Seidel "saying that I was going to be in trouble if I didn't stop and get a drug test before I took myself to the emergency room for a broken ankle. I had to go get a drug test before." Tr. at 36. Petitioner testified that his sister then took him to MinuteClinic and he took a drug test. Tr. at 36-38. Petitioner testified that after taking the drug test, he went to immediate care, and then went to the hospital. Tr. at 38.

Petitioner testified that he was not intoxicated on March 24, 2022. Tr. at 26. Petitioner testified that he did not smoke marijuana prior to work on March 24, 2022. Tr. at 27, 41. Petitioner testified that he had not taken any other illegal or illicit substances on March 24, 2022. Tr. at 27. Petitioner agreed that he told one of his physicians that he had last smoked marijuana on March 23, 2022. Tr. at 41. Petitioner testified that he has a medical marijuana card. Tr. at 41, 77-78. Petitioner testified that he had not been under the influence of any drug the morning of March 24, 2022. Tr. at 41.

Summary of medical records

Petitioner presented at Evanston Hospital on March 24, 2022. Px3 at 83. Petitioner complained of right ankle pain status post mechanical fall. Px3 at 83. Petitioner reported a consistent accident history. Px3 at 83, 239. Petitioner reported that he noticed immediate pain to his right ankle and was unable to bear weight. Px3 at 83. It was noted that Petitioner had also scraped his left knee and right elbow during the fall, but that Petitioner denied any significant pain to those areas. Px3 at 83. X-rays were obtained, which demonstrated a spiral fracture of the distal fibula and widening of the ankle mortise medially. Px3 at 85-86.

On March 25, 2022, Petitioner underwent (1) open reduction and internal fixation ("ORIF"), right ankle distal fibula and (2) ORIF, right ankle syndesmosis, which was performed by Dr. Rajeev Garapati. Px3 at 88. Petitioner's postoperative diagnosis was right unstable ankle fracture. Px3 at 89-90.

Petitioner saw Dr. Jeremy Adler at Evanston Hospital on April 4, 2022. Px3 at 65. Dr. Adler noted that Petitioner was doing well, and that Petitioner reported minimal pain. Px3 at 65. X-rays were obtained, which demonstrated (1) interval ORIF of the distal fibular fracture with syndesmotic stabilization, (2) unchanged small nondisplaced posterior malleolar fracture, and (3) possible small anterior tibiotalar intraarticular body/fracture fragment. Px3 at 62. Dr. Adler instructed Petitioner to continue with no weightbearing on the right lower extremity and recommended Petitioner transition to a Cam boot. Px3 at 67. Dr. Garapati reviewed Dr. Adler's notes, and further noted that Petitioner's condition was not preexisting, that it "happened during injury," and that maximum medical improvement ("MMI") was expected in four to six months. Px3 at 68.

Petitioner saw Dr. Garapati on May 11, 2022, at which time Dr. Garapati noted that Petitioner had been using a Cam boot and knee scooter. Px3 at 45. X-rays were obtained, which demonstrated an intact lateral malleolus and syndesmotic fixation. Px3 at 42. Dr. Garapati instructed Petitioner to continue use of the Cam boot. Px3 at 46. Dr. Garapati noted that Petitioner was warned about the syndesmotic screw breaking. Px3 at 46. Petitioner was kept off work. Px3 at 46. Petitioner testified that after May 11, 2022, he attended physical therapy for the first couple of weeks at Athletico, until approval became an issue. Tr. at 50. Petitioner testified that Athletico informed him that he would not be able to attend physical therapy in late May 2022 or early June 2022. Tr. at 50.

Petitioner next saw Dr. Garapati on June 8, 2022, at which time Dr. Garapati noted that Petitioner was doing well and improving, that Petitioner had been in a Cam boot, and that Petitioner had numbness on the top of his foot. Px3 at 28. X-rays were obtained, which demonstrated sequelae of ORIF of distal fibular fracture, with no new fracture noted. Px3 at 25. Dr. Garapati recommended Petitioner wean from use of the Cam boot, continue physical therapy, and use an ankle brace. Px3 at 30. Dr. Garapati released Petitioner to light duty. Px3 at 30. Petitioner testified that after Dr. Garapati recommended that he attend physical therapy on June 8, 2022, he attempted to recommence physical therapy, and "[t]he same thing, just a couple of weeks and then no approval and then sent home." Tr. at 51. Petitioner testified that he was unable to attend any physical therapy sessions between June 8, 2022 and July 20, 2022. Tr. at 52-53.

Petitioner followed up with Dr. Garapati on July 20, 2022. Px3 at 9. Dr. Garapati noted that Petitioner had been in a brace, was participating in physical therapy, and was still not able to do full activity. Px3 at 10. X-rays were obtained, which demonstrated that the screw connecting the plate involving the lateral fibula to the tibia was fractured. Px3 at 7. Dr. Garapati recommended Petitioner wean from use of the brace. Px3 at 8. Dr. Garapati released Petitioner to light duty only, without heavy lifting, ground level work, and no stairs or ladders, and noted that MMI was about three months away. Px3 at 8, 17. Petitioner testified that he attended several sessions of physical therapy at Athletico between July 20, 2022 and August 2022, and that it was his understanding that Respondent again terminated medical benefits and TTD benefits. Tr. at 53.

Petitioner attended eight sessions of physical therapy at Athletico Physical Therapy from June 22, 2022 through August 23, 2022, with nine sessions noted as canceled. Px4. Petitioner reported a consistent accident history at his initial evaluation on June 22, 2022. Px4 at 29.

On December 8, 2022, Petitioner presented at Skyline Orthopedics and was seen by Dr. Jonathan Watson. Px5. Dr. Watson noted that Petitioner was a 26-year-old male who was being seen for initial evaluation for workers comp involving a right ankle injury. A consistent accident history was noted. Petitioner reported that he was still having ankle pain over the posterior and lateral ankle, over the hardware. Dr. Watson noted that Petitioner had done a course of physical therapy. X-rays were obtained, which demonstrated (1) normal alignment, (2) a healed fibula fracture with plate and screws, (3) a healed posterior malleolus fracture, and (4) a broken syndesmosis screw. Dr. Watsons impression was right closed ankle fracture with painful hardware. Dr. Watson ordered physical therapy, with additional treatment instructions noted as work conditioning physical therapy, four days per week, three to four hours per day for four weeks. Dr. Watson released Petitioner to return to work on December 9, 2022 with restrictions, including no lifting over 10 pounds and occasional standing and walking. Petitioner testified that he last saw Dr. Watson on January 30, 2023. Tr. at 58, 67. Petitioner testified that he has not been able to attend the physical therapy program recommended by Dr. Watson because it has not been approved. Tr. at 58.

Earnings/AWW

Petitioner testified that he began work at Respondent at the beginning of March 2022, and that he "had a couple days at the end of February, but they weren't quote/unquote official." Tr. at 16. When asked what his hours were from the beginning of March through the date of the accident, Petitioner responded "[d]efinitely more than 40. None of it was ever recorded. There was never clock-in, like a time clock. It was just kind of texting." Tr. at 16. Petitioner testified that his hours would be set via text messages, and that "I would just text Robbie when I was done with the job. I gave him all the copies of the bills at the end of each job." Tr. at 17. Petitioner testified that he typically started his workday at 7 a.m. or 8 a.m. and that the time he ended his workday varied, and sometimes he got home before 5 p.m. and sometimes he got home after 9 p.m. Tr. at 18. Petitioner agreed that he worked between eight and 12 hours a day. Tr. at 19. Petitioner testified that he worked full-time, that he was

paid $21.00 per hour, and that he was paid by direct deposit. Tr. at 19, 65-66. Petitioner testified that he received direct deposits directly from Respondent and that he received three direct deposits prior to the accident. Tr. at 19-20,66. Petitioner testified that he had not been fully paid for all the hours that he had worked at Respondent up to the date of the accident. Tr. at 20.

TTD/Maintenance

Petitioner testified that he spoke with Mr. Seidel two days after the accident, that he requested that Mr. Seidel begin paying his medical bills and TTD, and that Mr. Seidel refused. Tr. at 46. Petitioner testified that Mr. Seidel's refusal was based on Petitioner failing the drug test. Tr. at 46.

Petitioner testified that he expressed to Respondent that he was interested in returning to work. Tr. at 55-56. Petitioner testified that as of the date of arbitration, he had not received an offer of accommodated work from Respondent. Tr. at 56. Petitioner testified that if a job were offered to him, he would take it. Tr. at 56. Petitioner then testified that whether he would accept an accommodated position if one was offered was a tough question. Tr. at 60.

Petitioner testified that Respondent terminated medical benefits and TTD benefits on or about September 30, 2022, and that he has not been paid anything since September 2022. Tr. at 54, 57.

On cross examination, Petitioner testified that he had looked for work in the two months prior to arbitration, and that he did "small things here and there," but that he did not have an occupation as of the date of arbitration. Tr. at 88.

Current condition

Petitioner testified that he was not able to put any pressure on his right foot for six months. Tr. at 48.

Petitioner testified that the plate in his leg bothers him every day. Tr. at 42. Petitioner testified that he was bothered by the plate while walking to the hearing location. Tr. at 42.

Petitioner testified that he would like to complete the work conditioning program and that he wants to be 100 percent again like he used to be. Tr. at 59. Petitioner testified that he wants to return to work, maybe not for the same people, but that he would love to do what he used to do. Tr. at 59-60.

Petitioner testified that he had not used a cane or crutches in a while and that he was not wearing a walking boot at the time of arbitration. Tr. at 67. Petitioner testified that he still had to use an ankle brace sometimes. Tr. at 67.

CONCLUSIONS OF LAW

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

Decisions of an arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). The burden of proof is on a claimant to establish the elements of his right to compensation, and unless the evidence considered in its entirety supports a finding that the injury resulted from a cause connected with the employment, there is no right to recover. *Board of Trustees v. Industrial Commission,* 44 Ill. 2d 214 (1969).

Credibility Assessment

Credibility is the quality of a witness which renders his evidence worthy of belief. It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence and assign weight to witness testimony. *O'Dette v. Industrial Commission*, 79 Ill. 2d 249, 253 (1980); *Hosteny v. Workers' Compensation Commission*, 397 Ill. App. 3d 665, 674 (2009). Where a claimant's testimony is inconsistent with his actual behavior and conduct, the Commission has held that an award cannot stand. *McDonald v. Industrial Commission,* 39 Ill. 2d 396 (1968); *Swift v. Industrial Commission,* 52 Ill. 2d 490 (1972).

In the case at hand, the Arbitrator observed Petitioner's behavior and conduct during the hearing and finds him to be a credible witness. The Arbitrator compared Petitioner's testimony with the totality of the evidence submitted and did not find any material contradictions that would deem the witness unreliable.

Respondent's Exhibit 1

At arbitration, the Arbitrator reserved ruling on Petitioner's objection to the admission of Respondent's Exhibit 1. After considering the entire record, the Arbitrator sustains Petitioner's objection, and Respondent's Exhibit 1 is rejected.

Issue C, whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds as follows:

Respondent disputes that an accident occurred that arose out of and in the course of Petitioner's employment by Respondent and relies on the defense of intoxication.

The Arbitrator finds that Petitioner has proven by a preponderance of the evidence that he sustained an accident that arose out of and in the course of his employment by Respondent on March 24, 2022. In support of her findings, the Arbitrator relies on Petitioner's credible testimony that (1) Petitioner's duties while working at Respondent included driving a moving van and moving furniture, (2) on March 24, 2022, while carrying two crates belonging to a customer down to the moving van, he slipped on the third or fourth step from the bottom of the staircase, fell forward, and his ankle went inward, and (3) he had no issues or problems with his right foot or right leg prior to March 24, 2022. Petitioner's testimony was unrebutted. The Arbitrator also relies on the treatment records in evidence, which document a consistent accident history.

Regarding Respondent's reliance on the defense of intoxication, the Arbitrator acknowledges that Petitioner was forthright in his testimony that he smoked marijuana on March 23, 2022, the day prior to the accident. The Arbitrator notes that Petitioner credibly testified that he was not intoxicated on March 24, 2022, that he did not smoke marijuana prior to work on March 24, 2022, that he had not taken any other illegal or illicit substances on March 24, 2022, and that he was not under the influence of any drug the morning of March 24, 2022. The Arbitrator further acknowledges that Respondent offered its Exhibits 1, 3, and 5, containing the results of Petitioner's drug test. Petitioner objected to the admission of these exhibits, Petitioner's objections were sustained, and the exhibits were rejected. Even if, however, Respondent's exhibits had been admitted and there was evidence of a positive drug test, there is no evidence in the record that Petitioner was so intoxicated that the intoxication constituted a departure from the employment or that Petitioner's intoxication was the proximate cause of the injury.

Based on the record as a whole, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that he sustained an accident that arose out of and in the course of his employment by Respondent on March 24, 2022.

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

Having considered all the evidence, the Arbitrator finds that Petitioner's current right ankle condition of ill-being is causally related to the March 24, 2022 injury. The Arbitrator relies on the following in support of her findings: (1) the medical records of NorthShore University Health System, (2) the records of Athletico Physical Therapy, (3) the medical records of Skyline Orthopedics, (4) Petitioner's credible testimony that he was not suffering from any other injuries to his right leg or right foot prior to March 24, 2022, and (5) the fact that none of the records in evidence reflect any right leg or right foot issues or treatment prior to March 24, 2022. The Arbitrator notes that the evidence demonstrates that Petitioner was able to work full duty and without restrictions immediately prior to the March 24, 2022 accident. The Arbitrator further notes that the medical evidence offered was unrebutted.

In resolving the issue of causation, the Arbitrator further finds that Petitioner is not at MMI.

Issue G, as to what were Petitioner's earnings, the Arbitrator finds as follows:

Petitioner claims that his earnings during the year preceding the injury were $43,680.00 and that his average weekly wage was $840.00. Ax1. Respondent disputes Petitioner's claims, and Respondent claims that Petitioner's average weekly wage was $412.50. Ax1.

Petitioner testified that he worked more than 40 hours per week, and that it was not recorded. Tr. at 16. Petitioner agreed that he worked between eight and 12 hours per day and that he earned $21.00 per hour. Tr. at 19, 66. Petitioner testified that he was paid by direct deposit and that he received three direct deposits prior to the accident. Tr. at 19-20, 66. Petitioner offered Px14, which are screenshots of direct deposits received by Petitioner. Px14 reflects that Petitioner received a direct deposit on March 17, 2022 in the amount of $650.03 and that he received a direct deposit on March 31, 2022 in the amount of $323.24. Respondent offered Rx2, Petitioner's payroll records from Respondent, which were admitted over Petitioner's objection. Rx2 reflects that Petitioner earned $22.00 per hour and that he worked 37.50 hours for the period of February 28, 2022 to March 13, 2022 and that he worked 18 hours for the period of March 14, 2022 to March 27, 2022. Rx2 is consistent with the amounts reflected as direct deposits in Px14. Having considered all the evidence, the Arbitrator finds that Petitioner's AWW was $412.50, as Respondent is bound by its stipulation under *Walker v. Industrial Comm'n*, 345 Ill. App. 3d 1084, 1087-1088 (2004).

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

Consistent with the Arbitrator's prior findings regarding the issues of accident and causal connection, the Arbitrator finds that Petitioner's medical treatment has been reasonable and necessary, and that Respondent has not yet paid all appropriate charges. At arbitration, Petitioner presented the following unpaid medical bills: (1) Athletico Physical Therapy ($4,404.00), (2) NorthShore University Health System ($5,725.40), (3) Skyline Orthopedics ($773.24), and (4) BCBS Lien ($26,767.29). As the Arbitrator has found that Petitioner's treatment has been reasonable and necessary, the Arbitrator further finds that all bills, as provided in Px6 and Px7, are awarded and that Respondent is liable for payment of these bills, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act.

Respondent is entitled to a credit for any payments made towards the awarded outstanding expenses and shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit.

Issue K, whether Petitioner is entitled to any prospective medical care, the Arbitrator finds as follows:

Consistent with the Arbitrator's prior findings, and having considered all the evidence, the Arbitrator finds that Petitioner is entitled to prospective medical care as recommended by Dr. Watson. As of December 8, 2022, Dr. Watson recommended that Petitioner undergo a work conditioning program. Accordingly, the Arbitrator finds that Petitioner is entitled to the recommended work conditioning program, which is contemplated as compensable treatment under Section 8(a) of the Act, and therefore, Respondent is responsible for authorizing and paying for same.

Issue L, whether Petitioner is entitled to temporary total disability and maintenance, the Arbitrator finds as follows:

Petitioner claims that he is entitled to TTD benefits from March 25, 2022 through June 8, 2022 and that he is entitled to maintenance benefits from June 9, 2022 through April 3, 2023, the date of arbitration. Ax1. Respondent disputes Petitioner's claims for TTD and maintenance benefits. Ax1.

The evidence demonstrates that Petitioner was kept off work by Dr. Garapati through June 8, 2022, at which time he released Petitioner to light duty work. Petitioner then saw Dr. Watson on December 8, 2022, who released Petitioner to work with restrictions, including no lifting over 10 pounds and occasional standing and walking. Petitioner testified that he expressed to Respondent that he was interested in returning to work. Tr. at 55-56. Petitioner testified that as of the date of arbitration, he had not received an offer of accommodated work from Respondent. Tr. at 56. Petitioner's testimony was unrebutted.

While Petitioner has requested maintenance benefits for the period of June 9, 2022 through April 3, 2023, the Arbitrator finds that an award of TTD benefits is more appropriate for this period. Accordingly, the Arbitrator finds that Petitioner is entitled to TTD benefits from March 25, 2022 through April 3, 2023, the date of arbitration.

Issue M, whether penalties/attorney's fees should be imposed upon Respondent, the Arbitrator finds as follows:

The award of Section 19(l) penalties is mandatory '[i]f the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay." *McMahan v. Industrial Commission*, 183 Ill.2d 499, 514-15 (1998). The employer bears the burden of justifying the delay and its justification is sufficient only if a reasonable person in the employer's position would have believed the delay was justified. *Board of Education of the City of Chicago v. Industrial Commission*, 93 Ill.2d 1, 9-10 (1982). Section 19(l) penalties are awardable at the rate of $30.00 per day "for each day that the benefits under Section 8(a) or Section 8(b)" were "withheld or refused," up to a maximum of $10,000.00. A delay in payment of 14 days or more creates a rebuttable presumption of unreasonable delay. In this case, the evidence demonstrates that Respondent has delayed or withheld payment of Section 8(a) and Section 8(b) benefits to Petitioner from March 25, 2022 through April 3, 2023, the date of arbitration. See Px13. The Arbitrator finds that Respondent did not offer an adequate justification for denial of payment. As such, the Arbitrator further finds Respondent liable for Section 19(l) penalties in the maximum amount of $10,000.00 since benefits were denied for 375 days, from March 25, 2022 through April 3, 2023, the date of arbitration.

The Arbitrator further finds it appropriate to award Section 19(k) penalties and Section 16 attorney fees, which are discretionary rather than mandatory. They are "intended to address situations where there is not only a delay but the delay is deliberate or the result of bad faith or improper purpose." *McMahan*, 183 Ill.2d at 514-516. The employer bears the burden of proving that it acted in an objectively reasonable manner in denying a claim under all of the existing circumstances. *Consolidated Freightways, Inc. v. Industrial Commission*, 136 Ill.App.3d 630 (1985). In this case, the Arbitrator finds that Respondent had no objectively reasonable basis to delay or deny payment of benefits. The Arbitrator exercises her discretion and finds Respondent liable for Section 19(k) penalties in the amount of $1,043.03, representing 50% of the awarded TTD benefits and considering the stipulated credit of $12,646.07 for TTD benefits paid by Respondent, and $18,834.97, representing 50% of the awarded Section 8(a) benefits, and Section 16 attorney fees in the amount of $3,975.60, representing 20% of the awarded benefits.

Issue O, whether Petitioner is entitled to a vocational assessment, the Arbitrator finds as follows:

Consistent with the Arbitrator's prior findings, the Arbitrator finds that the issue of whether Petitioner is entitled to a vocational assessment is premature for resolution.

Ana Vazquez

ANA VAZQUEZ, ARBITRATOR

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC030755
Case Name	Onree Williams v. Terminal Getaway Spa
Consolidated Cases	17WC009389;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0070
Number of Pages of Decision	29
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Adam Rosner
Respondent Attorney	Stephen Trotto

DATE FILED: 2/6/2024

/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 down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Onree Williams,

Petitioner,

vs. No. 15 WC 030755

Terminal Getaway Spa,

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 benefit rates, causal connection, medical expenses, temporary disability, and permanent disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below, and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission corrects clerical errors on page 2 of the Decision of the Arbitrator. The Arbitrator awarded Petitioner temporary total disability (TTD) benefits of $418.85/week for 27-4/7 weeks, commencing September 18, 2015 through March 29, 2016, as provided in Section 8(b) of the Act. As the TTD rate under this Section is 66-2/3% of the average weekly wage (AWW), the Commission modifies the TTD rate to $415.85/week, representing 66-2/3% of the AWW of $623.77. The Commission affirms the period of TTD awarded, from September 18, 2015 through March 29, 2016, but finds that period represents 27-5/7 weeks, not 27-4/7 weeks.

The Commission affirms the Arbitrator's award of medical benefits pursuant to the fee schedule, but also finds that Respondent shall be given a credit for all payments it has made toward those bills.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 17, 2023, is hereby modified as stated above, and otherwise affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $12,300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

February 6, 2024

MP/mcp
o-01/18/24
068

/s/ *Marc Parker*
Marc Parker

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC030755
Case Name	Onree Williams v. Terminal Getaway Spa
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	26
Decision Issued By	Jacqueline Hickey, Arbitrator

Petitioner Attorney	Adam Rosner
Respondent Attorney	Stephen Trotto

DATE FILED: 5/17/2023

THE INTEREST RATE FOR THE WEEK OF MAY 16, 2023 4.98%

/s/ Jacqueline Hickey, 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

Onree Williams
Employee/Petitioner

v.

Terminal Gateway Spa
Employer/Respondent

Case # 15 WC 30755

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

DISPUTED ISSUES

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

FINDINGS
On **August 30, 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 $**32,436.20** the average weekly wage was $**623.77.**

On the date of accident, Petitioner was **47** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**8,985.33** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $$**8,985.33.**

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 $418.85/week for 27 4/7 weeks, commencing September 18, 2015 through March 29, 2016 at a rate of $418.85, as provided in Section 8(b) of the Act.
Respondent shall be given a credit of $**8,985.33** for TTD.

Medical Benefits
Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of:

- Fullerton Drake Medical Center $7,832.50
- Dr. John Mazzarella $2,840.00
- Rx Development $145.93
- Windy City Anesthesia $1,145.00
- Advanced Ambulatory Surgical Center $11,512.00

Permanent Partial Disability

Respondent shall pay Petitioner permanent partial disability benefits of $374.26/week for 10.75 weeks, because the injuries sustained caused the 25% loss of use of the left index finger and 1.9 weeks for 5% loss of the left middle finger, a total of 12.65 weeks to be paid by Respondent, 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.

Jacqueline C. Hickey

_____

Signature of Arbitrator

MAY 17, 2023

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

ONREE WILLIAMS, Petitioner,	)	
v.	)	Case No.: **15WC30755 & 17WC9389**
TERMINAL GATEWAY SPA, Respondent.	)	

RIDER TO DECISIONS

This matter proceeded to hearing on June 22, 2022 in Chicago, Illinois before Arbitrator Jacqueline Hickey on Petitioner's Petition for Immediate Hearing regarding case 17WC9389. However, there are two cases that are consolidated and pending before the Arbitrator, 15WC30755 for date of accident of 8/30/15 and 17WC9389 for date of accident 10/28/15 . Two decisions have been issued however one rider is attached for both decisions. See below.

15WC30755: Issues in dispute include causal connection, AWW, TTD, medical bills and nature & extent. Arbitrator's Exhibit "Ax" 1.

17WC9389 (19B): Issues in dispute include accident, causal connection, AWW, Age/dependents, medical bills, TTD and prospective medical. Arbitrator's Exhibit "Ax" 2.

FINDINGS OF FACT

Petitioner, Onree Williams, testified that he was not currently employed and that his last employer was Respondent, Terminal Getaway Spa. The Arbitrator notes that Petitioner amended the pleadings regarding Respondent's name to "Terminal Getaway Spa." Id. at 15. Petitioner last worked for Respondent in September of 2015 and has not worked for any other employer since that date. Id. at 16. Petitioner testified that he worked as a massage therapist for Respondent from January of 2014 through September of 2015, around two years. Id. at 16. Even though petitioner has not worked since 8-30-2015, Petitioner stated that since then his bilateral wrist /hand symptoms have worsened. (T.69). On cross examination Petitioner admitted to also having back problems, arthritis, and bone spurs which required medical attention (T.71-72). Petitioner testified that his hours varied depending on how many clients he had but his typical shift was around seven hours per day, five days per week. (T. 17-18)

Petitioner testified that he worked for Respondent on August 30, 2015. Id. at 18. Petitioner testified that on August 30, 2015, he performed a massage on a client and went to grab a client's bag from the closet with a sliding door. Id. at 18. As Petitioner was giving the bag to the client, Petitioner's manager closed the wood sliding door on Petitioner's left index finger and middle fingers. Id. at 19-20. Petitioner testified that he felt a shooting pain in his left index finger but did not seek treatment initially as he thought the pain would go away with ice. Id. at 21. Petitioner testified that he continued working for Respondent the following week but noted that his left index finger continued to swell up. Id. at 22.

On the alleged manifestation date of 10-28-2015, Petitioner, also testified that that due to repetitive activities at work he developed bilateral carpal tunnel syndrome and bilateral index, middle and ring trigger fingers. Petitioner worked for Respondent as a massage therapist from January 2014 until September 2015 but this was not his first massage therapist job. Petitioner testified that after injuring his left index and middle fingers he began to experience pain in the bilateral hands/ wrists (T.27). Petitioner stated that he also experienced pain, numbness and tingling in his bilateral index, middle and ring fingers. (T.45). Petitioner testified that Dr. Fink prescribed trigger finger releases (T45-48). Petitioner stated that over the course of his treatment his hands/wrists have gotten worse (T.50). Petitioner stated that since the accident of 8-30-2015 he has not returned to work for Respondent nor has he worked for another employer as a massage therapist or in any other capacity. (T.68). Petitioner further testified that since 8-30-2015 he has not looked for work. (T.69).

Petitioner testified that he eventually sought treatment with Dr. Gerber at Fullerton Drake Medical Center. Id. On September 18, 2015, Petitioner presented to Dr. Gerber with limitation of motion in the left hand in the 2nd and third fingers and the Arbitrator notes that Petitioner gave a history consistent with his testimony at trial. Px1. Dr. Gerber noted spasm and inflammation at the MCP joints 2nd and 3rd fingers, diminished grip strength, and restrictions in the 2nd and 3rd fingers MCP range of motion. Id. Dr. Gerber recommended physical therapy, placed Petitioner on work restrictions of no use with left hand, recommended a left-hand MRI, and referred Petitioner to Dr. Fink. Id. Petitioner continued to follow up with Dr. Gerber through June of 2016 at Fullerton Drake Medical Center for his left hand and specifically of left index finger sprain. Id. Petitioner completed physical therapy at Fullerton Drake Medical Center from September 18, 2015 through June 7, 2016. Id. While treating Petitioner, Dr. Gerber noted complaints of pain and limitation of motion in the index and middle finger left hand. There is no mention of repetitive activity at work as a massage therapist or bilateral wrist pain. There is no diagnosis of bilateral carpal tunnel syndrome. Dr. Gerber prescribed physical therapy to the left index and middle fingers. On 9-21-2015 Petitioner returned to Dr. Gerber with complaints isolated to the left index and middle finger with no complaints to the bilateral wrists or triggering fingers of both hands.

On October 16, 2015, Petitioner underwent the MRI of his left hand with Dr. Olmsted at Fullerton MRI. Px4. Dr. Olmsted's impression of the MRI was normal. The impression stated: "No acute traumatic injury demonstrated. No soft tissue contusion. No osseous injury capsuologament." Px4.

On October 26, 2015, Petitioner initially presented to Dr. Fink at Gold Coast Orthopedic with pain in his left index finger, giving a history consistent with the testimony at trial. Px6. On physical examination, Dr. Fink noted a small 1cm mass over the PIP joint and lacks last 20 degrees of flexion of the proximal interphalangeal joint of the left index finger. Id. X-rays taken of Petitioner's left hand showed a small indentation fracture of the left second metacarpal head that was now healed. Id. Dr. Fink recommended removal of the mass over the PIP joint and for Petitioner to continue physical therapy at Fullerton Drake. Id. Dr. Fink stated in his deposition that Petitioner did not complain of bilateral hand/wrist pain upon his initial visit. (PX 14, pg39).

On October 29, 2015, Petitioner presented to Dr. Kiang for an EMG of his bilateral upper extremities as Petitioner was experiencing left first through third finger paresthesia. Px5. Dr. Kiang's impression of the EMG was the severe right carpal tunnel syndrome affecting only the motor aspect of the nerve and mild left carpal tunnel syndrome affecting only the motor aspect of the nerve. Id. Dr. Kiang did not note a history of bilateral hand/ wrist pain. Dr. Kiang diagnosis was "severe right carpal tunnel syndrome affecting only the motor aspect of the nerve and mild left carpal tunnel syndrome affecting only the motor aspect of the nerve not likely due to his work injury with contributory left 2nd and 3rd fingers." (Px1)

On November 20, 2015, Petitioner underwent the removal of the soft tissue mass on the left index finger proximal interphalangeal joint by Dr. Fink. Px10. Dr. Fink was assisted in the surgical removal by Dr. Mazzarella at Advanced Ambulatory Surgical Center. Id.

On 11-25-15 Dr. Fink followed up with Petitioner and again did not document complaints of pain to both hands and wrists. (Px6; Px14, pg. 43).

On 2-17-16 Dr. Fink noted continued progress with mobility in the left index finger but admitted on cross examination that Petitioner did not complain of symptoms to both hands and wrists at this visit. Dr. Fink admitted that he did not examine the wrists and hands because Petitioner did not make complaints to same. (Px14, pg44-45).

On February 18, 2016, Petitioner underwent an independent medical examination by Dr. Fernandez at the request of the insurance company. Rx1, Dep.Ex.2. At this visit, Petitioner presented with complaints of residual swelling, stiffness, weakness, and 7/10 pain in his left index finger and giving a history consistent with the testimony at trial. Id. On physical examination to the left index finger, Dr. Fernandez noted weakness complaints, dorsal thickening at the surgical site where the mass was removed, and discomfort to direct palpation along the scar. Id. Dr. Fernandez took x-rays and did not note any indentation fractures of the left index finger at that time. Id. Dr. Fernandez noted that he did not have the operative report or pathology report regarding what the mass was that was excised but opined that the mass or its resection was not related to the work accident. Id. Dr. Fernandez diagnosed Petitioner with a contusion-type injury from the work accident and found Petitioner to be at MMI. Id. Finally, Dr. Fernandez found Petitioner to be honest, but stated he did not have a clear understanding as to how Petitioner's work accident caused the need for a mass excision. Id. Dr. Fernandez further stated in his IME medical report dated 11-14-2019 that, "There is no indication that Petitioner was having numbness or tingling complaints as part of his general work duties as a massage therapist. In addition, to the physical demand level is defined as light. While the activities involve some

pushing, gripping, and pulling, including the use of tools these are variable or intermittent in nature and even assuming that there were more frequent in nature, these would not be the type or nature that would cause or aggravate the underlying carpal tunnel syndrome even from a non-traumatic "repetitive" exposure theory. (Rx1 & 3 11-14-19 Fernandez report at pg7).

Following the IME, Petitioner presented to Dr. Fink on February 17, 2016 with progress in left index finger mobility. Px6. On physical examination, Dr. Fink noted pain on range of motion and edema at the PIP joint. Px6. Petitioner followed up with Dr. Fink on March 21, 2016 with a painful mass on top of the joint to the left index finger. Id. On 3-21-16 Dr. Fink examined Petitioner and noted the mass but did not note complaints of pain to both hands and wrist. Review of the record reflects examination isolated to the left index finger. (Px6).

At trial, Petitioner testified that he continued to have pain, numbness, and mobility issues in his left finger two months post-accident and after the mass removal. T.25. Petitioner testified that in addition to his left index finger, he was also having issues with both of his hands. Id. at 26-27, 29-30. Petitioner testified that the hand issues began around six months after starting work for Respondent but started to become more severe after the left index finger injury. Id. Petitioner testified he continued performing massages despite feeling shooting pain and numbness because he had to work. Id. at 30. Regarding Petitioner job duties as a massage therapist, Petitioner testified he performed between eight and twenty massages per day. Id. at 30. Petitioner testified that each massage ranged between ten and ninety minutes. Id. Petitioner testified he performed different types of massages including deep tissue; Swedish Massage; and sports massage. Id. at 31.

Regarding other job duties for Respondent, Petitioner testified that he worked the receptionist desk and book the customers. Id. at 40. Petitioner again testified that his hands/wrists started bothering him six months after starting work for Respondent, in January 2014, but didn't decide to get treatment until after his August of 2015 left index injury. Id. at 41. Petitioner testified that after his work accident in August of 2015, he started to use his left hand more and started noticing the tingling more so in his hands. Id. at 41.

On March 30, 2016, Dr. Fink authored a Narrative Report after reviewing Dr. Fernandez IME report. Id. Dr. Fink noted that Petitioner's mass PIP joint and the residual abscess at the PIP joint was "definitely due to the primary injury [August 30, 2015 work accident] and subsequent scar tissue was formed." Id. Dr. Fink opined that Petitioner also complained of carpal tunnel syndrome on the right and mild on the left and "there is definite causal relationship between his work as a massage therapist and symptomatology." Id. Finally, Dr. Fink recommended the abscess to be removed and carpal tunnel releases on both hands, in order to prevent further atrophy as Petitioner was showing signs of complex regional pain syndrome as shown in the EMG. Id.

Petitioner followed up with Dr. Fink on May 25, 2016 with continued decreased sensation on both hands and swelling in the left index finger along with the stitch abscess. Id. On physical examination, Dr. Fink noted positive effusion to the PIP joint of the left index finger and decreased sensation bilateral hands, left greater than right. Id. Dr. Fink continued to recommend

the removal of the stitch abscess and bilateral carpal tunnel releases. Id. At trial, Petitioner testified that he never underwent the stitch abscess surgery. Id. at 28-29.

On June 29, 2016, Petitioner followed up with Dr. Fink with continued bilateral wrist pain and decreased sensation in the fingers. Id. On physical examination, Dr. Fink noted positive Tinel's signs bilaterally, decreased sensation to the bilateral thumbs, index fingers, long fingers, and radial half of the ring fingers. Id. Petitioner followed up with Dr. Fink on August 8, 2016 with locking in his bilateral index and long fingers. Id. Dr. Fink noted similar physical examination findings but also positive bilateral Phalen's tests and tenderness in the A1 pulley of bilateral index and long fingers consistent with trigger finger on both hands. Id. At this time, Dr. Fink continued to recommend the bilateral carpal tunnel releases along with releases of the trigger fingers. Id.

Petitioner testified that he continued to follow up with Dr. Fink for over seven years from 2016 throughout 2022, with his last visit before trial, taking place on April 14, 2022. The total amount of visits Petitioner presented to Dr. Fink equal twenty-nine visits. Px6. On physical examinations during these visits, Dr. Fink continued to recommend the bilateral carpal tunnel releases. Id. As noted in Dr. Fink's records, Petitioner's left wrist was more symptomatic than his right wrist at the last visit, consistent with the testimony at trial. Id. Additionally, Petitioner underwent bilateral wrist injections on June 28, 2016 and left wrist Dep-Medrol injection on March 8, 2017 with Dr. Fink. Id.

On November 14, 2019, Petitioner presented for a second independent medical examination by Dr. Fernandez. Rx1, Dep. Ex.3. At this visit, Petitioner complained of residual pain in the left index finger and numbness and tingling in the bilateral wrists. Id. On physical examination, Dr. Fernandez noted pain complaints on provocative testing to the bilateral wrists extending into the palms, tenderness at the A1 pulley of the left index finger and pain with ROM. Dr. Fernandez diagnosed Petitioner with trigger digit of the left index finger, bilateral carpal tunnel syndrome, and previous diagnosis of a work-related contusion or sprain of the left index and middle fingers which was resolved. Id. Dr. Fernandez opined it was "atypical" bilateral carpal tunnel syndrome because Petitioner "does not have clear irritability extending into the median nerve distribution." Id. Dr. Fernandez opined that Petitioner's bilateral carpal tunnel syndrome was not related to the August of 2015 as that was a crush injury and only related to the left hand. Id. Dr. Fernandez opined that Petitioner's job activities as a massage therapist did not cause the carpal tunnel syndrome based on a job description report that defines the activity as "light." Dr. Fernandez notes that Petitioner's job activities do involve pushing, gripping, and pulling. Id. Regarding future treatment, Dr. Fernandez opined that the Petitioner may undergo a trigger finger A1 pulley injection and A1 release and bilateral carpal tunnel releases but indicated that this treatment would not be related to the manifestation injury. Id. Finally, Dr. Fernandez opined that Petitioner was at MMI and could return to work full duty as a result of the work injuries. Id.

At trial, Petitioner testified that his left wrist bothered him more than his right wrist. T.42. Petitioner testified that he wished to proceed with the bilateral carpal tunnel releases as recommended by Dr. Fink. Id. at 44. Petitioner testified that he also felt "locking", numbness, and tingling in his bilateral index, middle, and ring fingers on both hands. Id. at 45. Petitioner testified that Dr. Fink was only recommending the bilateral carpal tunnel releases as of the date

of trial. Id. at 49. Petitioner testified that his symptoms continued to worsen over the years he treated with Dr. Fink. Id. at 50-51.

Petitioner testified that prior to working for Respondent, he worked for Delta Airlines as a ramp agent loading bags onto the airplane. Id. at 53. Petitioner testified that his current condition has affected his ability to bowl, play basketball, or workout. Id. at 53. Petitioner testified that he has been wearing [wrist] braces on and off for the past six years. Id. at 54. Petitioner testified that prior to the work accident on August 30, 2015, he had no issues with his left hand or left index finger. Id. Petitioner testified when he started work for Respondent as a massage therapist, his bilateral wrists and hands became much more severe to the point where he had to seek medical treatment. Id. at 54-55. Petitioner testified that he initially felt symptoms in his bilateral wrists and hands six months after starting work for Respondent but continued working. Id. at 55. Petitioner testified that he has been taking Tramadol and Gabapentin twice a day, every day, for his symptoms which causes a side effect of dizziness. Id. at 56.

On cross-examination, Petitioner testified that Terminal Getaway Spa is located in O'Hare Airport and he would give massages to client waiting for flights. Id. at 58-59. Petitioner testified that the average time of his massages were thirty minutes. Id. at 60-61. Petitioner testified that his other job duties included using a computer to book the clients and check clients out after the massage. Id. at 62. Petitioner testified that he attended college but never graduated or received a degree. Id. at 63-64. Petitioner testified that he has not worked or performed any activities as a massage therapist since his work for Respondent. Id. at 68. Petitioner testified that he also has arthritis, spondylosis, and issues with his neck. Id. at 70-72. Petitioner testified that he has been on SSI since November of 2021 but has had no other income since his work for Respondent. Id. at 73-74. Petitioner testified that he lives with his father. Id. at 74.

Respondent presented a series of Facebook photos from Petitioner's Facebook page. T.76, Rx2. These Facebook photos included: Petitioner in a bowling alley with his mother; Petitioner at Terminal Getaway Spa; Petitioner at the gym with a professional basketball player; (4) Petitioner with a TV broadcaster at Windy City Live; (5) Petitioner at the gym in Miami from 2015; (6) Petitioner with John Quinones at Terminal Getaway Spa in 2015; Petitioner with Marcus Allen at the Airport; and a Petitioner at an event in Skokie performing massages in 2013 or 2014. T.74-89, Rx2, Rx3, Rx4. The Facebook photos show multiple dates in which the pictures were posted. Rx2. Petitioner testified that Facebook reminds users of past memories to be able to be reposted. Tx83. Petitioner testified that many of the photos were taken prior to starting work for Respondent and while he was working for Respondent. Id. at 87-88.

Testimony of Dr. Robert Fink- treating physician

Dr. Fink testified to his treatment of Petitioner and his opinions regarding Petitioner's condition. Px14. Dr. Fink testified that he is board certified in orthopedic surgery and part of his practice consists of carpal tunnel releases, fractures of the fingers, and tumors in the hand and wrist. Id. at 6-8. Dr. Fink testified he first met with Petitioner on October 26, 2015 after Petitioner smashed his fingers in a sliding door at Respondent on August 30, 2015. Id at 9. Dr. Fink testified that he noted a small mass on Petitioner's PIP joint of the left index finger. Id. at 10. Dr. Fink testified that a mass or growth can be caused by a specific trauma accident as it can cause a hematoma

bleeding mass and the tissue that gets crushed to multiply causing fibroid tumors. Id. at 10, 12. Dr. Fink testified that his office performed an x-ray of Petitioner's left hand with comparison views which showed a fracture of the left second metacarpal head. Id. at 11. Dr. Fink testified he recommended the removal of the mass, which he performed. Id. at 12-13. Dr. Fink testified Petitioner continued to follow up with him throughout early 2016 with progress with mobility of the left index finger. Id. at 13.

When explaining his opinion regarding the causal relationship between Petitioner's work accident on August 30, 2015, Dr. Fink testified when reviewing the pathology report, "I believe it was [related]. . . That was a crush injury to his hand that didn't have anything wrong with it before he had that injury." Id. at 15. Dr. Fink testified regarding his Narrative Report, dated March 30, 2016, and the EMG dated October 29, 2015. Id. at 17. Dr. Fink testified the EMG showed "[s]omething is going wrong with the motor nerves, so that's all consistent with carpal tunnel to the motor branch of the media nerve." Id. at 19. Dr. Fink testified that the best way to diagnose carpal tunnel syndrome is physical examination and talking with the patient, with the EMG being a supplemental test. Id. at 20. Dr. Fink testified that he looks for provocative signs of carpal tunnel syndrome such as decreased sensation and pain which Petitioner had. Id. at 20. Dr. Fink explained how he tested objectively for sensation of the fingers on Petitioner:

"I usually test with. . . a little piece of cotton and safety pin, so I tell him to close your eyes. I do it to both hands, and I, at the beginning stick [him] with the light touch, touching the fingers, different fingers, and then after we're done with the light touch, we go with the safety pin test…. Objective with the safety pin. They kind of move. I stick you with the safety pin, think about it. You're going to move. If you're going to feel it, you're going to move. That's definitely objective. Subjective, if I touch you with the light cotton, that's a little more subjective." Id. at 23.

Dr. Fink testified that positive decreased sensation to the thumb, index, long, and one-half of the ring finger correlates with carpal tunnel syndrome nerve distribution. Id. at 24. Dr. Fink testified that a Tinel's test is an objective test indicates the media nerve being squeezed in the carpal tunnel. Id. at 26. Dr. Fink testified that positive Phalen test means squeezing of the media nerve in the carpal tunnel, which he also noted during his treatment of Petitioner. Id. at 29.
Dr. Fink testified that on August 8, 2016, Petitioner had new complaints of locking in the index and long finger. Id. at 28. Dr. Fink testified that he treated Petitioner for over six years through 2021 and that Petitioner symptoms continued to worsen with night awakening, pain and numbness in both wrists/hands, and needing assistance with driving. Id. at 30-31. Dr. Fink testified that he kept Petitioner off work during the treatment because of Petitioner's job duties as a massage therapist requiring repetitive motion of the hands, which makes carpal tunnel syndrome worse. Id. at 31-32. Dr. Fink testified that the repetitive motion like Petitioner's job activities is the type of activities that cause carpal tunnel syndrome. Id. at 32. Dr. Fink testified that repetitive motion of the wrists," volar flexion, dorsiflexion, pressing hard on a massage" can cause carpal tunnel syndrome. Id. at 32-33. Dr. Fink testified that Petitioner's employment included performing massages using repetitive motion hands and wrists, which is causally related to his conditions of bilateral carpal tunnel syndrome. Id. at 35-36. Dr. Fink noted that Petitioner never had any issues prior to the manifestation date in October of 2015. Id. at 37. Dr. Fink testified that two to three years of performing repetitive motion of the hands and wrists can

cause carpal tunnel syndrome. Id. at 38. Dr. Fink testified that to treat carpal tunnel syndrome, first start with medication and therapy, then injections, and then surgery. Id. at 33. Dr. Fink testified that the carpal tunnel releases he is recommending Petitioner can improve Petitioner's symptoms such as the night awakening and numbness. Id. at 33, 35.

On cross examination, Dr. Fink testified that he did not review the MRI of Petitioner's left hand from October 16, 2015, but stated the x-ray showed him the fracture as the MRI does not show the bones as well. Id. at 40-41. Dr. Fink testified that the pathology from the removal of the mass on November 20, 2015 showed a "ganglion cyst at the top" which was not malignant. Id. at 41-42. Dr. Fink testified that Petitioner treated for his left index finger for 2015 and until March of 2016. Id. at 42-46. Dr. Fink testified that Petitioner first made complaints of his bilateral wrists/hands on March 30, 2016. Id. at 46. Dr. Fink testified regarding his treatment of Petitioner throughout 2016. Id. at 46-52. Dr. Fink testified that Petitioner's right wrist was more symptomatic than his left in March of 2016. Id. at 53. Dr. Fink testified that he would perform the carpal tunnel release on the wrist that is more symptomatic at the time. Id. at 53. Dr. Fink testified that the stitch abscess eventually disappeared as the antibiotic Petitioner was using healed it. Id. at 55.

Dr. Fink testified that Petitioner could be performing an activity that did not include repetitive motion activity in the wrists, but that repetitive motion will make it worse. Id. at 55-56. Dr. Fink testified that Petitioner's condition continued to worsen throughout his treatment. Id. at 56-57. Dr. Fink testified that Petitioner stopped complaining about the trigger finger. Id. at 57. Dr. Fink testified that Petitioner was seen in the emergency room on June 19, 2019 for pain in his neck and hands. Id. at 58. When explaining why he continued to recommend the bilateral carpal tunnel syndrome, Dr. Fink testified that Petitioner had positive subjective and objective tests and positive EMG test. Id. at 61. On redirect examination, Dr. Fink testified that it is typical to perform the carpal tunnel release surgery on the more symptomatic wrist first, then the other. Id. at 65. Dr. Fink testified that even though the Petitioner has not worked since 8-30-2015 , Petitioners bilateral carpal tunnel condition worsened. Dr. Fink based the foregoing upon Petitioners increased subjective complaints. (PEX14, pg. 57). On 11-10-21 Dr. Fink testified that from his initial visit on 10-26-2015 through the date of deposition, Petitioner could have been working at a job that did not entail repetitive activity with his hands. (PEX14, pg. 56).

Testimony of Dr. John Fernandez- Section 12 Examiner

Dr. Fernandez testified in this matter regarding his two examinations of Petitioner on February 18, 2016 and November 14, 2019 and his opinions contained in the IME reports. Rx1. Dr. Fernandez testified regarding the information contained in his initial IME report on February 18, 2016 including the history, subjective complaints, physical examination, and medical records reviewed. Id. Dr. Fernandez testified that Petitioner's MRI scan on October 16, 2015 was unremarkable and that the EMG on October 29, 2015 showed severe right carpal tunnel syndrome and mild left carpal tunnel syndrome, only affecting the motor aspects of the nerves. Id. at 11. Dr. Fernandez testified that these were "atypical" EMG findings but indicated an EMG can be "overly or underly sensitive, or nonspecific." Id. at 12-13. Dr. Fernandez explained that the EMG did not show any sensory involvement, which indicates complaints of numbness and tingling, but "it could be falsely negative." Id. at 16. Dr. Fernandez testified that an EMG "is not

necessarily clinically related to any type of condition or diagnosis" and a patient can have a positive EMG and not have carpal tunnel syndrome, and vice versa. Id. at 13. Dr. Fernandez testified that physicians also rely on the clinical symptoms to diagnose carpal tunnel syndrome. Id. at 14.

Dr. Fernandez testified he noted a normal physical examination with subjective complaints of weakness and inability to make a fist but provocative testing such as a Tinel sign and Phalen's test was negative. Id. at 16-20. Dr. Fernandez testified that his office took x-rays of the left hand which were normal. Id. at 20. Dr. Fernandez testified he diagnosed Petitioner with left index finger residual pain and stiffness post-excision of mass. Id. at 20. Dr. Fernandez testified he did not see an indentation fracture of the left index finger or a mass that was formed on the left hand based on the MRI and the operative report. Id. at 21. Based on that, Dr. Fernandez testified he diagnosed Petitioner with a soft tissue or contusion injury as a result of the August 30, 2015 work accident. Id. at 22. When testifying regarding the mass on Petitioner's left index finger, Dr. Fernandez testified that a mass would not be caused by a crush injury but that a mass is not a "cyst." Id. at 22. Dr. Fernandez testified that Petitioner was at MMI from the work accident and would not require any future treatment on the date of the first IME of 2/18/16. Id. at 25. Dr. Fernandez testified that Petitioner did not exhibit the physical examination findings for carpal tunnel syndrome, so he referred Petitioner back to Dr. Fink for further guidance. Id. at 26. Dr. Fernandez testified that he reviewed a job description for Petitioner's work as a massage therapist which described the physical demands level as "light." Id. Dr. Fernandez testified that massage therapy is not the type of repetitive motion with the hands to cause or contribute to carpal tunnel syndrome. Id. at 28.

Dr. Fernandez then testified regarding his November 14, 2019 IME report and the opinions contained therein. Id. at 30-31. Dr. Fernandez testified regarding his review of Petitioner's history, medical records, subjective complaints, and physical examinations. Id. Dr. Fernandez testified that Petitioner's DASH score increased, meaning that Petitioner's conditions became more severe compared to the initial IME. ID. at 32. Dr. Fernandez testified that Petitioner stated he was unable to perform activities such as basketball, bowling, and working out. Id. at 33. Dr. Fernandez testified that Petitioner was complaining of numbness and tingling in the hands, left greater than right, stiffness to flexion in the left index and middle finger. Id. at 33. Dr. Fernandez testified that Petitioner does smoke cigars, which may be a minor risk factor for carpal tunnel syndrome, but that Petitioner has no past medical history of risk factors for carpal tunnel syndrome and trigger finger. Id. at 38. Dr. Fernandez testified that overcompensating with one hand for the other would not cause a direct impact on the hand that is overcompensating. Id. at 41-42. Dr. Fernandez testified that he diagnosed Petitioner with trigger digit and "atypical" carpal tunnel syndrome. Id. at 46. Dr. Fernandez testified he based his diagnosis of "atypical" carpal tunnel syndrome on the physical exam and the motor aspect of the EMG findings. Id. at 46-47. Dr. Fernandez testified that "it does not mean [Petitioner] does not have carpal tunnel syndrome. It is just very atypical. Very unusual." Id. at 48. Dr. Fernandez testified that an FCE may be performed to get a "better sense of what [Petitioner] is capable of doing based on his complaints" but that it may be limited due to the pain complaints. Id. at 53-54. Finally, Dr. Fernandez testified that Petitioner was cooperative and not malingering. Id. at 54.

On cross examination, Dr. Fernandez testified he has never reviewed the pathology report for the mass removal and that the surgeon performing the excision would be in the best position to describe what the mass was. Id. at 58. Dr. Fernandez testified that it was a "mass" on Petitioner's left index finger based on the operative report. Id. at 59. Dr. Fernandez testified that the best explanation for Petitioner's diagnosis was trigger finger. Id. at 60. Dr. Fernandez testified that the motor aspect and not the sensory nerve on an EMG is atypical for carpal tunnel syndrome, but "have to put it together with everything else." Id. at 61-62. Dr. Fernandez testified that he would take the diagnostic studies to correlate with a patient's symptoms and physical examination findings to come to a diagnosis and treatment plan. Id. at 62. Dr. Fernandez testified that "frequent gripping, grasping" and associated components of force cause carpal tunnel syndrome. Id. at 63.

Dr. Fernandez testified that two to three months is sufficient time to cause or contribute to carpal tunnel syndrome if the job activities are activities that can cause or contribute to carpal tunnel syndrome. Id. at 67. Dr. Fernandez testified that the carpal tunnel affects the median nerve and the nerve distribution pattern into the fingers is specifically the "thumb, index, middle and part of the ring finger." Id. at 68. Dr. Fernandez testified that he would recommend an A1 pulley injection and release for Petitioner's trigger finger. Id. at 69. Dr. Fernandez testified that he would defer to Dr. Fink's discretion in whether to perform the carpal tunnel release surgeries and he would be recommending the same or similar treatment plans as Dr. Fink. Id. at 69.

On redirect examination, Dr. Fernandez testified that he did not believe Petitioner's bilateral carpal tunnel syndrome was related to his activities as a massage therapist because of the (1) temporality of Petitioner's onset of symptoms and (2) the type of force Petitioner's job duties required. Id. at 76. Dr. Fernandez explained the force of Petitioner's job duties as: "[i]t is the type of force. There's a difference in the force that's required to push on somebody with a palm, use an instrument, to push deeply into somebody with a knuckle or hand, and the force of gripping a tool and doing that on a repeated enough basis that it would contribute to carpal tunnel. Id. at 76. Dr. Fernandez testified that he did not believe the trigger finger was related either for the same reasons. Id. at 77.

On 1-17-2022 Dr. Fernandez stated in his deposition that at the time of his examination on 11-14-2019, he noted that Petitioner has not worked for four years, however, during this time petitioner's symptoms have increased. Dr. Fernandez stated that this is unusual given the fact that if the carpal tunnel syndrome was to be deemed work related due to repetitive exposure frequency, there would be a significant improvement in symptoms while being off work. (Id. at 52). In addition, Dr. Fernandez stated that he saw no reason why Petitioner could not return to work as a massage therapist. Id. Dr. Fernandez further stated in his medical report dated 11-14-2019 that, "There is no indication that Petitioner was having numbness or tingling complaints as part of his general work duties as a massage therapist. In addition, to the physical demand level is defined as light. While the activities involve some pushing, gripping, and pulling, including the use of tools these are variable or intermittent in nature and even assuming that there were more frequent in nature, these would not be the type or nature that would cause or aggravate the underlying carpal tunnel syndrome even from a non-traumatic "repetitive" exposure theory. (Id. and Rx1 pg7).

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). 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 Arbitrator, as the trier of fact in this case, has the responsibility to observe the witnesses testify, judge their credibility, and determine how much weight to afford their testimony and the other evidence presented. *Walker v. Chicago Housing Authority*, 2015 IL App (1st) 133788, ¶ 47. Credibility is the quality of a witness which renders his evidence worthy of belief. The Arbitrator, whose province it is to evaluate witness credibility, evaluates the demeanor of the witness and any external inconsistencies with his/her testimony. Where a claimant's testimony is inconsistent with his/her actual behavior and conduct, the Commission has held that an award cannot stand. *McDonald v. Industrial Commission,* 39 Ill. 2d 396 (1968); *Swift v. Industrial Commission,* 52 Ill. 2d 490 (1972).

In the case at hand, the Arbitrator observed Petitioner during the hearing and finds him to be a credible witness. The Arbitrator compared Petitioner's testimony with the totality of the evidence submitted and did not find any material contradictions that would deem the witness unreliable. None of the physicians who treated or examined him noted any symptom magnification from all of the exhibits reviewed by the Arbitrator.

15 WC 30755

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, ¶ 1, 11 N.E.3d 453. A work-related injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. Even if the claimant had a preexisting degenerative condition which made him more vulnerable to injury, recovery for an accidental injury will not be denied as long as he can show that his employment was also a causative factor. Thus, a claimant may establish a causal connection in such cases if he can show that a work-related injury played a role in aggravating his preexisting condition. *Sisbro, Inc. v. Industrial Comm'n,* 207 Ill. 2d 193, 205, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003). "A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." *International Harvester v. Industrial Com.*, 93 Ill. 2d 59, 63 442 N.E.2d 908 (1982). In *Schroeder v. IWCC,* 2017 IL App (4th) 160192WC, the Appellate Court clarified that the "chain of events" principle does not apply solely where a claimant is in a condition of absolute good health. Rather, a claimant need only establish that an accident was a cause of his condition. *Sisbro, Inc. v. Industrial Commission*, 207 Ill.2d 193, 205 (2003).

For the 15WC30755 case, which involves the left index and middle fingers, the Arbitrator is persuaded by the medical records, testimony of Dr. Fink and the record as a whole that these injuries and finger conditions are causally related to the traumatic incident that Petitioner sustained while at work for Respondent on August 30, 2015. The Arbitrator finds the Petitioner truthful in his assertion that his left index finger and middle fingers injuries occurred in a manner consistent with his testimony at trial. The Arbitrator finds Dr. Gerber and Dr. Fink to specifically have been credible in their opinions in the medical records regarding the nature of his finger injuries and their causal relationship to the claimed injury at work for the Respondent. Further, the Arbitrator finds Dr. Fink to have been persuasive in his opinions from his testimony regarding the nature of Petitioner's injuries and their causal relation to the work accident. The Arbitrator does not find the opinions of Dr. Fernandez as persuasive on this specific issue. Petitioner testified that on August 30, 2015, he injured his left index and middle fingers when his manager at Respondent slammed a solid wooden closet door on his fingers at work. Petitioner continue working the following week and thought the pain would go away as he was icing it. However, Petitioner testified that his left index finger continued to swell up, so he sought medical treatment. On September 18, 2015, Petitioner presented to Dr. Gerber at Fullerton Drake Medical where he was recommended physical therapy for his left hand and placed on work restrictions. Petitioner presented for physical therapy at Fullerton Drake Medical Center for approximately nine months, or through 6/7/16. Petitioner then presented to Dr. Fink on October 26, 2015 with a mass on his left index finger. Dr. Fink took x-rays which showed a small indentation fracture of left second metacarpal head that was now healed. Petitioner eventually

underwent a removal of the mass with Dr. Fink on November 20, 2015 and continued treating for his left index finger residual pain until March 30, 2016. Additionally, Petitioner underwent an MRI of his left hand on October 16, 2015, which was unremarkable.

Dr. Fink testified that a specific trauma injury can cause a mass or tumor, which happened in Petitioner's case. Specifically, Dr. Fink testified that the scar tissue built up around Petitioner's left index finger. Dr. Fernandez opined and testified that a "mass" could not be caused by a specific trauma injury and diagnosed Petitioner with a left index finger contusion as a result of the work accident. However, Dr. Fernandez admitted that he was unsure of exactly the type of "mass" that was on Petitioner's left index finger and would defer to the pathology report or the treating surgeon, which again in this circumstance was Dr. Fink. Additionally, Dr. Fernandez admitted he never reviewed the pathology report. The Arbitrator finds it compelling that Dr. Fernandez had incomplete information regarding the finger cyst and did not review the pathology report which confirmed the diagnosis per Dr. Fink.

During Dr. Fink's deposition, he testified that the mass was a "ganglion cyst" that was not malignant when reviewing the pathology report. Px10. Dr. Fernandez testified that he didn't think it was a cyst based on the operative report, but as noted above, would defer to the treating surgeon and the pathology report. As Dr. Fink pointed out, Petitioner did not have a mass on his finger before the accident but developed a mass following the accident. Further, Petitioner testified that he had no issues with his left index finger prior to the work accident. The Arbitrator notes that Respondent presented no evidence that Petitioner had any treatment for his left index finger prior to the work accident. As Dr. Fink was the treating surgeon who performed the "ganglion cyst" removal and had reviewed the pathology report, the Arbitrator finds Dr. Fink's testimony as more persuasive than Dr. Fernandez that Petitioner's left index finger mass was a result of his work accident. The parties do not dispute the left index and middle finger sprains and contusions, but that the mass or cyst and its excision were related to the work incident on 8/30/15.

With respect to the small indentation fracture on the left index finger, Dr. Fink reviewed x-rays in his office that he reviewed and opined that it showed Petitioner an indentation fracture. Dr. Fernandez appeared to relied upon the normal MRI showing no ligament damage. However, as Dr. Fink testified to, MRIs do not show the bones as well as x-rays. Therefore, the Arbitrator relies upon Dr. Fink's review of the left-hand x-rays and opinions regarding Petitioner's left index finger indentation fracture in finding the fracture to be related to work incident on 8/30/15.

Therefore, the Arbitrator finds the opinions of Petitioner's treating physicians including Dr. Gerber and Dr. Fink, to be more credible and persuasive on the sole issue of causation, relating only to the left index finger injury (sprain, cyst and fracture) and left middle finger injury (sprain/contusion) on 8/30/15. Thus, the Arbitrator finds that Petitioner's left index finger and middle finger conditions are causally related to his work accident on August 30, 2015, up and through the last date of treatment for these specific injuries, 3/30/16. The Arbitrator does not find Petitioner's ongoing complaints regarding his bilateral hands and carpal tunnel syndrome, in addition to trigger finger, to be related to the 8/30/15 or 10/28/15 work incidents but notes that these medical conditions will be further discussed and elaborated on later in this Rider to Decision under subheading 17WC9389.

Issue G, 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. *Id.* For purposes of section 10, a "bonus" is "something in addition to what is expected or strictly due." *Arcelor Mittal Steel v. Illinois Workers' Compensation Comm'n*, 2011 IL App (1st) 102180WC, ¶ 40. An employee receives a bonus "for no consideration or in consideration of overall performance at the sole discretion of the employer." *Id*. 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).

The Arbitrator notes Respondent introduced Petitioner's wage statements for Respondent into evidence. Rx6. After calculation as pursuant to Section 10 of the Act, the Arbitrator finds Petitioner's average weekly wage as $623.77.

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 incorporates findings and conclusions as stated in paragraph F above, specifically finding causation between the left index and middles fingers injuries and conditions and the 8/30/15 work incident. Overall, the Arbitrator finds Petitioner's treatment to both left index and middles fingers injuries from the date of accident of 8/30/15 through 3/30/16 to be reasonable, necessary and related, and finds that Respondent has not paid for all of said treatment. Again, Petitioner underwent the removal of the left index finger mass with Dr. Fink on November 20, 2015 and continued treating for his left index finger conditions and residual pain until March 30, 2016. For this reason, the Arbitrator finds the treatment up and through that date to be reasonable necessary and related to the 8/30/15 work incident. For any and all bills that Respondent has already paid and has documentation of payment, a credit will be given. The arbitrator notes that Petitioner treated with the same physician, Dr. Fink/Gold Coast Orthopedics for both the August 2015 finger injuries and the alleged October 2015 bilateral carpal tunnel conditions. There is overlap in the bills for this reason and the Arbitrator will address bills for the alleged hand conditions in the 17WC9389 portion of this Rider to Decision. In addition, the arbitrator notes that per Petitioner's Exhibit 6 for Dr. Fink's bills, there is only one bill included that relates to the finger conditions, that was incurred prior 3/30/16, and this bill appears to have a $0 balance. The Arbitrator also notes that bills were submitted regarding a subpoena to Spine MD Limited, however the bills and medical contained in the record correspond to Fullerton Drake Medical Center and are therefore duplicative and shall not be awarded. Lastly, there are numerous charges for Dr. Fink/Gold Coast Orthopedics, WCRX Solutions and RX Development after 3/30/16, and the Arbitrator finds these are not reasonable nor related to the left index and middle fingers injuries incurred on 8/30/15.

The Arbitrator again finds Petitioner suffered a crush injury to his left index and middle fingers on August 30, 2015 which resulted in a cyst or mass to develop on his index finger and an indentation fracture, as well as sprains/contusions to both fingers. As such, Dr. Gerber

recommended physical therapy, which Petitioner performed through 6/7/16, but the Arbitrator notes a large gap in care from 3/18/16 to 6/3/16. Further, Dr. Fink performed the mass excision surgery on November 20, 2015. Petitioner continued to treat with Dr. Fink until March 30, 2016 for his left index finger and middle finger residual pain and swelling.

As such, having found for Petitioner on causation for his left index finger and middle finger conditions, the Arbitrator finds that the medical services provided to Petitioner throughout the course of his treatment through 3/30/16 were both reasonable and necessary, and orders the Respondent to pay the medical bills pursuant to medical fee schedule. Medications to relieve pain and inflammation would be reasonable and necessary to help Petitioner in his recovery. Windy City Anesthesia provided anesthesia services for the ganglion cyst removal surgery as well. See below:

- Fullerton Drake Medical Center $7,832.50
- Dr. John Mazzarella $2,840.00
- Rx Development $145.93
- Windy City Anesthesia $1,145.00
- Advanced Ambulatory Surgical Center $11,512.00
- Dr. Fink/ Gold Coast: bills prior to 3/30/16 that were submitted into evidence, appear to have been paid

Overall, Respondent to pay reasonable and necessary medical expenses for the above providers through 3/30/16 for the causally related left index and middle finger conditions and injuries Petitioner sustained.

Issue K, what Temporary Total Disability Benefits Are in Dispute?

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).

The Arbitrator incorporates findings and conclusions as stated in paragraph F above, specifically finding causation between the left index and middles fingers injuries and conditions and the 8/30/15 work accident. Overall, the Arbitrator finds Petitioner's treatment, including recommendation of work restrictions, to both left index and middles fingers injuries from the date of accident of 8/30/15 through 3/30/16 to be related. For clarity sake, the Arbitrator notes that Petitioner claimed TTD from 9/18/15 through 5/24/16. Respondent has claimed it has paid $8,985.33 in TTD from 9/18/15 through 10/29/15. At trial, Petitioner stipulated to the TTD amount Respondent previously paid.

Petitioner was initially put on work restrictions by Dr. Gerber on September 18, 2015 and was on work restrictions or off work throughout the rest of his treatment for his left finger and middle finger injuries. Petitioner testified that Respondent was unable to accommodate his restrictions and no evidence was presented to the contrary. Dr. Fernandez recommended potentially a couple weeks of work restrictions, but again, this was based on the diagnosis of a left index finger contusion only.

Having found Petitioner sustained compensable conditions of ill-being arising out of in in the course and scope of his employment with Respondent and that his condition of ill-being is causally related to the 8/30/15 work incident, any related periods of temporary total disability incurred through 3/30/16 for the left index and middle fingers, would be the responsibility of Respondent. Petitioner alleges, Dr. Fink confirms and the medical records support, that Petitioner was temporarily and totally disabled for a period of time covering from 9/18/15 through 3/30/16, the last date of treatment for the left index and middle fingers per treating physician Dr. Fink.

Respondent shall pay Petitioner temporary total disability benefits of $418.85/week for 27 4/7 weeks, commencing September 18, 2015 through March 29, 2016 at a rate of $418.85, as provided in Section 8(b) of the Act.

Issue L, the nature and extent of the injury, the Arbitrator finds as follows:

In determining PPD benefits, Section 8.1b(b) of the Act directs the Commission to consider: "(i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records." 820 ILCS 305/8.1b(b); *Con-Way Freight, Inc. v. Illinois Workers' Compensation Comm'n,* 2016 IL App (1st) 152576WC, ¶ 22, 67 N.E.3d 959. "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b). "None of the factors set forth in section 8.1b is to be the sole determinant of the claimant's disability." *Corn Belt Energy Corp. v. Illinois Workers' Compensation Comm'n*, 2016 IL App (3d) 150311WC, ¶ 49.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that while no AMA rating was submitted into evidence and therefore the Arbitrator gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that Petitioner was employed as a massage therapist at the time of the accident. This job requires Petitioner to use his hands daily for massages of customer as well as front desk work. Per Dr. Fernandez's review of the job description, this is considered a "light" demand role. The Arbitrator notes the Petitioner has not returned to his job as a massage therapist for Respondent since the date of accident and has not worked for any employer since. However, since the initial date of accident corresponding to case number 15WC30755, Petitioner claims bilateral carpal tunnel conditions relating to work and therefore also keeping him from working as of the date of trial. The Arbitrator gives moderate weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 47 years old at the time of the accident. Petitioner had been working for Respondent for two years before the

August 2015 accident and did not return to work for Respondent. The Arbitrator gives some weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes Petitioner has not alleged nor established any loss in future earnings capacity. The Arbitrator therefore assigns little 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 as a result of the 8/30/15 work injury petitioner was ultimately diagnosed with a left index finger ganglion cyst and a small indentation fracture, in addition to left index and middle finger sprains. He treated for around seven months after the date of the accident, undergoing therapies and eventually surgery. The arbitrator notes that a formal release from care for any claimed work conditions, with or without restrictions, has not been given by Dr. Fink but that Dr. Fernandez opined that Petitioner could return to work as a massage therapist and is at MMI for the 8/30/15 injuries. The doctors in this matter agree that Petitioner has carpal tunnel syndrome, however the arbitrator has found this condition to not be causally related to the 10/28/15 alleged date of injury. Therefore, Petitioner remains off of a work for an unrelated medical condition. Petitioner also still intends to obtain and undergo bilateral carpal tunnel release surgery. The Arbitrator therefore gives *greater* weight to this factor.

Overall, the Arbitrator finds that Petitioner has been permanently disabled to the extent of 25% loss of use of the left index finger and 5% loss of the left middle finger. The Arbitrator bases this finding on the Petitioner's testimony, the physicians' testimony, the medical records and overall review of the record as a whole.

Based on the above factors, the Arbitrator finds that Petitioner sustained a permanent partial disability to the extent of the 25% loss of use of the left index finger and 5% loss of the left middle finger, a total of 12.65 weeks to be paid by Respondent, as provided in Section 8(d)(2) of the Act, at a weekly rate of $374.26/week for 10.75 weeks

17WC9389

Issue C, whether the accident arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds as follows:

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). 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.*

A repetitive-trauma claimant must provide proof that the injury and its causal link to her employment became plainly apparent to a reasonable person on a specific date. *Durand v. IWCC,* 224 Ill. 2d at 65; *see also Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524, 531 (1987) (holding the accident date in a repetitive-trauma case is the date on which the injury manifests itself). To prove a compensable accident, an employee who suffers a repetitive trauma injury must meet the same standard of proof as an employee who suffers a sudden injury from a discrete event. *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 64 (2006). That means, inter alia, that an employee suffering from a repetitive trauma injury must point to a specific "manifestation date," i.e., a date within the limitations period on which both the injury and its causal link to the employee's work became plainly apparent to a reasonable person. Id. at 65; see also *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524, 531 (1987).

In the present case, Petitioner has alleged a manifestation date of October 28, 2015. This is approximately two months after Petitioner's August 30, 2015 work accident which this Arbitrator has already made a determination on, as further explained previously under subheading "15WC30755" of this Rider to Decisions. As noted above, Petitioner testified that his bilateral wrist/hand pain began six months after he started work as a massage therapist for Respondent (on or around June 2014) yet it appears he did not report this injury/pain to Respondent, nor to his medical providers, who were treating him for 7 months for the left index and middle fingers, until sometime in 2016. Further, Petitioner's employment with Respondent was not the first massage therapist job he has held and it is apparent to the Arbitrator that Petitioner has worked in this field for some time. Petitioner testified that the bilateral hand/wrist pain continued to progress and became worse after the August 2015 incident, despite noticing pain and numbness at his work for Respondent since approximately June 2014. The arbitrator

finds that it should have become apparent to Petitioner, at or around that 6 months mark after starting work for respondent, that his developing hand condition was potentially linked to his new job. Instead, Petitioner does not report or complain of his hands until 2016. He was regularly in the care of doctors treating for his fingers, particularly the left index finger, yet it does not appear in the medical and Dr. Fink admits, Petitioner was not reporting bilateral hand/wrist pain or issues. The arbitrator does not find the Petitioner to be untruthful, but acknowledges that it seems clear that these bilateral hand complaints were not made to the treating physicians in a reasonable and timely fashion for one reason or another. The doctors appear to agree regarding Petitioner having bilateral carpal tunnel syndrome and possibly needing surgery however, Dr. Fernandez and the Respondent do not believe this diagnosis is related to Petitioner's employment as a massage therapist with Respondent, and the Arbitrator agrees and further elaborates below.

Dr. Fernandez testified that he did not believe Petitioner's bilateral carpal tunnel syndrome was related to his activities as a massage therapist because of the (1) temporality of Petitioner's onset of symptoms and (2) the type of force Petitioner's job duties required. Id. at 76. Dr. Fernandez explained the force of Petitioner's job duties as:"[i]t is the type of force. There's a difference in the force that's required to push on somebody with a palm, use an instrument, to push deeply into somebody with a knuckle or hand, and the force of gripping a tool and doing that on a repeated enough basis that it would contribute to carpal tunnel. Id. at 76. Dr. Fernandez testified that he did not believe the trigger finger was related either for the same reasons. Id. at 77.

Further on 10-29-2015 Petitioner underwent an EMG/NCV by Dr. Kiang but notably not for any prior suspicion nor diagnoses of carpal tunnel syndrome. Dr. Kiang took a history of "… During the course of his employment for Terminal Gateway Spa Inc., his manager accidently shut his fingers in the door causing pain and limitation of motion in the patients left hand and second and third fingers. He denies any bowel, balance or bladder problems. His left hand MRI scan showed no acute traumatic injury demonstrated. He presents today for further electrodiagnostic medicine and consultation and treatment.". (Px1) Dr. Kiang did not note a history of bilateral hand/ wrist pain. Dr. Kiang diagnosis was " Severe right carpal tunnel syndrome affecting only the motor aspect of the nerve and mild left carpal tunnel syndrome affecting only the motor aspect of the nerve not likely due to his work injury with contributory left 2nd and 3rd fingers." (Px1) The arbitrator finds this opinion to be persuasive as to causal connection between the carpal tunnel diagnosis and the manifestation date of 10/28/15, and whether Petitioner suffered these bilateral hand injuries that arose out of and were in the course of his employment with Respondent. The right hand was noted to be worse, despite Petitioner reporting worse pain in the left hand. The arbitrator also notes Petitioner's self-reported use of hand braces for some time prior to working for Respondent as well.

The Arbitrator notes that Dr. Fink stated in his deposition that the first time he reviewed the EMG performed by Dr. Kiang was on his 3-30-16 visit with Petitioner. At that time Dr. Fink diagnosed bilateral carpal tunnel syndrome. (Px14, pg. 47). The office note reflects that Dr. Fink prescribed carpal tunnel release to both wrists with the right hand first because it is more severe than the left (Px6). The carpal tunnel syndrome was determined/found due to the EMG being ordered due to the acute injuries to the left index finger, not for any reported hand complaints. The arbitrator finds this to be significant here, as well as the year plus delay in reporting issues with the bilateral hands

in relation to carpal tunnel symptoms after starting work for respondent in January 2014. On 11-10-21 Dr. Fink testified that he initially recommended to perform the right carpal tunnel first and then the left because the left was more severe. However, at his 11-9-2016 visit Dr. Fink changed his recommendation to perform the left carpal tunnel procedure first because the left hand complaints became more severe than the right. (PX14, pg. 52-53).

Most importantly, the Arbitrator is persuaded by IME Dr. Fernandez and his explanation of carpal tunnel syndrome, Petitioner's job and the timeline of Petitioner's pain complaints and treatment. This second case again revolves around the 10/28/15 manifestation for the alleged bilateral carpal tunnel and whether this additional diagnosis arises out of Petitioner's employment with respondent and is causally related.

On 1-17-2022 Dr. Fernandez stated in his deposition that at the time of his examination at Respondents request on 11-14-2019, he noted that Petitioner has not worked for four years, however, during this time petitioner's symptoms have increased. Dr. Fernandez stated that this is unusual given the fact that if the carpal tunnel syndrome was to be deemed work related due to repetitive exposure frequency, there would be a significant improvement in symptoms while being off work. (Rx1 pg.52). In addition, Dr. Fernandez stated that he saw no reason why Petitioner could not return to work as a massage therapist. (Rx 1 at pg 52). Dr. Fernandez further stated in his IME report dated 11-14-2019 that, "There is no indication that Petitioner was having numbness or tingling complaints as part of his general work duties as a massage therapist. In addition, to the physical demand level is defined as light. While the activities involve some pushing, gripping, and pulling, including the use of tools these are variable or intermittent in nature and even assuming that there were more frequent in nature, these would not be the type or nature that would cause or aggravate the underlying carpal tunnel syndrome even from a non-traumatic "repetitive" exposure theory. (Rx1 &3, 11-14-19 Fernandez report at pg7).

The Arbitrator is not convinced that the bilateral carpal tunnel diagnoses are casually related to Petitioner's job with Respondent, nor that the alleged repetitive trauma manifested on 10/28/15 as Petitioner argues. The Arbitrator finds that Petitioner did not suffer a work-related repetitive trauma injury to his bilateral hands/wrists (carpal tunnel) and trigger finger of the index and middle fingers of the bilateral hands, that arose out of and was in the course of petitioner's employment for the reasons previously explained. While the Arbitrator finds Petitioner to be overall credible and the treating physician Dr. Fink to be credible and persuasive regarding the 8/30/15 left index and middle finger acute injuries and conditions, the Arbitrator finds Dr. Fernandez to be more persuasive on the issue of whether or not the bilateral carpal tunnel syndrome arose out of Petitioner's employment with Respondent. After review of the record, and specifically the testimony from both Dr. Fink and Dr. Fernandez, the Arbitrator finds that on the alleged manifestation date of October 28, 2015, Petitioner did not sustain an accidental injury to his bilateral hands/wrists that arose out of and were in the course of Petitioner's employment with Respondent. In conclusion, Petitioner failed to prove that a causal relationship exists between the bilateral carpal tunnel conditions and trigger finger conditions, and an alleged manifestation of this medical condition sustained on 10-28-2015. Therefore, benefits are denied.

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

Having found for Respondent on the issue of accident, all other issues are moot, and all benefits for Petitioner are hereby denied.

The Arbitrator was persuaded by IME Dr. Fernandez and his explanation above regarding carpal tunnel syndrome, Petitioner's job and the timeline of Petitioner's pain complaints and treatment. This second case again revolved around bilateral carpal tunnel and trigger fingers and whether these additional diagnoses for Petitioner's current condition of ill being are causally connected to alleged injury on 10/28/15 and require surgical repair. Respondent does not deny Petitioner has carpal tunnel but rather that is unrelated to his work duties and employment with Respondent. On 1-17-2022 Dr. Fernandez stated in his deposition that at the time of his examination on 11-14-2019, he noted that Petitioner has not worked for four years, however, during this time petitioner's symptoms have increased. Dr. Fernandez stated that this is unusual given the fact that if the carpal tunnel syndrome was to be deemed work related due to repetitive exposure frequency, there would be a significant improvement in symptoms while being off work. (Rx1 pg.52). In addition Dr. Fernandez stated that he saw no reason why Petitioner could not return to work as a massage therapist. (Rx 1 at pg 52.). Dr. Fernandez further stated in his IME report dated 11-14-2019 that, "There is no indication that Petitioner was having numbness or tingling complaints as part of his general work duties as a massage therapist. In addition, to the physical demand level is defined as light. While the activities involve some pushing, gripping, and pulling, including the use of tools these are variable or intermittent in nature and even assuming that there were more frequent in nature, these would not be the type or nature that would cause or aggravate the underlying carpal tunnel syndrome even from a non-traumatic "repetitive" exposure theory. (Rx1 &3, 11-14-19 Fernandez report at pg7).

Based on the above, the arbitrator further finds Petitioner failed to prove that a causal relationship exists between the bilateral carpal tunnel condition and trigger finger conditions and the alleged accidental injuries sustained on 10-28-2015. Therefore, benefits are denied.

Issue G, Petitioner's earnings, the Arbitrator finds as follows:

Having found for Respondent on the issue of accident and causation, all other issues are moot, and all benefits for Petitioner are hereby denied.

Issue H, Regarding Petitioner's age, marital status and dependent children at the time of the accident, the Arbitrator finds as follows:

Having found for Respondent on the issue of accident and causation, all other issues are moot, and all benefits for Petitioner are hereby denied.

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:

Having found for Respondent on the issue of accident and causation, all other issues are moot, and all benefits for Petitioner are hereby denied. The Arbitrator adds that Petitioner treated for both the left index and middle finger injuries and the bilateral carpal tunnel syndrome with Dr. Fink but separately addressed the payment of bills related to the prior 15WC30755 case. Bills for the prior finger injuries incurred before 3/30/16 were previously deemed to be reasonable, necessary and related. No bills for bilateral carpal tunnel/trigger fingers are awarded.

Issue K, whether Petitioner is entitled to prospective medical care, the Arbitrator finds as follows:

Having found for Respondent on the issue of accident and causation, all other issues are moot, and all benefits for Petitioner are hereby denied.

The Arbitrator denies prospective medical treatment to the petitioner. This finding is based on the opinions of Dr. Fernandez and the timeline of Petitioner's reported hand complaint as previously explained above. The arbitrator found that the petitioner's bilateral carpal tunnel and trigger conditions of the hands/wrists are not causally related to any alleged 10/28/15 work injury with Respondent. The arbitrator found Petitioner failed to prove that a causal relationship exists between the bilateral carpal tunnel conditions and trigger finger conditions, and an alleged accidental injury sustained on 10-28-2015. Since the requested prospective treatment is solely for the bilateral hands/wrists, all prospective treatment is hereby denied.

Issue L, whether Petitioner is entitled temporary total disability benefits, the Arbitrator finds as follows:

Having found for Respondent on the issue of accident and causation, all other issues are moot, and all benefits for Petitioner are hereby denied.

It is so ordered:

Jacqueline C. Hickey

Jacqueline C. Hickey
Arbitrator

5/16/23
Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC009389
Case Name	Onree Williams v. Terminal Gateway Spa
Consolidated Cases	15WC030755;
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	24IWCC0071
Number of Pages of Decision	28
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Adam Rosner
Respondent Attorney	Stephen Trotto

DATE FILED: 2/6/2024

/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

Onree Williams,

Petitioner,

vs. NO: 17 WC 009389

Terminal Getaway Spa,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary disability, causal connection, partial disability, benefits rates, medical expenses, and prospective medical care, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 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.

The bond requirement in Section 19(f)(2) of the Act is only applicable when the Commission has entered an award for the payment of money. Therefore, no bond is set by the Commission. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

February 6, 2024

MP:yl
o 1/19/24
68

/s/ *Marc Parker*
Marc Parker

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC009389
Case Name	Onree Williams v. Terminal Gateway Spa
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	25
Decision Issued By	Jacqueline Hickey, Arbitrator

Petitioner Attorney	Adam Rosner
Respondent Attorney	Stephen Trotto

DATE FILED: 5/17/2023

THE INTEREST RATE FOR THE WEEK OF MAY 16, 2023 4.98%

/s/ Jacqueline Hickey, 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)

Onree Williams
Employee/Petitioner

v.

Terminal Getaway Spa
Employer/Respondent

Case # **17** WC **9389**

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

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

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

G. ☒ What were Petitioner's earnings?

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

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

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

K. ☒ 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 manifestation date, **October 28, 2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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 $**32,436.20**; the average weekly wage was **$623.77.**

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** 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

The Arbitrator holds that Petitioner failed to prove that he sustained an accidental injury to his bilateral hands arising out of and in the course of his employment on 10-28-2015. In addition, Petitioner failed to prove that a causal relationship exists between the bilateral carpal tunnel condition and the alleged work injury sustained on the manifestation date of 10-28-2015.

Therefore, Petitioner's claim for prospective medical, medical bills and temporary total disability benefits are denied and all other issues are moot, as is further explained in the attached Rider.

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.

Jacqueline C. Hickey

_____

Signature of Arbitrator

MAY 17, 2023

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

ONREE WILLIAMS, Petitioner,	)	
v.	)	Case No.: **15WC30755 & 17WC9389**
TERMINAL GATEWAY SPA, Respondent.	)	

RIDER TO DECISIONS

This matter proceeded to hearing on June 22, 2022 in Chicago, Illinois before Arbitrator Jacqueline Hickey on Petitioner's Petition for Immediate Hearing regarding case 17WC9389. However, there are two cases that are consolidated and pending before the Arbitrator, 15WC30755 for date of accident of 8/30/15 and 17WC9389 for date of accident 10/28/15 . Two decisions have been issued however one rider is attached for both decisions. See below.

15WC30755: Issues in dispute include causal connection, AWW, TTD, medical bills and nature & extent. Arbitrator's Exhibit "Ax" 1.

17WC9389 (19B): Issues in dispute include accident, causal connection, AWW, Age/dependents, medical bills, TTD and prospective medical. Arbitrator's Exhibit "Ax" 2.

FINDINGS OF FACT

Petitioner, Onree Williams, testified that he was not currently employed and that his last employer was Respondent, Terminal Getaway Spa. The Arbitrator notes that Petitioner amended the pleadings regarding Respondent's name to "Terminal Getaway Spa." Id. at 15. Petitioner last worked for Respondent in September of 2015 and has not worked for any other employer since that date. Id. at 16. Petitioner testified that he worked as a massage therapist for Respondent from January of 2014 through September of 2015, around two years. Id. at 16. Even though petitioner has not worked since 8-30-2015, Petitioner stated that since then his bilateral wrist /hand symptoms have worsened. (T.69). On cross examination Petitioner admitted to also having back problems, arthritis, and bone spurs which required medical attention (T.71-72). Petitioner testified that his hours varied depending on how many clients he had but his typical shift was around seven hours per day, five days per week. (T. 17-18)

Petitioner testified that he worked for Respondent on August 30, 2015. Id. at 18. Petitioner testified that on August 30, 2015, he performed a massage on a client and went to grab a client's bag from the closet with a sliding door. Id. at 18. As Petitioner was giving the bag to the client, Petitioner's manager closed the wood sliding door on Petitioner's left index finger and middle fingers. Id. at 19-20. Petitioner testified that he felt a shooting pain in his left index finger but did not seek treatment initially as he thought the pain would go away with ice. Id. at 21. Petitioner testified that he continued working for Respondent the following week but noted that his left index finger continued to swell up. Id. at 22.

On the alleged manifestation date of 10-28-2015, Petitioner, also testified that that due to repetitive activities at work he developed bilateral carpal tunnel syndrome and bilateral index, middle and ring trigger fingers. Petitioner worked for Respondent as a massage therapist from January 2014 until September 2015 but this was not his first massage therapist job. Petitioner testified that after injuring his left index and middle fingers he began to experience pain in the bilateral hands/ wrists (T.27). Petitioner stated that he also experienced pain, numbness and tingling in his bilateral index, middle and ring fingers. (T.45). Petitioner testified that Dr. Fink prescribed trigger finger releases (T45-48). Petitioner stated that over the course of his treatment his hands/wrists have gotten worse (T.50). Petitioner stated that since the accident of 8-30-2015 he has not returned to work for Respondent nor has he worked for another employer as a massage therapist or in any other capacity. (T.68). Petitioner further testified that since 8-30-2015 he has not looked for work. (T.69).

Petitioner testified that he eventually sought treatment with Dr. Gerber at Fullerton Drake Medical Center. Id. On September 18, 2015, Petitioner presented to Dr. Gerber with limitation of motion in the left hand in the 2nd and third fingers and the Arbitrator notes that Petitioner gave a history consistent with his testimony at trial. Px1. Dr. Gerber noted spasm and inflammation at the MCP joints 2nd and 3rd fingers, diminished grip strength, and restrictions in the 2nd and 3rd fingers MCP range of motion. Id. Dr. Gerber recommended physical therapy, placed Petitioner on work restrictions of no use with left hand, recommended a left-hand MRI, and referred Petitioner to Dr. Fink. Id. Petitioner continued to follow up with Dr. Gerber through June of 2016 at Fullerton Drake Medical Center for his left hand and specifically of left index finger sprain. Id. Petitioner completed physical therapy at Fullerton Drake Medical Center from September 18, 2015 through June 7, 2016. Id. While treating Petitioner, Dr. Gerber noted complaints of pain and limitation of motion in the index and middle finger left hand. There is no mention of repetitive activity at work as a massage therapist or bilateral wrist pain. There is no diagnosis of bilateral carpal tunnel syndrome. Dr. Gerber prescribed physical therapy to the left index and middle fingers. On 9-21-2015 Petitioner returned to Dr. Gerber with complaints isolated to the left index and middle finger with no complaints to the bilateral wrists or triggering fingers of both hands.

On October 16, 2015, Petitioner underwent the MRI of his left hand with Dr. Olmsted at Fullerton MRI. Px4. Dr. Olmsted's impression of the MRI was normal. The impression stated: "No acute traumatic injury demonstrated. No soft tissue contusion. No osseous injury capsuologament." Px4.

On October 26, 2015, Petitioner initially presented to Dr. Fink at Gold Coast Orthopedic with pain in his left index finger, giving a history consistent with the testimony at trial. Px6. On physical examination, Dr. Fink noted a small 1cm mass over the PIP joint and lacks last 20 degrees of flexion of the proximal interphalangeal joint of the left index finger. Id. X-rays taken of Petitioner's left hand showed a small indentation fracture of the left second metacarpal head that was now healed. Id. Dr. Fink recommended removal of the mass over the PIP joint and for Petitioner to continue physical therapy at Fullerton Drake. Id. Dr. Fink stated in his deposition that Petitioner did not complain of bilateral hand/wrist pain upon his initial visit. (PX 14, pg39).

On October 29, 2015, Petitioner presented to Dr. Kiang for an EMG of his bilateral upper extremities as Petitioner was experiencing left first through third finger paresthesia. Px5. Dr. Kiang's impression of the EMG was the severe right carpal tunnel syndrome affecting only the motor aspect of the nerve and mild left carpal tunnel syndrome affecting only the motor aspect of the nerve. Id. Dr. Kiang did not note a history of bilateral hand/ wrist pain. Dr. Kiang diagnosis was "severe right carpal tunnel syndrome affecting only the motor aspect of the nerve and mild left carpal tunnel syndrome affecting only the motor aspect of the nerve not likely due to his work injury with contributory left 2nd and 3rd fingers." (Px1)

On November 20, 2015, Petitioner underwent the removal of the soft tissue mass on the left index finger proximal interphalangeal joint by Dr. Fink. Px10. Dr. Fink was assisted in the surgical removal by Dr. Mazzarella at Advanced Ambulatory Surgical Center. Id.

On 11-25-15 Dr. Fink followed up with Petitioner and again did not document complaints of pain to both hands and wrists. (Px6; Px14, pg. 43).

On 2-17-16 Dr. Fink noted continued progress with mobility in the left index finger but admitted on cross examination that Petitioner did not complain of symptoms to both hands and wrists at this visit. Dr. Fink admitted that he did not examine the wrists and hands because Petitioner did not make complaints to same. (Px14, pg44-45).

On February 18, 2016, Petitioner underwent an independent medical examination by Dr. Fernandez at the request of the insurance company. Rx1, Dep.Ex.2. At this visit, Petitioner presented with complaints of residual swelling, stiffness, weakness, and 7/10 pain in his left index finger and giving a history consistent with the testimony at trial. Id. On physical examination to the left index finger, Dr. Fernandez noted weakness complaints, dorsal thickening at the surgical site where the mass was removed, and discomfort to direct palpation along the scar. Id. Dr. Fernandez took x-rays and did not note any indentation fractures of the left index finger at that time. Id. Dr. Fernandez noted that he did not have the operative report or pathology report regarding what the mass was that was excised but opined that the mass or its resection was not related to the work accident. Id. Dr. Fernandez diagnosed Petitioner with a contusion-type injury from the work accident and found Petitioner to be at MMI. Id. Finally, Dr. Fernandez found Petitioner to be honest, but stated he did not have a clear understanding as to how Petitioner's work accident caused the need for a mass excision. Id. Dr. Fernandez further stated in his IME medical report dated 11-14-2019 that, "There is no indication that Petitioner was having numbness or tingling complaints as part of his general work duties as a massage therapist. In addition, to the physical demand level is defined as light. While the activities involve some

pushing, gripping, and pulling, including the use of tools these are variable or intermittent in nature and even assuming that there were more frequent in nature, these would not be the type or nature that would cause or aggravate the underlying carpal tunnel syndrome even from a non-traumatic "repetitive" exposure theory. (Rx1 & 3 11-14-19 Fernandez report at pg7).

Following the IME, Petitioner presented to Dr. Fink on February 17, 2016 with progress in left index finger mobility. Px6. On physical examination, Dr. Fink noted pain on range of motion and edema at the PIP joint. Px6. Petitioner followed up with Dr. Fink on March 21, 2016 with a painful mass on top of the joint to the left index finger. Id. On 3-21-16 Dr. Fink examined Petitioner and noted the mass but did not note complaints of pain to both hands and wrist. Review of the record reflects examination isolated to the left index finger. (Px6).

At trial, Petitioner testified that he continued to have pain, numbness, and mobility issues in his left finger two months post-accident and after the mass removal. T.25. Petitioner testified that in addition to his left index finger, he was also having issues with both of his hands. Id. at 26-27, 29-30. Petitioner testified that the hand issues began around six months after starting work for Respondent but started to become more severe after the left index finger injury. Id. Petitioner testified he continued performing massages despite feeling shooting pain and numbness because he had to work. Id. at 30. Regarding Petitioner job duties as a massage therapist, Petitioner testified he performed between eight and twenty massages per day. Id. at 30. Petitioner testified that each massage ranged between ten and ninety minutes. Id. Petitioner testified he performed different types of massages including deep tissue; Swedish Massage; and sports massage. Id. at 31.

Regarding other job duties for Respondent, Petitioner testified that he worked the receptionist desk and book the customers. Id. at 40. Petitioner again testified that his hands/wrists started bothering him six months after starting work for Respondent, in January 2014, but didn't decide to get treatment until after his August of 2015 left index injury. Id. at 41. Petitioner testified that after his work accident in August of 2015, he started to use his left hand more and started noticing the tingling more so in his hands. Id. at 41.

On March 30, 2016, Dr. Fink authored a Narrative Report after reviewing Dr. Fernandez IME report. Id. Dr. Fink noted that Petitioner's mass PIP joint and the residual abscess at the PIP joint was "definitely due to the primary injury [August 30, 2015 work accident] and subsequent scar tissue was formed." Id. Dr. Fink opined that Petitioner also complained of carpal tunnel syndrome on the right and mild on the left and "there is definite causal relationship between his work as a massage therapist and symptomatology." Id. Finally, Dr. Fink recommended the abscess to be removed and carpal tunnel releases on both hands, in order to prevent further atrophy as Petitioner was showing signs of complex regional pain syndrome as shown in the EMG. Id.

Petitioner followed up with Dr. Fink on May 25, 2016 with continued decreased sensation on both hands and swelling in the left index finger along with the stitch abscess. Id. On physical examination, Dr. Fink noted positive effusion to the PIP joint of the left index finger and decreased sensation bilateral hands, left greater than right. Id. Dr. Fink continued to recommend

the removal of the stitch abscess and bilateral carpal tunnel releases. Id. At trial, Petitioner testified that he never underwent the stitch abscess surgery. Id. at 28-29.

On June 29, 2016, Petitioner followed up with Dr. Fink with continued bilateral wrist pain and decreased sensation in the fingers. Id. On physical examination, Dr. Fink noted positive Tinel's signs bilaterally, decreased sensation to the bilateral thumbs, index fingers, long fingers, and radial half of the ring fingers. Id. Petitioner followed up with Dr. Fink on August 8, 2016 with locking in his bilateral index and long fingers. Id. Dr. Fink noted similar physical examination findings but also positive bilateral Phalen's tests and tenderness in the A1 pulley of bilateral index and long fingers consistent with trigger finger on both hands. Id. At this time, Dr. Fink continued to recommend the bilateral carpal tunnel releases along with releases of the trigger fingers. Id.

Petitioner testified that he continued to follow up with Dr. Fink for over seven years from 2016 throughout 2022, with his last visit before trial, taking place on April 14, 2022. The total amount of visits Petitioner presented to Dr. Fink equal twenty-nine visits. Px6. On physical examinations during these visits, Dr. Fink continued to recommend the bilateral carpal tunnel releases. Id. As noted in Dr. Fink's records, Petitioner's left wrist was more symptomatic than his right wrist at the last visit, consistent with the testimony at trial. Id. Additionally, Petitioner underwent bilateral wrist injections on June 28, 2016 and left wrist Dep-Medrol injection on March 8, 2017 with Dr. Fink. Id.

On November 14, 2019, Petitioner presented for a second independent medical examination by Dr. Fernandez. Rx1, Dep. Ex.3. At this visit, Petitioner complained of residual pain in the left index finger and numbness and tingling in the bilateral wrists. Id. On physical examination, Dr. Fernandez noted pain complaints on provocative testing to the bilateral wrists extending into the palms, tenderness at the A1 pulley of the left index finger and pain with ROM. Dr. Fernandez diagnosed Petitioner with trigger digit of the left index finger, bilateral carpal tunnel syndrome, and previous diagnosis of a work-related contusion or sprain of the left index and middle fingers which was resolved. Id. Dr. Fernandez opined it was "atypical" bilateral carpal tunnel syndrome because Petitioner "does not have clear irritability extending into the median nerve distribution." Id. Dr. Fernandez opined that Petitioner's bilateral carpal tunnel syndrome was not related to the August of 2015 as that was a crush injury and only related to the left hand. Id. Dr. Fernandez opined that Petitioner's job activities as a massage therapist did not cause the carpal tunnel syndrome based on a job description report that defines the activity as "light." Dr. Fernandez notes that Petitioner's job activities do involve pushing, gripping, and pulling. Id. Regarding future treatment, Dr. Fernandez opined that the Petitioner may undergo a trigger finger A1 pulley injection and A1 release and bilateral carpal tunnel releases but indicated that this treatment would not be related to the manifestation injury. Id. Finally, Dr. Fernandez opined that Petitioner was at MMI and could return to work full duty as a result of the work injuries. Id.

At trial, Petitioner testified that his left wrist bothered him more than his right wrist. T.42. Petitioner testified that he wished to proceed with the bilateral carpal tunnel releases as recommended by Dr. Fink. Id. at 44. Petitioner testified that he also felt "locking", numbness, and tingling in his bilateral index, middle, and ring fingers on both hands. Id. at 45. Petitioner testified that Dr. Fink was only recommending the bilateral carpal tunnel releases as of the date

of trial. Id. at 49. Petitioner testified that his symptoms continued to worsen over the years he treated with Dr. Fink. Id. at 50-51.

Petitioner testified that prior to working for Respondent, he worked for Delta Airlines as a ramp agent loading bags onto the airplane. Id. at 53. Petitioner testified that his current condition has affected his ability to bowl, play basketball, or workout. Id. at 53. Petitioner testified that he has been wearing [wrist] braces on and off for the past six years. Id. at 54. Petitioner testified that prior to the work accident on August 30, 2015, he had no issues with his left hand or left index finger. Id. Petitioner testified when he started work for Respondent as a massage therapist, his bilateral wrists and hands became much more severe to the point where he had to seek medical treatment. Id. at 54-55. Petitioner testified that he initially felt symptoms in his bilateral wrists and hands six months after starting work for Respondent but continued working. Id. at 55. Petitioner testified that he has been taking Tramadol and Gabapentin twice a day, every day, for his symptoms which causes a side effect of dizziness. Id. at 56.

On cross-examination, Petitioner testified that Terminal Getaway Spa is located in O'Hare Airport and he would give massages to client waiting for flights. Id. at 58-59. Petitioner testified that the average time of his massages were thirty minutes. Id. at 60-61. Petitioner testified that his other job duties included using a computer to book the clients and check clients out after the massage. Id. at 62. Petitioner testified that he attended college but never graduated or received a degree. Id. at 63-64. Petitioner testified that he has not worked or performed any activities as a massage therapist since his work for Respondent. Id. at 68. Petitioner testified that he also has arthritis, spondylosis, and issues with his neck. Id. at 70-72. Petitioner testified that he has been on SSI since November of 2021 but has had no other income since his work for Respondent. Id. at 73-74. Petitioner testified that he lives with his father. Id. at 74.

Respondent presented a series of Facebook photos from Petitioner's Facebook page. T.76, Rx2. These Facebook photos included: Petitioner in a bowling alley with his mother; Petitioner at Terminal Getaway Spa; Petitioner at the gym with a professional basketball player; (4) Petitioner with a TV broadcaster at Windy City Live; (5) Petitioner at the gym in Miami from 2015; (6) Petitioner with John Quinones at Terminal Getaway Spa in 2015; Petitioner with Marcus Allen at the Airport; and a Petitioner at an event in Skokie performing massages in 2013 or 2014. T.74-89, Rx2, Rx3, Rx4. The Facebook photos show multiple dates in which the pictures were posted. Rx2. Petitioner testified that Facebook reminds users of past memories to be able to be reposted. Tx83. Petitioner testified that many of the photos were taken prior to starting work for Respondent and while he was working for Respondent. Id. at 87-88.

Testimony of Dr. Robert Fink- treating physician

Dr. Fink testified to his treatment of Petitioner and his opinions regarding Petitioner's condition. Px14. Dr. Fink testified that he is board certified in orthopedic surgery and part of his practice consists of carpal tunnel releases, fractures of the fingers, and tumors in the hand and wrist. Id. at 6-8. Dr. Fink testified he first met with Petitioner on October 26, 2015 after Petitioner smashed his fingers in a sliding door at Respondent on August 30, 2015. Id at 9. Dr. Fink testified that he noted a small mass on Petitioner's PIP joint of the left index finger. Id. at 10. Dr. Fink testified that a mass or growth can be caused by a specific trauma accident as it can cause a hematoma

bleeding mass and the tissue that gets crushed to multiply causing fibroid tumors. Id. at 10, 12. Dr. Fink testified that his office performed an x-ray of Petitioner's left hand with comparison views which showed a fracture of the left second metacarpal head. Id. at 11. Dr. Fink testified he recommended the removal of the mass, which he performed. Id. at 12-13. Dr. Fink testified Petitioner continued to follow up with him throughout early 2016 with progress with mobility of the left index finger. Id. at 13.

When explaining his opinion regarding the causal relationship between Petitioner's work accident on August 30, 2015, Dr. Fink testified when reviewing the pathology report, "I believe it was [related]. . . That was a crush injury to his hand that didn't have anything wrong with it before he had that injury." Id. at 15. Dr. Fink testified regarding his Narrative Report, dated March 30, 2016, and the EMG dated October 29, 2015. Id. at 17. Dr. Fink testified the EMG showed "[s]omething is going wrong with the motor nerves, so that's all consistent with carpal tunnel to the motor branch of the media nerve." Id. at 19. Dr. Fink testified that the best way to diagnose carpal tunnel syndrome is physical examination and talking with the patient, with the EMG being a supplemental test. Id. at 20. Dr. Fink testified that he looks for provocative signs of carpal tunnel syndrome such as decreased sensation and pain which Petitioner had. Id. at 20. Dr. Fink explained how he tested objectively for sensation of the fingers on Petitioner:

"I usually test with. . . a little piece of cotton and safety pin, so I tell him to close your eyes. I do it to both hands, and I, at the beginning stick [him] with the light touch, touching the fingers, different fingers, and then after we're done with the light touch, we go with the safety pin test…. Objective with the safety pin. They kind of move. I stick you with the safety pin, think about it. You're going to move. If you're going to feel it, you're going to move. That's definitely objective. Subjective, if I touch you with the light cotton, that's a little more subjective." Id. at 23.

Dr. Fink testified that positive decreased sensation to the thumb, index, long, and one-half of the ring finger correlates with carpal tunnel syndrome nerve distribution. Id. at 24. Dr. Fink testified that a Tinel's test is an objective test indicates the media nerve being squeezed in the carpal tunnel. Id. at 26. Dr. Fink testified that positive Phalen test means squeezing of the media nerve in the carpal tunnel, which he also noted during his treatment of Petitioner. Id. at 29.
Dr. Fink testified that on August 8, 2016, Petitioner had new complaints of locking in the index and long finger. Id. at 28. Dr. Fink testified that he treated Petitioner for over six years through 2021 and that Petitioner symptoms continued to worsen with night awakening, pain and numbness in both wrists/hands, and needing assistance with driving. Id. at 30-31. Dr. Fink testified that he kept Petitioner off work during the treatment because of Petitioner's job duties as a massage therapist requiring repetitive motion of the hands, which makes carpal tunnel syndrome worse. Id. at 31-32. Dr. Fink testified that the repetitive motion like Petitioner's job activities is the type of activities that cause carpal tunnel syndrome. Id. at 32. Dr. Fink testified that repetitive motion of the wrists," volar flexion, dorsiflexion, pressing hard on a massage" can cause carpal tunnel syndrome. Id. at 32-33. Dr. Fink testified that Petitioner's employment included performing massages using repetitive motion hands and wrists, which is causally related to his conditions of bilateral carpal tunnel syndrome. Id. at 35-36. Dr. Fink noted that Petitioner never had any issues prior to the manifestation date in October of 2015. Id. at 37. Dr. Fink testified that two to three years of performing repetitive motion of the hands and wrists can

cause carpal tunnel syndrome. Id. at 38. Dr. Fink testified that to treat carpal tunnel syndrome, first start with medication and therapy, then injections, and then surgery. Id. at 33. Dr. Fink testified that the carpal tunnel releases he is recommending Petitioner can improve Petitioner's symptoms such as the night awakening and numbness. Id. at 33, 35.

On cross examination, Dr. Fink testified that he did not review the MRI of Petitioner's left hand from October 16, 2015, but stated the x-ray showed him the fracture as the MRI does not show the bones as well. Id. at 40-41. Dr. Fink testified that the pathology from the removal of the mass on November 20, 2015 showed a "ganglion cyst at the top" which was not malignant. Id. at 41-42. Dr. Fink testified that Petitioner treated for his left index finger for 2015 and until March of 2016. Id. at 42-46. Dr. Fink testified that Petitioner first made complaints of his bilateral wrists/hands on March 30, 2016. Id. at 46. Dr. Fink testified regarding his treatment of Petitioner throughout 2016. Id. at 46-52. Dr. Fink testified that Petitioner's right wrist was more symptomatic than his left in March of 2016. Id. at 53. Dr. Fink testified that he would perform the carpal tunnel release on the wrist that is more symptomatic at the time. Id. at 53. Dr. Fink testified that the stitch abscess eventually disappeared as the antibiotic Petitioner was using healed it. Id. at 55.

Dr. Fink testified that Petitioner could be performing an activity that did not include repetitive motion activity in the wrists, but that repetitive motion will make it worse. Id. at 55-56. Dr. Fink testified that Petitioner's condition continued to worsen throughout his treatment. Id. at 56-57. Dr. Fink testified that Petitioner stopped complaining about the trigger finger. Id. at 57. Dr. Fink testified that Petitioner was seen in the emergency room on June 19, 2019 for pain in his neck and hands. Id. at 58. When explaining why he continued to recommend the bilateral carpal tunnel syndrome, Dr. Fink testified that Petitioner had positive subjective and objective tests and positive EMG test. Id. at 61. On redirect examination, Dr. Fink testified that it is typical to perform the carpal tunnel release surgery on the more symptomatic wrist first, then the other. Id. at 65. Dr. Fink testified that even though the Petitioner has not worked since 8-30-2015 , Petitioners bilateral carpal tunnel condition worsened. Dr. Fink based the foregoing upon Petitioners increased subjective complaints. (PEX14, pg. 57). On 11-10-21 Dr. Fink testified that from his initial visit on 10-26-2015 through the date of deposition, Petitioner could have been working at a job that did not entail repetitive activity with his hands. (PEX14, pg. 56).

Testimony of Dr. John Fernandez- Section 12 Examiner

Dr. Fernandez testified in this matter regarding his two examinations of Petitioner on February 18, 2016 and November 14, 2019 and his opinions contained in the IME reports. Rx1. Dr. Fernandez testified regarding the information contained in his initial IME report on February 18, 2016 including the history, subjective complaints, physical examination, and medical records reviewed. Id. Dr. Fernandez testified that Petitioner's MRI scan on October 16, 2015 was unremarkable and that the EMG on October 29, 2015 showed severe right carpal tunnel syndrome and mild left carpal tunnel syndrome, only affecting the motor aspects of the nerves. Id. at 11. Dr. Fernandez testified that these were "atypical" EMG findings but indicated an EMG can be "overly or underly sensitive, or nonspecific." Id. at 12-13. Dr. Fernandez explained that the EMG did not show any sensory involvement, which indicates complaints of numbness and tingling, but "it could be falsely negative." Id. at 16. Dr. Fernandez testified that an EMG "is not

necessarily clinically related to any type of condition or diagnosis" and a patient can have a positive EMG and not have carpal tunnel syndrome, and vice versa. Id. at 13. Dr. Fernandez testified that physicians also rely on the clinical symptoms to diagnose carpal tunnel syndrome. Id. at 14.

Dr. Fernandez testified he noted a normal physical examination with subjective complaints of weakness and inability to make a fist but provocative testing such as a Tinel sign and Phalen's test was negative. Id. at 16-20. Dr. Fernandez testified that his office took x-rays of the left hand which were normal. Id. at 20. Dr. Fernandez testified he diagnosed Petitioner with left index finger residual pain and stiffness post-excision of mass. Id. at 20. Dr. Fernandez testified he did not see an indentation fracture of the left index finger or a mass that was formed on the left hand based on the MRI and the operative report. Id. at 21. Based on that, Dr. Fernandez testified he diagnosed Petitioner with a soft tissue or contusion injury as a result of the August 30, 2015 work accident. Id. at 22. When testifying regarding the mass on Petitioner's left index finger, Dr. Fernandez testified that a mass would not be caused by a crush injury but that a mass is not a "cyst." Id. at 22. Dr. Fernandez testified that Petitioner was at MMI from the work accident and would not require any future treatment on the date of the first IME of 2/18/16. Id. at 25. Dr. Fernandez testified that Petitioner did not exhibit the physical examination findings for carpal tunnel syndrome, so he referred Petitioner back to Dr. Fink for further guidance. Id. at 26. Dr. Fernandez testified that he reviewed a job description for Petitioner's work as a massage therapist which described the physical demands level as "light." Id. Dr. Fernandez testified that massage therapy is not the type of repetitive motion with the hands to cause or contribute to carpal tunnel syndrome. Id. at 28.

Dr. Fernandez then testified regarding his November 14, 2019 IME report and the opinions contained therein. Id. at 30-31. Dr. Fernandez testified regarding his review of Petitioner's history, medical records, subjective complaints, and physical examinations. Id. Dr. Fernandez testified that Petitioner's DASH score increased, meaning that Petitioner's conditions became more severe compared to the initial IME. ID. at 32. Dr. Fernandez testified that Petitioner stated he was unable to perform activities such as basketball, bowling, and working out. Id. at 33. Dr. Fernandez testified that Petitioner was complaining of numbness and tingling in the hands, left greater than right, stiffness to flexion in the left index and middle finger. Id. at 33. Dr. Fernandez testified that Petitioner does smoke cigars, which may be a minor risk factor for carpal tunnel syndrome, but that Petitioner has no past medical history of risk factors for carpal tunnel syndrome and trigger finger. Id. at 38. Dr. Fernandez testified that overcompensating with one hand for the other would not cause a direct impact on the hand that is overcompensating. Id. at 41-42. Dr. Fernandez testified that he diagnosed Petitioner with trigger digit and "atypical" carpal tunnel syndrome. Id. at 46. Dr. Fernandez testified he based his diagnosis of "atypical" carpal tunnel syndrome on the physical exam and the motor aspect of the EMG findings. Id. at 46-47. Dr. Fernandez testified that "it does not mean [Petitioner] does not have carpal tunnel syndrome. It is just very atypical. Very unusual." Id. at 48. Dr. Fernandez testified that an FCE may be performed to get a "better sense of what [Petitioner] is capable of doing based on his complaints" but that it may be limited due to the pain complaints. Id. at 53-54. Finally, Dr. Fernandez testified that Petitioner was cooperative and not malingering. Id. at 54.

On cross examination, Dr. Fernandez testified he has never reviewed the pathology report for the mass removal and that the surgeon performing the excision would be in the best position to describe what the mass was. Id. at 58. Dr. Fernandez testified that it was a "mass" on Petitioner's left index finger based on the operative report. Id. at 59. Dr. Fernandez testified that the best explanation for Petitioner's diagnosis was trigger finger. Id. at 60. Dr. Fernandez testified that the motor aspect and not the sensory nerve on an EMG is atypical for carpal tunnel syndrome, but "have to put it together with everything else." Id. at 61-62. Dr. Fernandez testified that he would take the diagnostic studies to correlate with a patient's symptoms and physical examination findings to come to a diagnosis and treatment plan. Id. at 62. Dr. Fernandez testified that "frequent gripping, grasping" and associated components of force cause carpal tunnel syndrome. Id. at 63.

Dr. Fernandez testified that two to three months is sufficient time to cause or contribute to carpal tunnel syndrome if the job activities are activities that can cause or contribute to carpal tunnel syndrome. Id. at 67. Dr. Fernandez testified that the carpal tunnel affects the median nerve and the nerve distribution pattern into the fingers is specifically the "thumb, index, middle and part of the ring finger." Id. at 68. Dr. Fernandez testified that he would recommend an A1 pulley injection and release for Petitioner's trigger finger. Id. at 69. Dr. Fernandez testified that he would defer to Dr. Fink's discretion in whether to perform the carpal tunnel release surgeries and he would be recommending the same or similar treatment plans as Dr. Fink. Id. at 69.

On redirect examination, Dr. Fernandez testified that he did not believe Petitioner's bilateral carpal tunnel syndrome was related to his activities as a massage therapist because of the (1) temporality of Petitioner's onset of symptoms and (2) the type of force Petitioner's job duties required. Id. at 76. Dr. Fernandez explained the force of Petitioner's job duties as: "[i]t is the type of force. There's a difference in the force that's required to push on somebody with a palm, use an instrument, to push deeply into somebody with a knuckle or hand, and the force of gripping a tool and doing that on a repeated enough basis that it would contribute to carpal tunnel. Id. at 76. Dr. Fernandez testified that he did not believe the trigger finger was related either for the same reasons. Id. at 77.

On 1-17-2022 Dr. Fernandez stated in his deposition that at the time of his examination on 11-14-2019, he noted that Petitioner has not worked for four years, however, during this time petitioner's symptoms have increased. Dr. Fernandez stated that this is unusual given the fact that if the carpal tunnel syndrome was to be deemed work related due to repetitive exposure frequency, there would be a significant improvement in symptoms while being off work. (Id. at 52). In addition, Dr. Fernandez stated that he saw no reason why Petitioner could not return to work as a massage therapist. Id. Dr. Fernandez further stated in his medical report dated 11-14-2019 that, "There is no indication that Petitioner was having numbness or tingling complaints as part of his general work duties as a massage therapist. In addition, to the physical demand level is defined as light. While the activities involve some pushing, gripping, and pulling, including the use of tools these are variable or intermittent in nature and even assuming that there were more frequent in nature, these would not be the type or nature that would cause or aggravate the underlying carpal tunnel syndrome even from a non-traumatic "repetitive" exposure theory. (Id. and Rx1 pg7).

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). 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 Arbitrator, as the trier of fact in this case, has the responsibility to observe the witnesses testify, judge their credibility, and determine how much weight to afford their testimony and the other evidence presented. *Walker v. Chicago Housing Authority*, 2015 IL App (1st) 133788, ¶ 47. Credibility is the quality of a witness which renders his evidence worthy of belief. The Arbitrator, whose province it is to evaluate witness credibility, evaluates the demeanor of the witness and any external inconsistencies with his/her testimony. Where a claimant's testimony is inconsistent with his/her actual behavior and conduct, the Commission has held that an award cannot stand. *McDonald v. Industrial Commission,* 39 Ill. 2d 396 (1968); *Swift v. Industrial Commission,* 52 Ill. 2d 490 (1972).

In the case at hand, the Arbitrator observed Petitioner during the hearing and finds him to be a credible witness. The Arbitrator compared Petitioner's testimony with the totality of the evidence submitted and did not find any material contradictions that would deem the witness unreliable. None of the physicians who treated or examined him noted any symptom magnification from all of the exhibits reviewed by the Arbitrator.

15 WC 30755

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, ¶ 1, 11 N.E.3d 453. A work-related injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. Even if the claimant had a preexisting degenerative condition which made him more vulnerable to injury, recovery for an accidental injury will not be denied as long as he can show that his employment was also a causative factor. Thus, a claimant may establish a causal connection in such cases if he can show that a work-related injury played a role in aggravating his preexisting condition. *Sisbro, Inc. v. Industrial Comm'n,* 207 Ill. 2d 193, 205, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003). "A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." *International Harvester v. Industrial Com.*, 93 Ill. 2d 59, 63 442 N.E.2d 908 (1982). In *Schroeder v. IWCC,* 2017 IL App (4th) 160192WC, the Appellate Court clarified that the "chain of events" principle does not apply solely where a claimant is in a condition of absolute good health. Rather, a claimant need only establish that an accident was a cause of his condition. *Sisbro, Inc. v. Industrial Commission*, 207 Ill.2d 193, 205 (2003).

For the 15WC30755 case, which involves the left index and middle fingers, the Arbitrator is persuaded by the medical records, testimony of Dr. Fink and the record as a whole that these injuries and finger conditions are causally related to the traumatic incident that Petitioner sustained while at work for Respondent on August 30, 2015. The Arbitrator finds the Petitioner truthful in his assertion that his left index finger and middle fingers injuries occurred in a manner consistent with his testimony at trial. The Arbitrator finds Dr. Gerber and Dr. Fink to specifically have been credible in their opinions in the medical records regarding the nature of his finger injuries and their causal relationship to the claimed injury at work for the Respondent. Further, the Arbitrator finds Dr. Fink to have been persuasive in his opinions from his testimony regarding the nature of Petitioner's injuries and their causal relation to the work accident. The Arbitrator does not find the opinions of Dr. Fernandez as persuasive on this specific issue. Petitioner testified that on August 30, 2015, he injured his left index and middle fingers when his manager at Respondent slammed a solid wooden closet door on his fingers at work. Petitioner continue working the following week and thought the pain would go away as he was icing it. However, Petitioner testified that his left index finger continued to swell up, so he sought medical treatment. On September 18, 2015, Petitioner presented to Dr. Gerber at Fullerton Drake Medical where he was recommended physical therapy for his left hand and placed on work restrictions. Petitioner presented for physical therapy at Fullerton Drake Medical Center for approximately nine months, or through 6/7/16. Petitioner then presented to Dr. Fink on October 26, 2015 with a mass on his left index finger. Dr. Fink took x-rays which showed a small indentation fracture of left second metacarpal head that was now healed. Petitioner eventually

underwent a removal of the mass with Dr. Fink on November 20, 2015 and continued treating for his left index finger residual pain until March 30, 2016. Additionally, Petitioner underwent an MRI of his left hand on October 16, 2015, which was unremarkable.

Dr. Fink testified that a specific trauma injury can cause a mass or tumor, which happened in Petitioner's case. Specifically, Dr. Fink testified that the scar tissue built up around Petitioner's left index finger. Dr. Fernandez opined and testified that a "mass" could not be caused by a specific trauma injury and diagnosed Petitioner with a left index finger contusion as a result of the work accident. However, Dr. Fernandez admitted that he was unsure of exactly the type of "mass" that was on Petitioner's left index finger and would defer to the pathology report or the treating surgeon, which again in this circumstance was Dr. Fink. Additionally, Dr. Fernandez admitted he never reviewed the pathology report. The Arbitrator finds it compelling that Dr. Fernandez had incomplete information regarding the finger cyst and did not review the pathology report which confirmed the diagnosis per Dr. Fink.

During Dr. Fink's deposition, he testified that the mass was a "ganglion cyst" that was not malignant when reviewing the pathology report. Px10. Dr. Fernandez testified that he didn't think it was a cyst based on the operative report, but as noted above, would defer to the treating surgeon and the pathology report. As Dr. Fink pointed out, Petitioner did not have a mass on his finger before the accident but developed a mass following the accident. Further, Petitioner testified that he had no issues with his left index finger prior to the work accident. The Arbitrator notes that Respondent presented no evidence that Petitioner had any treatment for his left index finger prior to the work accident. As Dr. Fink was the treating surgeon who performed the "ganglion cyst" removal and had reviewed the pathology report, the Arbitrator finds Dr. Fink's testimony as more persuasive than Dr. Fernandez that Petitioner's left index finger mass was a result of his work accident. The parties do not dispute the left index and middle finger sprains and contusions, but that the mass or cyst and its excision were related to the work incident on 8/30/15.

With respect to the small indentation fracture on the left index finger, Dr. Fink reviewed x-rays in his office that he reviewed and opined that it showed Petitioner an indentation fracture. Dr. Fernandez appeared to relied upon the normal MRI showing no ligament damage. However, as Dr. Fink testified to, MRIs do not show the bones as well as x-rays. Therefore, the Arbitrator relies upon Dr. Fink's review of the left-hand x-rays and opinions regarding Petitioner's left index finger indentation fracture in finding the fracture to be related to work incident on 8/30/15.

Therefore, the Arbitrator finds the opinions of Petitioner's treating physicians including Dr. Gerber and Dr. Fink, to be more credible and persuasive on the sole issue of causation, relating only to the left index finger injury (sprain, cyst and fracture) and left middle finger injury (sprain/contusion) on 8/30/15. Thus, the Arbitrator finds that Petitioner's left index finger and middle finger conditions are causally related to his work accident on August 30, 2015, up and through the last date of treatment for these specific injuries, 3/30/16. The Arbitrator does not find Petitioner's ongoing complaints regarding his bilateral hands and carpal tunnel syndrome, in addition to trigger finger, to be related to the 8/30/15 or 10/28/15 work incidents but notes that these medical conditions will be further discussed and elaborated on later in this Rider to Decision under subheading 17WC9389.

Issue G, 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. *Id.* For purposes of section 10, a "bonus" is "something in addition to what is expected or strictly due." *Arcelor Mittal Steel v. Illinois Workers' Compensation Comm'n*, 2011 IL App (1st) 102180WC, ¶ 40. An employee receives a bonus "for no consideration or in consideration of overall performance at the sole discretion of the employer." *Id*. 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).

The Arbitrator notes Respondent introduced Petitioner's wage statements for Respondent into evidence. Rx6. After calculation as pursuant to Section 10 of the Act, the Arbitrator finds Petitioner's average weekly wage as $623.77.

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 incorporates findings and conclusions as stated in paragraph F above, specifically finding causation between the left index and middles fingers injuries and conditions and the 8/30/15 work incident. Overall, the Arbitrator finds Petitioner's treatment to both left index and middles fingers injuries from the date of accident of 8/30/15 through 3/30/16 to be reasonable, necessary and related, and finds that Respondent has not paid for all of said treatment. Again, Petitioner underwent the removal of the left index finger mass with Dr. Fink on November 20, 2015 and continued treating for his left index finger conditions and residual pain until March 30, 2016. For this reason, the Arbitrator finds the treatment up and through that date to be reasonable necessary and related to the 8/30/15 work incident. For any and all bills that Respondent has already paid and has documentation of payment, a credit will be given. The arbitrator notes that Petitioner treated with the same physician, Dr. Fink/Gold Coast Orthopedics for both the August 2015 finger injuries and the alleged October 2015 bilateral carpal tunnel conditions. There is overlap in the bills for this reason and the Arbitrator will address bills for the alleged hand conditions in the 17WC9389 portion of this Rider to Decision. In addition, the arbitrator notes that per Petitioner's Exhibit 6 for Dr. Fink's bills, there is only one bill included that relates to the finger conditions, that was incurred prior 3/30/16, and this bill appears to have a $0 balance. The Arbitrator also notes that bills were submitted regarding a subpoena to Spine MD Limited, however the bills and medical contained in the record correspond to Fullerton Drake Medical Center and are therefore duplicative and shall not be awarded. Lastly, there are numerous charges for Dr. Fink/Gold Coast Orthopedics, WCRX Solutions and RX Development after 3/30/16, and the Arbitrator finds these are not reasonable nor related to the left index and middle fingers injuries incurred on 8/30/15.

The Arbitrator again finds Petitioner suffered a crush injury to his left index and middle fingers on August 30, 2015 which resulted in a cyst or mass to develop on his index finger and an indentation fracture, as well as sprains/contusions to both fingers. As such, Dr. Gerber

recommended physical therapy, which Petitioner performed through 6/7/16, but the Arbitrator notes a large gap in care from 3/18/16 to 6/3/16. Further, Dr. Fink performed the mass excision surgery on November 20, 2015. Petitioner continued to treat with Dr. Fink until March 30, 2016 for his left index finger and middle finger residual pain and swelling.

As such, having found for Petitioner on causation for his left index finger and middle finger conditions, the Arbitrator finds that the medical services provided to Petitioner throughout the course of his treatment through 3/30/16 were both reasonable and necessary, and orders the Respondent to pay the medical bills pursuant to medical fee schedule. Medications to relieve pain and inflammation would be reasonable and necessary to help Petitioner in his recovery. Windy City Anesthesia provided anesthesia services for the ganglion cyst removal surgery as well. See below:

- Fullerton Drake Medical Center $7,832.50
- Dr. John Mazzarella $2,840.00
- Rx Development $145.93
- Windy City Anesthesia $1,145.00
- Advanced Ambulatory Surgical Center $11,512.00
- Dr. Fink/ Gold Coast: bills prior to 3/30/16 that were submitted into evidence, appear to have been paid

Overall, Respondent to pay reasonable and necessary medical expenses for the above providers through 3/30/16 for the causally related left index and middle finger conditions and injuries Petitioner sustained.

Issue K, what Temporary Total Disability Benefits Are in Dispute?

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).

The Arbitrator incorporates findings and conclusions as stated in paragraph F above, specifically finding causation between the left index and middles fingers injuries and conditions and the 8/30/15 work accident. Overall, the Arbitrator finds Petitioner's treatment, including recommendation of work restrictions, to both left index and middles fingers injuries from the date of accident of 8/30/15 through 3/30/16 to be related. For clarity sake, the Arbitrator notes that Petitioner claimed TTD from 9/18/15 through 5/24/16. Respondent has claimed it has paid $8,985.33 in TTD from 9/18/15 through 10/29/15. At trial, Petitioner stipulated to the TTD amount Respondent previously paid.

Petitioner was initially put on work restrictions by Dr. Gerber on September 18, 2015 and was on work restrictions or off work throughout the rest of his treatment for his left finger and middle finger injuries. Petitioner testified that Respondent was unable to accommodate his restrictions and no evidence was presented to the contrary. Dr. Fernandez recommended potentially a couple weeks of work restrictions, but again, this was based on the diagnosis of a left index finger contusion only.

Having found Petitioner sustained compensable conditions of ill-being arising out of in in the course and scope of his employment with Respondent and that his condition of ill-being is causally related to the 8/30/15 work incident, any related periods of temporary total disability incurred through 3/30/16 for the left index and middle fingers, would be the responsibility of Respondent. Petitioner alleges, Dr. Fink confirms and the medical records support, that Petitioner was temporarily and totally disabled for a period of time covering from 9/18/15 through 3/30/16, the last date of treatment for the left index and middle fingers per treating physician Dr. Fink.

Respondent shall pay Petitioner temporary total disability benefits of $418.85/week for 27 4/7 weeks, commencing September 18, 2015 through March 29, 2016 at a rate of $418.85, as provided in Section 8(b) of the Act.

Issue L, the nature and extent of the injury, the Arbitrator finds as follows:

In determining PPD benefits, Section 8.1b(b) of the Act directs the Commission to consider: "(i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records." 820 ILCS 305/8.1b(b); *Con-Way Freight, Inc. v. Illinois Workers' Compensation Comm'n,* 2016 IL App (1st) 152576WC, ¶ 22, 67 N.E.3d 959. "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b). "None of the factors set forth in section 8.1b is to be the sole determinant of the claimant's disability." *Corn Belt Energy Corp. v. Illinois Workers' Compensation Comm'n*, 2016 IL App (3d) 150311WC, ¶ 49.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that while no AMA rating was submitted into evidence and therefore the Arbitrator gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that Petitioner was employed as a massage therapist at the time of the accident. This job requires Petitioner to use his hands daily for massages of customer as well as front desk work. Per Dr. Fernandez's review of the job description, this is considered a "light" demand role. The Arbitrator notes the Petitioner has not returned to his job as a massage therapist for Respondent since the date of accident and has not worked for any employer since. However, since the initial date of accident corresponding to case number 15WC30755, Petitioner claims bilateral carpal tunnel conditions relating to work and therefore also keeping him from working as of the date of trial. The Arbitrator gives moderate weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 47 years old at the time of the accident. Petitioner had been working for Respondent for two years before the

August 2015 accident and did not return to work for Respondent. The Arbitrator gives some weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes Petitioner has not alleged nor established any loss in future earnings capacity. The Arbitrator therefore assigns little 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 as a result of the 8/30/15 work injury petitioner was ultimately diagnosed with a left index finger ganglion cyst and a small indentation fracture, in addition to left index and middle finger sprains. He treated for around seven months after the date of the accident, undergoing therapies and eventually surgery. The arbitrator notes that a formal release from care for any claimed work conditions, with or without restrictions, has not been given by Dr. Fink but that Dr. Fernandez opined that Petitioner could return to work as a massage therapist and is at MMI for the 8/30/15 injuries. The doctors in this matter agree that Petitioner has carpal tunnel syndrome, however the arbitrator has found this condition to not be causally related to the 10/28/15 alleged date of injury. Therefore, Petitioner remains off of a work for an unrelated medical condition. Petitioner also still intends to obtain and undergo bilateral carpal tunnel release surgery. The Arbitrator therefore gives *greater* weight to this factor.

Overall, the Arbitrator finds that Petitioner has been permanently disabled to the extent of 25% loss of use of the left index finger and 5% loss of the left middle finger. The Arbitrator bases this finding on the Petitioner's testimony, the physicians' testimony, the medical records and overall review of the record as a whole.

Based on the above factors, the Arbitrator finds that Petitioner sustained a permanent partial disability to the extent of the 25% loss of use of the left index finger and 5% loss of the left middle finger, a total of 12.65 weeks to be paid by Respondent, as provided in Section 8(d)(2) of the Act, at a weekly rate of $374.26/week for 10.75 weeks

17WC9389

Issue C, whether the accident arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds as follows:

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). 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.*

A repetitive-trauma claimant must provide proof that the injury and its causal link to her employment became plainly apparent to a reasonable person on a specific date. *Durand v. IWCC,* 224 Ill. 2d at 65; *see also Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524, 531 (1987) (holding the accident date in a repetitive-trauma case is the date on which the injury manifests itself). To prove a compensable accident, an employee who suffers a repetitive trauma injury must meet the same standard of proof as an employee who suffers a sudden injury from a discrete event. *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 64 (2006). That means, inter alia, that an employee suffering from a repetitive trauma injury must point to a specific "manifestation date," i.e., a date within the limitations period on which both the injury and its causal link to the employee's work became plainly apparent to a reasonable person. Id. at 65; see also *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524, 531 (1987).

In the present case, Petitioner has alleged a manifestation date of October 28, 2015. This is approximately two months after Petitioner's August 30, 2015 work accident which this Arbitrator has already made a determination on, as further explained previously under subheading "15WC30755" of this Rider to Decisions. As noted above, Petitioner testified that his bilateral wrist/hand pain began six months after he started work as a massage therapist for Respondent (on or around June 2014) yet it appears he did not report this injury/pain to Respondent, nor to his medical providers, who were treating him for 7 months for the left index and middle fingers, until sometime in 2016. Further, Petitioner's employment with Respondent was not the first massage therapist job he has held and it is apparent to the Arbitrator that Petitioner has worked in this field for some time. Petitioner testified that the bilateral hand/wrist pain continued to progress and became worse after the August 2015 incident, despite noticing pain and numbness at his work for Respondent since approximately June 2014. The arbitrator

finds that it should have become apparent to Petitioner, at or around that 6 months mark after starting work for respondent, that his developing hand condition was potentially linked to his new job. Instead, Petitioner does not report or complain of his hands until 2016. He was regularly in the care of doctors treating for his fingers, particularly the left index finger, yet it does not appear in the medical and Dr. Fink admits, Petitioner was not reporting bilateral hand/wrist pain or issues. The arbitrator does not find the Petitioner to be untruthful, but acknowledges that it seems clear that these bilateral hand complaints were not made to the treating physicians in a reasonable and timely fashion for one reason or another. The doctors appear to agree regarding Petitioner having bilateral carpal tunnel syndrome and possibly needing surgery however, Dr. Fernandez and the Respondent do not believe this diagnosis is related to Petitioner's employment as a massage therapist with Respondent, and the Arbitrator agrees and further elaborates below.

Dr. Fernandez testified that he did not believe Petitioner's bilateral carpal tunnel syndrome was related to his activities as a massage therapist because of the (1) temporality of Petitioner's onset of symptoms and (2) the type of force Petitioner's job duties required. Id. at 76. Dr. Fernandez explained the force of Petitioner's job duties as:"[i]t is the type of force. There's a difference in the force that's required to push on somebody with a palm, use an instrument, to push deeply into somebody with a knuckle or hand, and the force of gripping a tool and doing that on a repeated enough basis that it would contribute to carpal tunnel. Id. at 76. Dr. Fernandez testified that he did not believe the trigger finger was related either for the same reasons. Id. at 77.

Further on 10-29-2015 Petitioner underwent an EMG/NCV by Dr. Kiang but notably not for any prior suspicion nor diagnoses of carpal tunnel syndrome. Dr. Kiang took a history of "… During the course of his employment for Terminal Gateway Spa Inc., his manager accidently shut his fingers in the door causing pain and limitation of motion in the patients left hand and second and third fingers. He denies any bowel, balance or bladder problems. His left hand MRI scan showed no acute traumatic injury demonstrated. He presents today for further electrodiagnostic medicine and consultation and treatment.". (Px1) Dr. Kiang did not note a history of bilateral hand/ wrist pain. Dr. Kiang diagnosis was " Severe right carpal tunnel syndrome affecting only the motor aspect of the nerve and mild left carpal tunnel syndrome affecting only the motor aspect of the nerve not likely due to his work injury with contributory left 2nd and 3rd fingers." (Px1) The arbitrator finds this opinion to be persuasive as to causal connection between the carpal tunnel diagnosis and the manifestation date of 10/28/15, and whether Petitioner suffered these bilateral hand injuries that arose out of and were in the course of his employment with Respondent. The right hand was noted to be worse, despite Petitioner reporting worse pain in the left hand. The arbitrator also notes Petitioner's self-reported use of hand braces for some time prior to working for Respondent as well.

The Arbitrator notes that Dr. Fink stated in his deposition that the first time he reviewed the EMG performed by Dr. Kiang was on his 3-30-16 visit with Petitioner. At that time Dr. Fink diagnosed bilateral carpal tunnel syndrome. (Px14, pg. 47). The office note reflects that Dr. Fink prescribed carpal tunnel release to both wrists with the right hand first because it is more severe than the left (Px6). The carpal tunnel syndrome was determined/found due to the EMG being ordered due to the acute injuries to the left index finger, not for any reported hand complaints. The arbitrator finds this to be significant here, as well as the year plus delay in reporting issues with the bilateral hands

in relation to carpal tunnel symptoms after starting work for respondent in January 2014. On 11-10-21 Dr. Fink testified that he initially recommended to perform the right carpal tunnel first and then the left because the left was more severe. However, at his 11-9-2016 visit Dr. Fink changed his recommendation to perform the left carpal tunnel procedure first because the left hand complaints became more severe than the right. (PX14, pg. 52-53).

Most importantly, the Arbitrator is persuaded by IME Dr. Fernandez and his explanation of carpal tunnel syndrome, Petitioner's job and the timeline of Petitioner's pain complaints and treatment. This second case again revolves around the 10/28/15 manifestation for the alleged bilateral carpal tunnel and whether this additional diagnosis arises out of Petitioner's employment with respondent and is causally related.

On 1-17-2022 Dr. Fernandez stated in his deposition that at the time of his examination at Respondents request on 11-14-2019, he noted that Petitioner has not worked for four years, however, during this time petitioner's symptoms have increased. Dr. Fernandez stated that this is unusual given the fact that if the carpal tunnel syndrome was to be deemed work related due to repetitive exposure frequency, there would be a significant improvement in symptoms while being off work. (Rx1 pg.52). In addition, Dr. Fernandez stated that he saw no reason why Petitioner could not return to work as a massage therapist. (Rx 1 at pg 52). Dr. Fernandez further stated in his IME report dated 11-14-2019 that, "There is no indication that Petitioner was having numbness or tingling complaints as part of his general work duties as a massage therapist. In addition, to the physical demand level is defined as light. While the activities involve some pushing, gripping, and pulling, including the use of tools these are variable or intermittent in nature and even assuming that there were more frequent in nature, these would not be the type or nature that would cause or aggravate the underlying carpal tunnel syndrome even from a non-traumatic "repetitive" exposure theory. (Rx1 &3, 11-14-19 Fernandez report at pg7).

The Arbitrator is not convinced that the bilateral carpal tunnel diagnoses are casually related to Petitioner's job with Respondent, nor that the alleged repetitive trauma manifested on 10/28/15 as Petitioner argues. The Arbitrator finds that Petitioner did not suffer a work-related repetitive trauma injury to his bilateral hands/wrists (carpal tunnel) and trigger finger of the index and middle fingers of the bilateral hands, that arose out of and was in the course of petitioner's employment for the reasons previously explained. While the Arbitrator finds Petitioner to be overall credible and the treating physician Dr. Fink to be credible and persuasive regarding the 8/30/15 left index and middle finger acute injuries and conditions, the Arbitrator finds Dr. Fernandez to be more persuasive on the issue of whether or not the bilateral carpal tunnel syndrome arose out of Petitioner's employment with Respondent. After review of the record, and specifically the testimony from both Dr. Fink and Dr. Fernandez, the Arbitrator finds that on the alleged manifestation date of October 28, 2015, Petitioner did not sustain an accidental injury to his bilateral hands/wrists that arose out of and were in the course of Petitioner's employment with Respondent. In conclusion, Petitioner failed to prove that a causal relationship exists between the bilateral carpal tunnel conditions and trigger finger conditions, and an alleged manifestation of this medical condition sustained on 10-28-2015. Therefore, benefits are denied.

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

Having found for Respondent on the issue of accident, all other issues are moot, and all benefits for Petitioner are hereby denied.

The Arbitrator was persuaded by IME Dr. Fernandez and his explanation above regarding carpal tunnel syndrome, Petitioner's job and the timeline of Petitioner's pain complaints and treatment. This second case again revolved around bilateral carpal tunnel and trigger fingers and whether these additional diagnoses for Petitioner's current condition of ill being are causally connected to alleged injury on 10/28/15 and require surgical repair. Respondent does not deny Petitioner has carpal tunnel but rather that is unrelated to his work duties and employment with Respondent. On 1-17-2022 Dr. Fernandez stated in his deposition that at the time of his examination on 11-14-2019, he noted that Petitioner has not worked for four years, however, during this time petitioner's symptoms have increased. Dr. Fernandez stated that this is unusual given the fact that if the carpal tunnel syndrome was to be deemed work related due to repetitive exposure frequency, there would be a significant improvement in symptoms while being off work. (Rx1 pg.52). In addition Dr. Fernandez stated that he saw no reason why Petitioner could not return to work as a massage therapist. (Rx 1 at pg 52.). Dr. Fernandez further stated in his IME report dated 11-14-2019 that, "There is no indication that Petitioner was having numbness or tingling complaints as part of his general work duties as a massage therapist. In addition, to the physical demand level is defined as light. While the activities involve some pushing, gripping, and pulling, including the use of tools these are variable or intermittent in nature and even assuming that there were more frequent in nature, these would not be the type or nature that would cause or aggravate the underlying carpal tunnel syndrome even from a non-traumatic "repetitive" exposure theory. (Rx1 &3, 11-14-19 Fernandez report at pg7).

Based on the above, the arbitrator further finds Petitioner failed to prove that a causal relationship exists between the bilateral carpal tunnel condition and trigger finger conditions and the alleged accidental injuries sustained on 10-28-2015. Therefore, benefits are denied.

Issue G, Petitioner's earnings, the Arbitrator finds as follows:

Having found for Respondent on the issue of accident and causation, all other issues are moot, and all benefits for Petitioner are hereby denied.

Issue H, Regarding Petitioner's age, marital status and dependent children at the time of the accident, the Arbitrator finds as follows:

Having found for Respondent on the issue of accident and causation, all other issues are moot, and all benefits for Petitioner are hereby denied.

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:

Having found for Respondent on the issue of accident and causation, all other issues are moot, and all benefits for Petitioner are hereby denied. The Arbitrator adds that Petitioner treated for both the left index and middle finger injuries and the bilateral carpal tunnel syndrome with Dr. Fink but separately addressed the payment of bills related to the prior 15WC30755 case. Bills for the prior finger injuries incurred before 3/30/16 were previously deemed to be reasonable, necessary and related. No bills for bilateral carpal tunnel/trigger fingers are awarded.

Issue K, whether Petitioner is entitled to prospective medical care, the Arbitrator finds as follows:

Having found for Respondent on the issue of accident and causation, all other issues are moot, and all benefits for Petitioner are hereby denied.

The Arbitrator denies prospective medical treatment to the petitioner. This finding is based on the opinions of Dr. Fernandez and the timeline of Petitioner's reported hand complaint as previously explained above. The arbitrator found that the petitioner's bilateral carpal tunnel and trigger conditions of the hands/wrists are not causally related to any alleged 10/28/15 work injury with Respondent. The arbitrator found Petitioner failed to prove that a causal relationship exists between the bilateral carpal tunnel conditions and trigger finger conditions, and an alleged accidental injury sustained on 10-28-2015. Since the requested prospective treatment is solely for the bilateral hands/wrists, all prospective treatment is hereby denied.

Issue L, whether Petitioner is entitled temporary total disability benefits, the Arbitrator finds as follows:

Having found for Respondent on the issue of accident and causation, all other issues are moot, and all benefits for Petitioner are hereby denied.

It is so ordered:

Jacqueline C. Hickey

Jacqueline C. Hickey
Arbitrator

5/16/23
Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC026314
Case Name	Adam Ciccarelli v. KEHE Distributors Inc.
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0072
Number of Pages of Decision	11
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Joseph J. Leonard
Respondent Attorney	David Poulos

DATE FILED: 2/7/2024

/s/Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ADAM CICCARELLI,

Petitioner,

vs. NO: 21 WC 26314

KEHE DISTRIBUTORS, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability (TTD) benefits, permanent partial disability (PPD) benefits and credit, and being advised of the facts and law, reverses the Decision of the Arbitrator.

FINDINGS OF FACT

Job Duties/Injury

Petitioner testified that he had worked for Respondent for 27 years as a delivery driver prior to September 10, 2021. (T.7-8; T.10). His job duties involved driving a tractor-trailer delivering groceries. (T.8-9). Petitioner's Exhibit 18 documented Petitioner's route for September 10, 2021 and showed the number and order of stops, as well as the number of pallets of dry goods, dairy food and frozen food he had to deliver. (T.10-13; T.19-21; T.25; T.29; PX18). Petitioner used a jack to unload the pallets and explained that unloading dairy or frozen pallets involved cutting shrink wrap which was different than unloading the pallets with dry goods, "and I would have to bend down, pick them up, stack them on the cart. When the cart is full, then I would pull it or push it to the cooler." (T.12-14; T.16-17; T.19). Petitioner confirmed that his job duties also involved reaching, lifting and carrying and he agreed that Petitioner's Exhibit 2, Respondent's job description for a driver, accurately reflected his job duties. (T.26-28; PX2).

Petitioner made approximately four stops prior to 8:00 a.m. on September 10, 2021 and noticed that he was sore from doing his deliveries. "I got into my truck and I started driving to my

next store and that's when I noticed a sharp pain in my back and going down my leg." (T.29-31). Petitioner reported his condition to Brandon Rowald and completed his route. (T.31-33).

Petitioner also completed an Employee Statement on September 13, 2021. The form stated that the time of injury was between 8:00 a.m. and 9:00 a.m. on September 10, 2021. The description of the injury was: "I was driving my tractor between delivery stops when I got sharp pain in lower back and got increasingly worse throughout the day." (PX1). Petitioner described his pain as "strong pain in lower back numbness in right leg throughout day" and that it was sudden and increased throughout the day. (PX1). Petitioner further testified that he provided a recorded statement to Travelers Insurance Company by phone wherein he described his condition on September 10, 2021. (T.38; PX3). Respondent did not offer the recorded statement into evidence.

Medical Evidence

Respondent sent Petitioner for treatment at Edwards Occupational Health on September 10, 2021. (T.33-34; PX4). The medical records documented that Petitioner noted low back pain that radiated down his right leg while working although the histories varied as to when Petitioner noticed his symptoms, *i.e.*, after a delivery and stepping out of the truck, after picking up a load and getting into his vehicle. (T.34; PX4). Petitioner denied any prior low back injuries, treatment or tests. (T.9; PX4). Examination findings included spasms in Petitioner's back, no tenderness over the right lower lumbar paraspinal and positive straight leg raise on the right. Petitioner was diagnosed with acute right-sided low back strain. The physician assistant recommended conservative treatment, took Petitioner off work and ordered x-rays of the lumbar spine. (PX4).

Petitioner visited the emergency department at Bolingbrook Hospital about six hours later on September 10, 2021 due to more back pain. (T.35; PX4). He completed x-rays on September 11, 2021 which revealed a mild compression deformity of the superior endplate of L5 of undetermined age as well as degenerative changes of the lumbar spine. (PX9). The hospital record stated that Petitioner had noticed low back pain while driving his truck that morning, that he denied any fall and that he worked on his feet for long hours at a time. (PX4; PX9).

Petitioner next consulted with Dr. Ramsis Ghaly, a neurosurgeon with Ghaly Neurosurgical Associates, on September 14, 2021. The medical records indicated that Petitioner was working as a driver delivering groceries on September 10, 2021, that his duties involved loading, lifting, bending, twisting, getting in and out of his truck all day, carrying and overhead work, and that he was driving to work, driving his truck when he began to have increasing sharp back pain. (T.36; PX10). Petitioner denied having back pain on his way to work on September 10, 2021. (T.72).

Dr. Ghaly noted that Petitioner's pain in the lower back traveled down to his foot. He also had numbness and tingling in the middle toes. The visit note stated that Petitioner never had back pain like this, only intermittently every year or so, and never had leg pain, numbness or tingling. The record further noted that Petitioner did not have an impact or fall. Examination findings included positive right leg raising test with decreased pinprick sensation in the L5-S1 distribution. Dr. Ghaly reviewed the x-rays of the lumbar spine and believed Petitioner had a disc herniation at L5-S1 that was pushing into the nerve going down the leg. He recommended that Petitioner start

with physical therapy and medication before considering an injection or a microdiscectomy. (PX10).

Petitioner next saw his family physician at Woodridge Clinic on September 23, 2021. The medical record stated that Petitioner began feeling pain on his right side, from the gluteus radiating down to the calf with tingling and numbness in the toes, after delivering groceries and stepping down from the truck on September 10, 2021. Petitioner was referred to Dr. Carl Graf and Dr. Cary Templin and given an off work slip. (T.36-37; T.44-45; T.57-58; PX6; PX7).

Petitioner consulted with Dr. Graf on September 27, 2021 at Illinois Spine Institute. (T.37; PX13). The visit note documented Petitioner's job duties for Respondent which involved delivering thousands of pounds of food and lifting, and that on September 10, 2021, Petitioner began noticing right radiating leg pain and paresthesia after his fourth or fifth stop. Dr. Graf examined Petitioner and noted normal gross motor strength, numbness and paresthesia in the right L5 greater than S1 distribution and positive sitting straight leg raise on the right. Dr. Graf reviewed x-rays of the lumbar spine and diagnosed Petitioner with low back pain, lumbar radiculopathy and partial foot drop. He placed Petitioner on a Medrol Dosepak, ordered physical therapy and an MRI of the lumbar spine, and took Petitioner off work. (PX13).

Petitioner underwent physical therapy at Athletico from October 1, 2021 through April 1, 2022 [the date range included his post-operative therapy]. (T.37-38; PX19). The October 1, 2021 Initial Evaluation noted that Petitioner was driving for work on September 10 when he felt a sharp pain in his back that traveled down the leg to his foot. The report further stated that when Petitioner got out of his truck at the next stop, his pain worsened and he had difficulty lifting his right foot and toes off the ground. "He reports no history of back pain but says he has experienced soreness in his back related to lifting and pushing as a food delivery driver." (PX19).

Petitioner completed the MRI of the lumbar spine on October 4, 2021 at Advanced Physicians MRI & Imaging Center. (T.37; PX13). Dr. Graf reviewed the results of the MRI on October 22, 2021 and noted a right paracentral disc herniation at L4-5 causing lateral recess stenosis. He further noted foraminal stenosis on the right side at L5-S1 that was encroaching on the L5 root. Dr. Graf recommended a lumbar epidural steroid injection and continued physical therapy. (PX13).

Petitioner underwent the right L5-S1 and S1 lumbar transforaminal epidural steroid injection on November 16, 2021 with Dr. Shawn Kumar. Petitioner followed-up with Dr. Graf on December 3, 2021 and reported improvement in strength and decreased paresthesia in the right foot. Petitioner underwent a second procedure on December 9, 2021, a right L4-5, L5-S1 transforaminal epidural steroid injection. (T.37; T.39; PX12; PX13). On December 29, 2021, Petitioner informed Dr. Graf that he had minimal improvement after the second injection. He also reported that his radiating pain had improved but he continued to have numbness and weakness in the right foot. Dr. Graf ordered another MRI of the lumbar spine which Petitioner completed on January 10, 2022. The results indicated spondylotic degenerative changes with the most severe findings at L5-S1. There was also moderate to severe right neuroforaminal stenosis at that level. (T.39; PX13).

Dr. Graf reviewed the results of the second MRI on January 19, 2022 and stated that the findings were much improved when compared to the prior MRI and that Petitioner had a right paracentral disc herniation at L4-5 causing lateral recess stenosis. Dr. Graf recommended proceeding with a minimally invasive lumbar decompression and discectomy. Petitioner underwent surgery on February 16, 2022 at Speciality SurgiCare. His post-operative diagnoses were lumbar radiculopathy, partial right foot drop, right L4-5 lateral recess stenosis and right L4-5 lumbar disc herniation. (T.40; PX12). Petitioner testified that the surgery helped him. "No pain. I had foot drop and that basically went away." (T.40-41; PX13).

On April 8, 2022, Petitioner reported to Dr. Graf that he felt 100-percent improved, his strength had returned but he still had some minimal residual numbness. Dr. Graf allowed Petitioner to return to work full duty and wanted him to follow-up in one month's time. "[A]s long as he continues to do well I will release him at MMI at the juncture." (T.41; PX13). Petitioner returned to work for Respondent as a delivery driver. He now worked full-time on a different route. (T.7; T.41). As to his present condition, Petitioner testified: "Right now it feels good, I still am a little sore once in a while, but nothing that I went through when I had the injury. I feel much better." (T.42).

During arbitration, Petitioner reviewed his medical records with Respondent's attorney and agreed that the records did not mention injury due to lifting or an acute fall or accident. (T.45-49). He also did not believe that he told the ER he had injured himself lifting. "They asked me when did this happen, and I told them while I was driving my truck at work." (T.53; T.55). He added: "I probably told them I felt the pain when I was stepping down more." (T.55). Petitioner testified that it would be incorrect if the ER record stated that he injured himself while stepping down from the truck. He agreed that his onset of pain was sudden. (T.56). He further stated: "I told them exactly what I told everybody else. I was driving the truck and that's when the pain occurred. When I stepped out of my truck, there was more pain in my leg radiating." (T.59-60). Petitioner testified that he gave Dr. Graf the same history as everyone else. (T.60-61).

Depositions

Dr. Graf's evidence deposition was taken on May 9, 2022. He confirmed that he is a board-certified orthopedic spine surgeon and that he had reviewed a recorded statement, medical records from Woodridge Clinic, Dr. Ghaly and Edward-Elmhurst Health, as well as Dr. Ghanayem's Section 12 report and Petitioner's job description. (PX14, pgs. 6-8). Dr. Graf testified consistent with Petitioner's medical records from his office.

Dr. Graf explained that Petitioner's findings from the October 2021 MRI were consistent with his physical examination and that he believed the L5 nerve root was a potential cause for Petitioner's partial foot drop condition. (PX14, pgs. 12-13). He also testified that the January 2022 MRI demonstrated improvement of the disc herniation but there was still compression on the nerve root. (PX14, pg. 15). Dr. Graf denied that the findings represented chronic degenerative changes and denied that Petitioner suffered an aggravation of any pre-existing condition. "No. There was an extruded disk herniation . . . [a]nd the fact that I found an extruded disk herniation at the time of surgery supports that as well." (PX14, pgs. 37-38; pg. 54).

Dr. Graf additionally stated that Petitioner had a follow-up appointment scheduled for May 11, 2022 to ensure that he was able to tolerate full-duty level work. However, there were no further visit notes in evidence after April 8, 2022. (PX13; PX14, pg. 18; pgs. 27-28). Dr. Graf confirmed that the medical services provided by his office, Surgicare and Dr. Kumar had been reasonable and necessary. (PX14, pgs. 18-20; pgs. 26-27).

With respect to causal connection, Dr. Graf opined: "[H]is diagnosis of a lumbar disk herniation at L4-5 and the subsequent care and treatment would be considered causally related to the claimed injury in question from September 10th, 2021." (PX14, pgs. 20-21). He noted that Petitioner had been lifting thousands of pounds of food on that date and then had an onset of pain while driving. (PX14, pg. 21). Dr. Graf added: "[H]e has a very physically demanding job, lifting, bending, twisting, delivering food. It's not uncommon that somebody with such will develop a tear in the back of the disk, as you noted, an annular tear." (PX14, pg. 23).

Dr. Graf acknowledged that Petitioner did not inform him how often he used the pallet jack in the course of a typical work day and he did not know the exact items Petitioner had been lifting on the alleged injury date except that it was some food item. (PX14, pgs. 29-31). He also did not know how much the items weighed, or how many items Petitioner had to lift during the course of the workday, and Petitioner did not mention any specific instance where he was lifting and felt an onset of pain. (PX14, pgs. 31-32). Dr. Graf testified that even without the information, his opinion remained the same. (PX14, pg. 32). He further acknowledged that the history varied a little bit in the medical records and that Petitioner did not indicate that he had had an issue with his seat or seat belt on the alleged injury date. (PX14, pgs. 32-34).

Dr. Graf additionally testified that the five to six hours Petitioner worked before the onset of symptoms was "the cause of his disk herniation or subsequent pain, numbness, weakness, and subsequent treatment." (PX14, pgs. 48-51). Dr. Graf testified that oftentimes patients would have an onset of pain similar to Petitioner. "A lot of patients will perform an activity like this and then have some pain and symptoms which were increased the next morning. That's extremely common. So no, there's not always an immediate onset of pain." (PX14, pg. 53; see also pgs. 50-53).

The parties also took the evidence deposition of Dr. Alexander Ghanayem on July 25, 2022. Respondent had sent Petitioner for a Section 12 examination with Dr. Ghanayem at Loyola University Medical Center on February 3, 2022. Dr. Ghanayem testified consistent with his Section 12 report. (T.39; PX15; RX1; RX2). He is a board-certified orthopedic spine surgeon. (RX2, pgs. 5-6).

Dr. Ghanayem testified that Petitioner informed him that he drove a semi-truck and that on September 10, 2021, "he was driving the tractor-trailer and noticed pain and numbness in his right leg." (RX2, pgs. 10-11; pgs. 14-15). Dr. Ghanayem specifically asked Petitioner and Petitioner denied lifting anything at the time symptoms developed or that there had been an issue with the truck itself. Dr. Ghanayem stated that Petitioner's back and leg pain had gone away by the date of the evaluation. (RX2, pg. 11; pg. 15). Petitioner only felt a little weak in his foot with numbness over the top of the foot. (RX2, pgs. 11-12).

Dr. Ghanayem examined Petitioner and indicated that he did not have foot drop. (RX2, pg. 12). Petitioner also exhibited no pain with palpation to his back, he had normal lumbar range of motion without pain, but he did have one grade of weakness on his great toe extensor on the right side. Petitioner's ankle dorsiflexion was a 4+ out of five, straight leg raise was negative and he had some subjective sensory loss on the dorsum of his foot. (RX2, pgs. 12-13). Dr. Ghanayem reviewed Petitioner's MRI images and noted disc disease involving the lower four discs with a disc osteophyte bone spur complex at L4-5 that was causing some lateral recessed stenosis at that level. (RX2, pg. 13).

Dr. Ghanayem's overall diagnostic impression was that Petitioner had a little bit of weakness but that he was still functional to perform his job duties, and Petitioner also had some numbness in the top of his foot. (RX2, pgs. 13-14). Dr. Ghanayem opined that Petitioner did not require surgery even though he did have radiographic evidence of stenosis and his subjective complaints were consistent with the objective findings. "The numbness made sense based on L4/5. And having, you know, a little bit of toe extensor weakness and anterior tibialis weakness also tracks back to L4/5. So clinically there was no goofiness, if you will." (RX2, pg. 14).

With respect to causation, Dr. Ghanayem opined that he did not believe an injury occurred because Petitioner was simply driving a truck when the onset of symptoms developed. (RX2, pgs. 14-16). He confirmed that he had no other information regarding Petitioner's job duties on the alleged accident date or any other history that may have been given to other providers. (RX2, pgs. 18-23). Dr. Ghanayem also added that he would expect symptoms to manifest right away after an inciting event. "You've got to feel like something - - you have to be doing something and something wasn't right, and you felt like a pain, or a pop, or a catch. You have to have something." (RX2, pg. 26). Regardless of causation, Dr. Ghanayem opined that Petitioner's medical treatment through the date of the Section 12 examination had been reasonable and necessary. (RX2, pg. 20; pg. 27). He also testified: "If you had a bona fide lumbar radiculopathy with a foot drop, surgery can be reasonable." (RX2, pg. 31).

CONCLUSIONS OF LAW

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

The Arbitrator did not find Petitioner credible because of the various accounts of the alleged injury noted in the arbitration record and thus determined that Petitioner failed to establish that he sustained a work-related accident and that his current condition of ill-being was causally related to that accident. The Commission is not bound by the Arbitrator's findings. Our Supreme Court has long held that 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. Indus. Comm'n*, 291 Ill. App. 3d 734, 740 (1997) (citing *Kirkwood v. Indus. Comm'n*, 84 Ill. 2d 14, 20 (1981)). Interpretation of medical testimony is particularly within the province of the Commission. *A.O. Smith Corp. v. Indus. Comm'n*, 51 Ill. 2d 533, 536-37 (1972). The Commission has considered all the testimony, exhibits, pleadings and arguments submitted by the parties.

The Commission finds that the overall histories documented in the record were not identical but were consistent with Petitioner's testimony that he noticed the onset of back pain while driving his truck and after working approximately four hours delivering pallets of grocery goods on September 10, 2021. Petitioner's testimony was corroborated by Petitioner's Exhibit 18 which indicated that Petitioner had unloaded approximately a dozen pallets of food items by the time he began noticing symptoms. The medical records also provided context regarding Petitioner's onset of pain while working – noting that his pain began after a delivery, or that prior to him getting into the truck, he had picked up a load. The records additionally noted that Petitioner worked on his feet for long hours, did a lot of lifting, bending, twisting, carrying, overhead work, pushing and that he was in and out of his truck all day. Petitioner had testified to the physical nature of his job duties as well and his testimony was corroborated by Respondent's job description for a driver. Throughout his testimony at arbitration, Petitioner never deviated from his testimony regarding the onset of back pain which was also consistent with the Employee Statement completed on September 13, 2021. He further credibly explained any inconsistencies in the record.

Based on the preponderance of the evidence, the Commission finds that Petitioner sustained an injury while working for Respondent on September 10, 2021. The Commission therefore reverses the Arbitrator's Decision on the issue of accident.

The Commission also reverses the Arbitrator's Decision with respect to causal connection. Petitioner had worked for Respondent for 27 years. He denied any prior back injuries and denied undergoing any treatment or tests related to his low back prior to September 10, 2021.

Respondent relied on the opinions of its Section 12 examiner, Dr. Ghanayem, who did not believe any injury occurred because Petitioner was simply driving a truck when the onset of symptoms developed. Dr. Ghanayem therefore found no causal relationship between Petitioner's work for Respondent and his low back condition. He acknowledged, however, that he had no other information regarding Petitioner's job duties on September 10, 2021 or any other history that may have been given to the other medical providers.

Dr. Graf, on the other hand, testified that Petitioner's onset of pain began while driving between stops and after lifting thousands of pounds of food. Dr. Graf added that Petitioner had a physically demanding job that involved lifting, bending, twisting, delivering food and that these movements could lead to a disc tear. Dr. Graf admitted that he did not know how often Petitioner used the pallet jack in the course of a typical work day but he believed Petitioner had been lifting food items on September 10, 2021. He also did not know how much the items weighed, or how many items Petitioner had to lift during the course of the workday, and Petitioner did not mention any specific instance where he was lifting and felt an onset of pain. Notwithstanding, Dr. Graf's opinions remained the same.

Dr. Graf further testified that Petitioner's findings from the October 2021 MRI were consistent with his physical examination. Dr. Graf had noted a right paracentral disc herniation at L4-5 causing lateral recess stenosis as well as foraminal stenosis on the right side at L5-S1 that was encroaching on the L5 root. He explained that the L5 nerve root was a potential cause for Petitioner's partial foot drop condition. Dr. Graf additionally testified that the January 2022 MRI demonstrated improvement of the disc herniation but there was still compression on the nerve root.

He opined that Petitioner's lumbar spine condition and the subsequent care and treatment were causally related to the September 10, 2021 work accident, and testified that the extruded disc herniation was more likely than not related to Petitioner's work activities. Dr. Graf denied that the findings on the January 2022 MRI represented chronic degenerative changes or that Petitioner suffered an aggravation of any pre-existing condition.

The Commission finds Dr. Graf's opinions more persuasive than Dr. Ghanayem's opinions as Dr. Graf's opinions were based on a more thorough understanding of Petitioner's work activities prior to the onset of symptoms on September 10, 2021. The Commission also finds compelling Dr. Graf's explanation of Petitioner's mechanism of injury and the resulting condition of ill-being which was consistent with Dr. Graf's physical examination and review of the MRIs. The Commission notes that notwithstanding his causation opinion, Dr. Ghanayem also believed Petitioner to be credible and even testified that his subjective complaints were consistent with the objective findings. The Commission therefore finds that Petitioner proved by a preponderance of the evidence that his condition of ill-being in the lumbar spine with partial right foot drop is causally related to the September 10, 2021 work accident.

The Commission next finds that Petitioner is entitled to worker's compensation benefits. Respondent primarily disputed liability for benefits based on its position on accident and causal connection. For the claimed medical bills, Respondent did not dispute the reasonableness or necessity of the treatment. The Commission notes Dr. Ghanayem's opinion that Petitioner's medical treatment through the date of the Section 12 examination [February 3, 2022] had been reasonable and necessary irrespective of causation. Dr. Graf also testified that the medical services provided by his office, Surgicare and Dr. Kumar [for the injections] had been reasonable and necessary. The Commission therefore awards the following medical bills, representing the reasonable and necessary treatment rendered to Petitioner as a result of the September 10, 2021 work accident, pursuant to Sections 8(a) and 8.2 of the Act:

a) Surgicare Limited Specialty	$17,415.19	(PX12; PX14, Dep. Ex. 3)
b) Illinois Spine Institute	$32,980.54	(PX14, Dep. Ex. 2)
c) Ghaly Neuro Associates	$650.00	(PX11)
d) Adventist Bolingbrook Hospital	$6,166.82	(PX8)
e) Athletico	$4,495.47	(PX17)

TOTAL: $61,708.02

With respect to TTD benefits, the evidence demonstrated that Petitioner sought treatment at Edwards Occupational Health on September 10, 2021 and was immediately taken off work. Petitioner remained off work until he saw Dr. Graf on April 8, 2022 and Dr. Graf allowed him to return to work full duty. The Commission therefore finds that Petitioner is entitled to TTD benefits from September 11, 2021 through April 8, 2022.

The Commission additionally finds that pursuant to the parties' stipulation, Respondent is entitled to a credit under Section 8(j) of the Act in the amount of $12,378.50. Respondent shall

hold Petitioner harmless from any claims by any providers of the services for which Respondent receives credit pursuant to Section 8(j) of the Act.

Finally, as to PPD benefits, the Commission has considered and weighed the five factors under Section 8.1b of the Act as follows:

(i) Impairment Rating: The parties did not offer any impairment rating into evidence. The Commission gives this factor no weight.

(ii) Occupation of Injured Employee: Following his full duty release on April 8, 2022, Petitioner returned to work for Respondent as a delivery driver. He testified that he worked full-time but on a different route. The Commission gives this factor moderate weight.

(iii) Petitioner's Age: Petitioner was 57 years old on the accident date; neither party submitted evidence into the record which would indicate the impact of Petitioner's age on any permanent disability resulting from the September 10, 2021 work accident. Nonetheless, the Commission finds that Petitioner must still live with this disability and gives moderate weight to this factor.

(iv) Petitioner's Future Earning Capacity: There is no evidence in the record as to reduced earning capacity. The Commission gives this factor no weight.

(v) Evidence of Disability: Evidence of Petitioner's disability is corroborated by the treating medical records. Following the September 10, 2021 work accident, Petitioner was diagnosed with lumbar radiculopathy, partial right foot drop, right L4-5 lateral recess stenosis and right L4-5 lumbar disc herniation. Petitioner was prescribed medication, underwent physical therapy, lumbar transforaminal epidural steroid injections and a minimally invasive lumbar decompression and discectomy.

Petitioner was released to full duty work on April 8, 2022. He testified that the surgery helped him and that his foot drop condition resolved. Petitioner further testified at arbitration: "Right now it feels good, I still am a little sore once in a while, but nothing that I went through when I had the injury. I feel much better." (T.42). The Commission gives this factor significant weight.

In light of the foregoing, with no single enumerated factor being the sole determinant of disability, the Commission finds that Petitioner is entitled to 15% loss of use of the person as a whole pursuant to Section 8(d)2 of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed on May 3, 2023, is hereby reversed for the reasons stated above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the reasonable, necessary, and related medical bills in the amount of $61,708.02 pursuant to Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner temporary total disability benefits of $1,376.55 per week for 30 weeks, from September 11, 2021 through April 8, 2022, 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 receive a credit pursuant to Section 8(j) of the Act in the amount of $12,378.50 per the parties' stipulation. Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent receives credit pursuant to Section 8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner permanent partial disability benefits of $937.11 per week for 75 weeks because the injuries sustained caused fifteen-percent (15%) loss of use of the person as a whole pursuant to Section 8(d)2 of the Act.

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

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

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

February 7, 2024

CAH/pm
O: 1/18/24
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	07WC055954
Case Name	Juan Ballesteros v. Chicago Hilton & Towers
Consolidated Cases	07WC055955; 08WC025987;
Proceeding Type	8(a)/19(h) Petition
Decision Type	Commission Decision
Commission Decision Number	24IWCC0073
Number of Pages of Decision	18
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Pro Se
Respondent Attorney	Dennis Noble

DATE FILED: 2/8/2024

/s/Kathryn Doerries, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JUAN BALLESTEROS,

Petitioner,

vs. NOS: 07 WC 055954

CHICAGO HILTON & TOWERS,

Respondent.

DECISION AND OPINION ON §19(h) AND §8(a) PETITION

These consolidated cases, 07 WC 55954, 07 WC 55955 and 08 WC 25987, come before the Commission on Petitioner's §19(h) and §8(a) Petition, alleging a material increase in his disability since the Commission's previous Decision and Opinion on Review (12 IWCC 0187) dated February 21, 2012. A hearing on the Petition was held before Commissioner Kathryn A. Doerries on June 15, 2023, in Chicago, Illinois and a record was made. The Commission, having considered the entire record, finds that Petitioner failed to prove a material increase in disability and that as a result Petitioner's §19(h) and §8(a) Petition is denied, for the reasons set forth below.

BACKGROUND AND HISTORY OF THE CASES AT ARBITRATION AND APPEAL

Petitioner filed three Applications for Adjustment of Claim alleging he sustained accidental injuries that arose out of and in the course of his employment on three dates. The cases were consolidated and an Arbitration Hearing was held on multiple dates in Chicago before Arbitrator Milton Black on June 28, 2010, August 18, 2010, September 20, 2010, October 19, 2010, and November 17, 2010. (6/15/23 Illinois Workers' Compensation "IWCC" Hrng., RX5) In an Arbitration Decision filed February 15, 2011, the Arbitrator found that Petitioner sustained accidental injuries on November 3, 2007, and May 10, 2008, that arose out of and in

the course of his employment and, further, that Petitioner did not sustain his burden of proving an accident that arose out of and in the course of his employment on January 17, 2007 (07 WC 55954). *Id.* @Arb.Dec.[Form], p. 2. The Arbitrator found Petitioner's current condition of ill-being is not causally related to the claimed accident of January 17, 2007, because no accident occurred on that date.

The Arbitrator's Order states the following:

Respondent shall be given a credit of $11,712.64 for TTD, $0 for TPD, and $0 for maintenance benefits, for a total credit of $11,712.64.

Respondent shall be given a credit of $5,542.55 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 receive a credit for all amounts paid to or on behalf of Petitioner on account of said accidental injuries.

Respondent shall pay Petitioner temporary total disability benefits of $424.67 /week for 27 weeks, commencing December 1, 2007 through December 28, 2007, commencing May 11, 2008 through August 11, 2008, commencing August 17, 2009 through September 28, 2009, and commencing January 30, 2010 through February 26, 2010, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from December 1, 2007 through February 26, 2010, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall pay reasonable and necessary medical services of $321,809.36, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $382.20/week for 200 weeks, because the injuries sustained caused the 40% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

The Arbitrator found that "Petitioner's sustained substantial spinal injury, which resulted in fusion surgery. He appears to be able to return to work but with limitations. The medical opinions that Petitioner cannot work are unpersuasive. The vocational evaluation opinions that Petitioner cannot return to his past work as a saucier and that he is not a candidate for vocational rehabilitation are unpersuasive." (6/15/23 IWCC Hrng., RX5, Arb.Dec.[NATURE AND EXTENT], p.6)

Petitioner subsequently filed a Petition for Review of the Arbitration Decision pertaining to all three cases on March 18, 2011, and Respondent filed a cross-review of the cases on March 21, 2011.

In a Decision and Opinion on Review dated February 21, 2012, the Commission unanimously affirmed and adopted the Arbitrator's Decision in its entirety. (6/15/23 IWCC Hrng., RX5)

The Commission Decision was appealed to the circuit court. In an Order dated October 10, 2012, the circuit court affirmed the Commission's decision. (6/15/23 IWCC Hrng., RX5, Circuit Court Order) There were no further appeals and the Decision of the Commission was final.

§19(h) of the Illinois Workers' Compensation Act

> (h) An agreement or award under this Act providing for compensation in installments, may at any time within 18 months after such agreement or award be reviewed by the Commission at the request of either the employer or the employee, on the ground that the disability of the employee has subsequently recurred, increased, diminished or ended.
> However, as to accidents occurring subsequent to July 1, 1955, which are covered by any agreement or award under this Act providing for compensation in installments made as a result of such accident, such agreement or award may at any time within 30 months, or 60 months in the case of an award under Section 8(d)1, after such agreement or award be reviewed by the Commission at the request of either the employer or the employee on the ground that the disability of the employee has subsequently recurred, increased, diminished or ended. *820 ILCS 305/19.*

Petitioner timely filed his §19(h)/§8(a) Petition on January 22, 2014. Petitioner's attorney filed a Motion to Withdraw his representation of Petitioner in October 2015 and that Motion was granted on December 10, 2016. Petitioner proceeded pro se thereafter.

> In reviewing a section 19(h) petition, the evidence presented in the original proceeding must be considered to determine if the petitioner's position has changed materially since the time of the Industrial Commission's first decision. (*Howard*, 89 Ill. 2d 428, 433 N.E.2d 657.) Whether there has been a material change in a petitioner's disability is an issue of fact, and the Industrial Commission's determination will not be overturned unless it is contrary to the manifest weight of the evidence. *Howard*, 89 Ill. 2d 428, 433 N.E.2d 657; *United States Steel Corp*., 133 Ill. App. 3d 811, 478 N.E.2d 1108. *Gay v. Industrial Comm'n*., 178 Ill. App. 3d 129, 132, 532 N.E.2d 1149, 1151, 1989.

The parties stipulated to admission of the 2010 transcripts into evidence as Joint Exhibit 1 ("JtX1") at the Commission Hearing on June 15, 2023.[1]

Petitioner testified to the following at the Arbitration Hearing through an interpreter. Petitioner testified that he has diabetes and takes insulin, Metformin, Actos, Aspirin, pain medications, sleeping medication "maybe three times per week." (6/15/23 IWCC Hrng., JtX1, T. 116-117) Petitioner testified that he also takes medication for dizziness. He described his current pain level "from 8 to 9" on a scale of 1 to 10. He never had back pain or treatment before November 3, 2007. (6/15/23 IWCC Hrng., JtX1, T. 117) He was able to work full days.

When asked what he notices about his back and/or leg at the time of the Arbitration Hearing, Petitioner testified that he has pain in his back and cramping in his leg. He has to lay down after he takes his pain medication. He can sit about 15 minutes. He needs to stand and sit, stand and sit. (6/15/23 IWCC Hrng., Jt.X1, T. 118) He testified that he was sitting more than 15 minutes at the Arbitration Hearing because he thought he had to sit. He did not know he would be permitted to stand. (6/15/23 IWCC Hrng., JtX1, T. 118-119)

When asked how far he could walk unassisted without a cane, Petitioner testified that he had never attempted that. He testified he could not bend, could not lift any weight or twist and he sleeps on his left side. When asked if he could squat, Petitioner testified that, in order to maintain his "muscle sort of flexible," he does the exercises that he was ordered to do at home. He testified Dr. Malek ordered some exercises to keep doing "what I could and not to put too much effort." He was unsure if he could kneel on his knees but did not think he could. (6/15/23 IWCC Hrng., JtX1, T. 120)

Petitioner testified that he climbs six or seven stairs as part of therapy. He could drive before November 3, 2007, but he stopped driving a little over two years prior to the Arbitration Hearing. Petitioner testified that he stopped driving because, "I don't have that much strength or potency to slam on the brakes or-" (6/15/23 IWCC Hrng., JtX1, T. 121)

Petitioner testified as to how he spent his days at the time of the Arbitration Hearing. When he would wake, his wife was cooking breakfast for the kids. Petitioner testified that his wife is the one who takes the kids to school, and he waits for her in bed. *Id.*

After that, Petitioner testified that he sits on his lazy boy and watches the news and then they would go out and walk a little bit. He takes Tylenol medication daily for pain. He would also lie down during the day or take a nap. (6/15/23 IWCC Hrng., JtX1, T. 122)

On cross examination Petitioner testified that between the time of his surgery in

[1] To avoid referencing the multiple Arbitration Hearing dates, page references are from the June 15, 2023, Commission Hearing Transcript.

August of '08 and the time of his testimony, he had other health issues including diabetes and polycythemia. Petitioner explained he was told he produced a lot of blood, and he needed "to have it withdrawn to get it out." (6/15/23 IWCC Hrng., JtX1, T. 156-157)

When asked if he had any type of stroke within the last two years, Petitioner responded, "Something like that I might have-- I might have had because my mouth went sideways, but I don't remember. I don't remember when it happened, but it was in January sometime." It was after his surgery and it affected his ability to walk. He testified, "the way I would walk wasn't correct or wasn't good. I would either have to hold on to a cane or something else. I don't remember what it's called." He did not think that the incident where his mouth went sideways affected his ability to walk. Dr. Malek released him and indicated he should be doing some home exercises but not too much, just what he was able to do. (JtX1, Comm. T. 156-157)

Petitioner further testified that he did his exercises in the morning and the afternoon unless he does not feel good. He does them four or five days per week on average. Petitioner was still in therapy; he was doing home exercises and prescribed therapy. July 29, 2010, was the first time he went to Accelerated Rehabilitation Center. Dr. Malek referred him to this facility because Petitioner told Dr. Malek his legs "are very weak, and there's (sic) those times where I can't even hold." He saw Dr. Malek in July after the prior court appearance but had not seen him for quite some time prior to that visit. Petitioner planned to make an appointment to see Dr. Malek when he finished the six weeks prescribed therapy. (6/15/23 IWCC Hrng, JtX1, T. 159-162)

Petitioner rated his condition at the Arbitration Hearing compared to two weeks before the surgery. He testified, "[t]he pain wise it could be the same because back then I couldn't-I couldn't even sleep. I couldn't turn around, or I couldn't turn around or go on my side, and now it's about the same because the pain gets very strong, and it's on and off, and that's the way it's going." He reiterated his pain level remained pretty consistent from the time of accident to the date of the Arbitration Hearing adding, "[s]ometimes it gets stronger now." Prior to the surgery he did not use a cane but would sometimes use what he described as a girdle, different than what he was wearing which was a stronger device to help support his back. Petitioner conceded it would it be fair to say that his condition was worse since the surgery, "because now the pain is stronger and more consistent, and now my legs are not the same as from the surgery or before the surgery." He testified his legs were weaker now than they were before the surgery, "because I don't have the same activity as before. I feel them weaker, and I think they need more exercise." (6/15/23 IWCC Hrng., JtX1, T. 162-165)

§19(h) & §8(a) COMMISSION HEARING JUNE 15, 2023

Pro se Petitioner testified at the Commission Hearing through an interpreter. Regarding changes since the last trial, Petitioner testified that he did not "understand with the documents and when was my trial took place if it was 2010, 2011 or 2012. I do not understand that. The

reports show that there is temporary disability in 2010 through Mr. Black Milton (sic) and in 2011 partial permanent disability through Mr. Black Milton. So I do not understand what happened. I never got any money." (T. 7) The Commissioner asked, "since that last trial, with Arbitrator Milton Black, what changes, if any, have there been in your condition?" Petitioner responded that his cervical (spine) got worse. He testified that the pain is really bad and he does less activities compared to how he "was before." He testified, "I'm just not the same person anymore, I'm not 100% there." Further, Petitioner testified that he had "two fractures- well three fractures with my left arm and I'm not able to perform my activities, and like I said, I don't know how things are now. I only know that I am not there 100% and I am disabled permanently. Everything that I have going on is permanent it's not temporary." (T. 7-8)

Petitioner then recounted that he had a fracture in his lumbar spine from November 3, 2007 and a second fracture on May 10, 2008. Petitioner was asked a second time by the Commissioner to testify regarding the changes he had since the last trial. (T. 9)

Petitioner testified that his "condition is worse now, my lower back and my cervical; And I haven't been able to perform my activities; As a matter of fact, I don't do anything because I feel like it's going to get worse and I lost all my abilities. I'm not how I used to be. Things are worse for me. I have a chronic pain and it bothers me every day, 24 hours a day, and unable to do anything. I'm not able to do anything. With the kind of work and with the line of work that I have that's what I mean with my experience. So I'm not able to stay active." (T. 9-10)

The Commissioner asked how his condition is different from before the trial to after the trial. Petitioner responded that he is walking slowly, has pain all the time and he is "not able to perform my activities and my condition is worse and worse, it's not getting better period little by little I'm going to get worse, I know that." (T. 10)

When asked if he received any medical treatments since the last trial, Petitioner again testified that he had therapy and appointments with the doctor. Not with the doctor that performed the first surgery, but Dr. Thomas NcNally, who performed his cervical surgery, pain doctors, and a doctor that attends to his diabetes. (T. 11)

When asked if he was currently working, Petitioner responded, "No, I am permanently disabled." Petitioner testified that he "wanted to tell the people that represent the company to respond to this case because it's been many years now and they just I say one thing or another and they never say the truth. I'm a human and I have values but I no longer have them." *Id.*

Petitioner added, "I wanted today's show you the proof, the evidence that I have, the reports from the doctors." (T. 11-12)

The Commissioner asked if any medical bills are outstanding and Petitioner replied, "Yes, everything, is outstanding. Well, Medicaid and Medicare have been backing me up

because of the years that I've been working, so thank God for that. That's it. Otherwise I would go crazy." (T. 11-12)

On cross–examination Petitioner was questioned whether or not his testimony, that Medicare and Medicaid backed him up, meant that they paid all his bills. Petitioner responded that he "would not know what to tell you. I have put everything together that I got from hospital, but after that, I don't know." When asked whether or not he was still getting bills in the mail, Petitioner testified that he was not, because his wife "is asking for the bills three or four days after and she is collecting them. She's the one helping me. I don't have the capability to do that." (T. 13)

Petitioner testified that he did not remember testifying in his case in June 2010. He remembered his attorney asked him questions, but not the "question." (T. 13) He thought he recalled testifying that he could not return to work back in 2010 because his health would not permit it. He remembered testifying that his back pain in 2010 was 8 to 9 out of 10, 10 being the worst, confirming his pain was still the same, actually worse. He agreed that he testified that the pain in his back and his legs would cramp and then he had to lay down. At the time of the Arbitration Hearing he could only sit for about 15 minutes. (T. 14)

Petitioner agreed that he had testified that he could not walk without the cane in 2010. (T. 14-15) Petitioner agreed he probably testified in 2010 that he could not lift anything, but it has been many years, so he could not remember. He testified nothing has changed. He cannot lift anything heavy, maybe a bag of bread, "but that's it." He does not want to take the risk. Petitioner testified he does not know what his limit is, but Dr. McNally said his condition is permanent. He agreed that he testified in 2010 that he could not bend and that has not changed much. He could not recall testifying that he could not twist in 2010, but testified he cannot twist. He has to move "and accommodate so I don't hurt myself." (T. 15-16)

When asked on cross-examination if he could kneel right now, Petitioner responded that he has had therapy "for that but it has been awhile." He added, "[s]ometimes I have to go on my knees and hold myself from something, and then when I need to get up my wife or my children will help me." Petitioner can walk the stairs, but he takes his time doing that. He recalled his attorney asked him in 2010 what he did on a daily basis and that he testified that he waited for his wife to get back from taking the children to school in bed, and that has not changed. He testified that his "wife is with me 24 hours. She's the one that takes care of me." (T. 17) Nothing has changed since 2010 except their routine has changed. He testified it is "worse now because we do not go out. We only go out to doctor's appointments." (T. 17-18)

Petitioner testified he stopped using a back brace more than a year prior. He has been suffering from diabetes since 2005 but he does not understand how diabetes works and was not sure his was controlled. He thought he was tested for diabetes after the accident. He testified the diabetes did not cause him to have pain in his legs or feet and "everything I'm going through it happened after the accident." (T. 18)

Petitioner testified further on cross-examination that he did not remember the last time he saw Dr. McNally, but he "just saw him. It must have been May or June." Dr. McNally prescribed "[t]he pain doctor." Petitioner testified he was also sent to get therapy this year, "but they only gave me therapy for three days and then they cancelled it because they said they do not work with my insurance." (T. 19)

With respect to questions his attorney asked in 2010 regarding how he felt after surgery with Dr. Malek, Petitioner testified he did not remember much about his testimony but did remember testifying the pain was stronger and consistent after the surgery and his legs were not the same adding "my body will never be the same." Petitioner recalled being examined in June 2014 by Dr. Alexander Ghanayem at Loyola, at the request of Hilton. (T. 20)

In 2016 Petitioner was involved in a motor vehicle accident, testifying, "[p]art of my body was hurting, it wasn't because of the accident, it was just a pain that I got in my cervical and my lower back. (T. 20)

After the motor vehicle accident, he had surgery on his neck by Dr. McNally in July 2016 at Weiss. He denied testifying at a deposition that the cervical surgery was because of the car accident, stating he "already had it." Petitioner testified that he was represented by an attorney at the discovery deposition and under oath on June 5, 2019, in the motor vehicle accident case. (T. 21)

There was an attorney representing the police from the City of Chicago asking Petitioner questions. The discovery deposition transcript was admitted into evidence as Respondent's Exhibit 3. Respondent's attorney asked Petitioner about page 29 of the deposition when he was asked the following questions: "as part of the benefits that you are requesting does that include the surgery that you had from Dr. McNally in 2016. Your answer: There is a possibility, yes. Do you remember testifying to that?" Petitioner replied, "No." He testified that he remembered seeing Dr. McNally after the accident in 2016. He thought he saw him in April of 2016, right after the accident. (T. 22-23)

When he was asked if he remembered telling Dr. McNally that his pain was much worse ---and that it radiated from the neck to the lower back, Petitioner replied, "Yes, but we were always talking about that because we had spoken back in March after the accident before the accident." He agreed he did not have the surgery until after the motor vehicle accident, but testified that they had already spoken about the surgery. Respondent's attorney then asked if Petitioner remembered questions about the surgery itself at his 2019 deposition and whether he remembered testifying that he was not going to get the surgery by Dr. McNally before he got hurt in the motor vehicle accident. (T. 23) Petitioner denied that is what he said and what he was asked. He testified he spoke about the surgery with Dr. McNally, but they had not set up the day and the time when the surgery was going to take place. (T. 24)

Respondent's attorney read from page 117 of the deposition and asked Petitioner if he remembered when he was "asked the following question: "So, you were in the process between the date that McNally told you you're a surgical candidate at C3, C4 and the date of the accident, you were by no means going to get that surgery, is that correct? And your answer was; Correct." Petitioner replied, "[t] he pain but the fracture was already there." (T. 25) He recalled saying "correct" when asked if he felt after the accident that he really had no choice and had to try the surgery. *Id.* Respondent's attorney asked if Petitioner remembered the following questions asked of him. "Okay, but after the accident, the pain increased, is that what you are saying? And your answer was; correct." *Id.*

Respondent's attorney then asked if Petitioner remembered questions about the condition of his body after the motor vehicle accident at the deposition. Petitioner replied he could not remember. Respondent's attorney asked if he remembered the following question related to the motor vehicle accident from page 38 of the deposition, "so you don't remember if you have had any other pain other than your neck and lower back? And your answer was; "[n]o, I don't remember. It's pain in my neck all the time and my whole body." (T. 26) He was also asked if he remembered being asked at the deposition, "[y]ou are claiming all of that is related to the motor vehicle accident with the City of Chicago, and your answer was, "well, I worsen with everything. I think you have all the medical reports. I think they can explain better." Petitioner replied that, "[n]o, I don't remember but I probably said that. I don't know." He remembered being asked, how his back pain was before and after the accident with the City of Chicago, (T. 26)

Petitioner remembered them asking him questions. When asked if he remembered what he testified to about his pain levels before the motor vehicle accident with the City of Chicago on a scale of one out of 10, Petitioner replied he did. When asked if he remembered what pain levels he testified he had before the motor vehicle accident with the City of Chicago, he thought it could have been 10, 8 or 10. Respondent's attorney read from pages 38 and 39 of the deposition and his answer then was, "Well, before the accident it was less. It was less than a 10 or a 9 and I had to take medication for that after the accident. All I can tell you it was a terrible pain both in my back and my neck. Petitioner agreed he said that and reiterated, "Yes, it was terrible." (T. 27)

Respondent's attorney noted Petitioner's comment that the pain was terrible and asked, "so the pain was terrible after the motor vehicle accident with the City of Chicago, correct?" Petitioner responded that it could have been true. Further, "I don't understand how they are taking this. What I said was the pain was worse. The wound, what I had going on, but I was ready to get surgery. And what I'm saying is, like, why are they blaming it on the accident now. I don't understand. It happened years that I had that surgery in 2008 so I don't understand, the injury." (T. 27-28)

Petitioner testified back in 2019 he was taking Norco because of the accident and he was still taking Gabapentin and Norco. Respondent's attorney asked if Petitioner remembered the

questions in the deposition regarding activities that were impacted by the motor vehicle accident with the City of Chicago, to which he responded, "Well if they are in the report, I think so, but I don't remember which ones they were." (T. 27-28)

Petitioner agreed that his answer that he could no longer walk or exercise as a result of the motor vehicle accident was true, that he has not been walking. (T. 29) He thought he remembered when they asked him about lifting and he said he could lift up to 8 pounds and he feels horrible pain that comes up to his neck. He also agreed he had to stop folk dancing zapatear. He remembered that he testified that before the motor vehicle accident with the City of Chicago he used to tend to a garden, however, he qualified that he would do so sitting down "up until this date." *Id.* And when asked if he remembered testifying that after the motor vehicle accident he could not garden and that his wife and son took that over. Petitioner testified he was not working in the garden and that his son is doing that, sometimes both his children or his wife will do it, but he does not. He did not recall if he was admitted to the Shirley Ryan Ability Lab in 2017. (T. 30)

Petitioner agreed that in 2018, he had a second examination performed by Dr. Alexander Ghanayem at Loyola University, and he recalled attending that examination. (T. 30)

Petitioner testified he injured his left arm when the accident occurred in May 10, 2008. He had therapy on his arm, on his neck, and on his lower back, since 2008. He did not know the nature of the injury but he testified that he "has pain and that it's really strong. It's a chronic pain." (T. 31) Further, Petitioner testified that the pain in his left arm started from the accident. *Id*.

Petitioner has not been working since May 10th, 2008. (T. 32) Petitioner was shown Respondent's Exhibit 4 (RX4). He identified his signature on the back and testified that he signed the "Answers to Interrogatories" as part of his case against the City of Chicago. He thought he had copies of it given to him by his attorney. (T. 32-33) Petitioner testified as a result of that case he received a settlement. Petitioner testified that in total he received $11,000.00 for that accident "but that was for the car that was crashed but I don't know. I don't know what it was for, but then they took away the payment for the attorney, they said medical bills, and I got only like ($)2,000—I don't really remember, ($)2,300, something like that." (T. 33)

Petitioner was asked on cross examination if he did or did not get paid as a result of the Worker's Compensation award in the subject case. He was unsure if he was paid partial or temporary disability. He testified, "I mean, the benefits that I was supposed to get every week they only gave me $11,000, you have the record there, I imagine." (T. 34)

When asked again if he was paid a settlement, he replied, "The settlement that was given to me in 2013, and what I've heard, I heard from you that it's money towards the medical bills." Petitioner testified further he heard it from Respondent's attorney as well that "it was Court (sic)

for like money for medical bills." *Id.* When asked if he paid the medical bills, Petitioner responded, "How am I going to pay for those medical bills, they made me declare bankruptcy. I'm not supposed to pay for the bills because the Judge Black Milton gave the order that you have to pay the medical bills which was like $321,000 you were supposed to pay directly to the providers because his son (sic) didn't have the right to take the money for the medical bills because that was for the doctors. I was supposed to get $76,000 and I never got them. As a matter of fact, the check says partial permanent disability, and if you know how much it was, I can say it. It doesn't say there that the money was to pay the medical bills. The check or the pay stub didn't say that. It was partial permanent disability, that's what was written there; and the settlement from 2011, the money from the settlement was never given to me, what I'm supposed to get weekly for the time that I was out." (T. 34-35)

Petitioner testified that his lawyer told him he had to use the money for medical bills. Petitioner testified that his lawyer did not give him anything, and the check or pay stub did not say anything that the money was for the medical bills. He did not remember the amount of the pay stub, but had copies of everything. Petitioner testified that he had the bill. He testified the money was given to him for partial permanent disability. (T. 35-36)

On re-direct examination, Petitioner testified, "I don't know if there are more questions and if the doctor (sic) is going to accept the report that I have there from the doctor and the medical bills." (T. 36)

Petitioner was invited by the Commissioner to clarify or explain his testimony after cross examination. Petitioner responded, "Yes, I want to know why they made us responsible to pay the medical bills from the beginning until now if it was proved that everything I went through was because of the accident from 2007 and 2008. Why did they just get rid of me like an animal, and that's what I'm asking for here. I want the monetary benefits to pay to me and the medical benefits for life, all of that." (T. 37)

Petitioner was asked by the Commissioner Doerries to clarify which condition Petitioner currently experiences is causally related to the work accident and has changed materially since the last trial. (T. 37) Petitioner responded, "Well, what I know is that ever since the accident happened my body is weakening. I fell. Have fallen many times and I am not the same person that I was before. As time goes by, you know, the chronic pain gets worse, and, you know, I'm just going down." (T. 37-38)

Exhibits

As referenced above the parties entered into evidence as a joint exhibit the transcripts and exhibits from multiple Arbitration Hearing dates before Arbitrator Milton Black in 2010. At the subject hearing, Petitioner entered four exhibits into evidence without objection and Respondent entered nine exhibits into evidence without objection with his first two exhibits noted to be the same as Petitioner's exhibits 3 and 4.

On July 29, 2009, Dr. Malek's office note confirms that Petitioner's upper back was doing better. Dr. Malek also noted Petitioner had an evaluation at Rush University on April 16, 2009, in which it was noted by Dr. Madhu Soni that Petitioner had a history of polycythemia and possible Bell's Palsy. Number 17 on Dr. Malek's list of Diagnoses confirms Petitioner had a cervical spine MRI on May 16, 2008 showing desiccation at multiple levels, no focal disc herniation. On January 13, 2010, Petitioner returned to his surgeon, Dr. Malek and reported he had a work up at Rush for Bell's Palsy. He still had some residual symptoms that, according to Dr. Malek, were neuropathic in nature. (6/15/23 IWCC Hrng. JtX1, ArbHrng., PX6)

The Arbitrator's Decision was issued on February 5, 2011, and was affirmed by the Commission on February 21, 2012, and by the Circuit Court on October 16, 2012. (RX5) No further appeal was taken and the Commission Decision became final. On January 3, 2013, Petitioner consulted Dr. McNally for thoracolumbar back pain, bilateral leg weakness when he walks and left sided scapular and shoulder pain. Petitioner's past surgical history was positive for a 2008 lumbar fusion and a 1993 hip-reattachment. His lumbar spine exam looked "pretty normal." Under review of systems, Petitioner's past medical history was positive for diabetes Type II. Dr. McNally's Diagnoses included lumbar spinal stenosis, kyphosis, posterior spinal fusion with right sided TLIF, lumbar disc displacement and cervical disc displacement. He recommended a CT myelogram of the lumbar spine, EMG/NCS of the bilateral lower extremities and a follow-up to review those studies. (PX1)

Respondent entered into evidence Dr. McNally's April 22, 2016, office note. (RX8). Petitioner's chief complaint was sharp pain that radiated from his neck to his lower back. He was there to review his most recent cervical MRI and EMG/NCS of bilateral upper extremities. He reported he and his wife were involved in a vehicle collision on April 13, 2016. They reported they were hit in the left rear side behind the driver side back passenger door. They were driving at about 20 mph and the police car hit them at about the same speed. There were no tickets issued and no sirens or lights were in use by the police. The patient and his wife were taken to Stroger Hospital, he was evaluated and released. …The patient reports that he has a sharp pain that radiates from the back of his neck and into his lower back. He states that his neck pain is located mostly to the right side of his neck and is a stabbing pain. He reports tingling into his right arm that at times will travel into his right hand. He states that his neck pain can also radiate into his bilateral arms down to his fingers. The patient reports that his lower back is painful, he locates this pain across his lower back with the most intense pain to his left lower back. He states that he has sharp pain that radiates into his left leg and his left foot. Patient also reports he is now experiencing pain and weakness at times to his right leg. He states that he has fallen several times in the past few weeks. He reports some numbness and tingling in his bilateral lower extremities. He also reports headaches almost every day. *Id.*

Dr. McNally's April 22, 2016, Assessment and Plan section states:

> 53 year old male who has continued severe neck, mid back and low back pain with upper and lower extremity paresthesias. He states that since his MVC on 4/13/16, his symptoms have worsened.
>
> His current thoracolumbar issues are causally related to his work related injuries and subsequent treatment necessitated by the injuries. He has developed a disabling pain syndrome. His condition remains permanent.
>
> The patient's imaging studies were reviewed, including his cervical MRI and EMG/NCS of bilateral upper extremities. The patient's diagnoses were presented and reviewed. We discussed non-operative and operative treatment options at length. We discussed the risks of non-operative and operative treatment options in detail. We discussed the benefits of non-operative and operative treatment options extensively. All questions were answered. The patient expressed understanding that there are risks associated with both surgical and non-surgical treatment.
>
> Regarding the large disc herniation to the right at C3-4, we discussed the different surgical approaches that could be considered, including anterior only decompression and fusion, posterior only decompression alone or decompression and fusion, or a combined anterior and posterior approach.
>
> As we have before, we re-discussed that a large portion of his symptoms are permanent. He will require lifelong pain management. His is disabled and will not be able to return to work. (RX8)

On January 3, 2023, Dr. McNally's office note confirms Petitioner's back injury is superimposed on severe sensorimotor polyneuropathy (DM). Petitioner was here for chronic pain of the lower back. He was still getting pain occipital neuralgia pain, multiple times per week. He was unable to walk without pain. He also gets headaches and stiffness in his neck. He rated his pain as 7/10. Dr. McNally wrote, "Due to his work related trauma, he developed a permanent disabling pain syndrome. His work related conditions will be expected to wax and wane over the years. He will require lifelong pain management. He may benefit from a SCS (spinal cord stimulator) trial. He is disabled and has chronic pain. He is MMI (maximum medical improvement) from his work related injuries though, as above he will require lifelong pain management." (PX1)

There was only one other note from Dr. McNally in Petitioner's Exhibit 1, dated May 18, 2023. Petitioner returned following up on pain of the lower back, worse since past 3 days with no new injury or trauma. Pain radiated in both legs down to toes but left leg worse and numbness and tingling in both feet. Severe pain in his right shoulder reported to be new. He described occipital neuralgia type symptoms according to the office note. Dr. McNally wrote the same note that he wrote on January 3, 2023, "Due to his work related trauma, he developed a permanent disabling pain syndrome… " (PX1)

Petitioner tendered into evidence copies of medical bills. (PX2)

Petitioner tendered into evidence the Section 12 Independent Medical Examination reports of Dr. Alexander Ghanayem dated June 26, 2014 (PX 4) and February 12, 2018. (PX 3)

In his June 26, 2014, report, Dr. Ghanayem opined:

> My impression is that this gentleman has residual back pain and leg symptoms after a lumbar fusion, which apparently, per his report, did not help him back in 2008. His symptoms radiate all the way up his spine to the cervical base and would not be related to the lumbar fusion, In addition, the circumferential leg symptoms would be an excess of what would be expected from the residuals of a lumbar fusion. His current diagnosis is failed back syndrome. Apparently, it was felt that he could go back to work with restriction in the past. I see no objective reason why that should change at this time. l do not know what he is qualified for, and l would defer to the vocational specialist for that. The number of his current complaints with the back pain radiating all the way up to the cervical base would be unrelated to his work injury. The circumferential leg symptoms would also be unrelated. I wonder if his polycythemia vera and his stroke has caused some deterioration in his health, along with his diabetes, which could be responsible for his current subjective complaints. Relative to this fusion and failed back syndrome, and the use of hydrocodone, his work restrictions placed in the past would be all that is necessary. (PX4)

In his February 12, 2018, report Dr. Ghanayem opined:

> My impression relative to this gentleman is that his lumbar spine is unchanged from my report in 2014. So far as his cervical spine is concerned, he did not sustain a cervical spine injury when I evaluated him the first time and it appears he had an injury to his cervical spine unrelated to work back in 2016. The cervical fusion is not related to his work injury in 2008 or prior. While I am not established in the need for cervical spine surgery relative to the motor vehicle accident, I am breaking any causal connection between his cervical spine surgery and his work injuries from the prior decade. It is therefore my opinion relative to his ability to work is unchanged from my prior report in 2014. Looking at the reports of his cervical spine and MRI scans, it appears that the March 2016 MRI scan shows a new disk herniation at C3-C4. This was not present at the time of his work injury in 2008 or prior. Issues of MMI as it relates to the cervical spine are moot because he did not sustain a cervical spine injury at the workplace. (PX3)

On April 13, 2016, Petitioner presented with neck and back pain to Cook County Health and Hospitals System via ambulance after a motor vehicle collision just prior to arrival. (RX6) The history of present illness states as follows. "The patient presents following motor vehicle

collision. The onset was just prior to arrival. 53 yo M pmhx chronic back pain s/p work accident years ago p/w back and neck pain s/p low speed MVC. Pt was restrained drive at approx. 20 mph. Pt reports he was rear ended by police car on left rear of car. Pts wife was in passenger seat. Pt reports no head trauma or LOC, but is partially amnestic to accident. Reports back and neck pain. Denies abdominal pain." *Id.*

Respondent introduced into evidence a discovery deposition of Petitioner in the subsequent lawsuit filed against the driver of the vehicle that hit him, and as an agent of the City of Chicago, and Chicago Police Department and Petitioner's Answers to City of Chicago Interrogatories. (RX3, RX4) In the discovery deposition, Petitioner testified that he has fallen more than six or seven times per year since 2008. (RX3, 33) Petitioner also testified that related to the motor vehicle accident, he has "pain in my neck all the time and my whole body." (RX3, 38) When asked if he was claiming all of that is related to the motor vehicle accident with the City of Chicago employee, Petitioner replied, "Well, I worsened with everything. I think you have all the medical reports. I think that can explain better." *Id.* Petitioner testified that his neck pain prior to the motor vehicle accident was 7 on a scale of 1 to 10. He further testified after the motor vehicle accident, his neck pain was "a lot. A lot of pain. I don't know what they gave me at the hospital, but it did not calm it." He rated it a ten. (RX3, 40-41)

Petitioner further testified while he was at Stroger, Cook County Hospital, his pain level of his neck was 10 on a scale of 1 to 10. (RX3, 77) He saw Dr. McNally in April or May 2016 after the accident. (RX3, 80) He had been seeing Dr. McNally since January 2013 until 2018. *Id.* The first time they talked about surgery was in March of 2016. He testified that he had surgery in June or July 2016 at C3-C4 and after the car accident, everything was a lot more painful. (R3, 84-85) He wore a collar for three months more or less after he left the hospital. He stopped wearing it on the advice of a doctor that told him it could weaken the muscles in his neck. (RX3, 88) After he had the fusion of C3-C4 with Dr. McNally, he had therapy and rehabilitation. (RX3, 88-89) Petitioner testified that the car accident affected "his privacy and his disability more than anything." He cannot have a private life or a social life like he had before. Everything is worsening things. (RX3, 101)

Petitioner testified that after the automobile accident, he can no longer walk like he use to do before or do exercise, like lifting up eight pounds. He testified he feels horrible pain that comes up to his neck. He cannot do Zapatear which the interpreter explained is folk dancing, very typical of Mexican dances where you use your feet and stomp them really hard on the floor. (RX3, 107-108) Petitioner testified that before the motor vehicle accident he could garden but not after the accident. His sons and his wife do the gardening now. (RX3, 111)

On cross-examination Petitioner testified that between the date that Dr. McNally told him he was a surgical candidate at C3-C4 and the date of the motor vehicle accident, he was by not any means going to get that surgery. (RX3, 117-118) After the car accident, the pain increased. After the car accident he felt he really had no choice and had to try the surgery. (RX3, 118)

Conclusions of Law

As a result of his original work-related injuries Petitioner sustained on November 3, 2007, and May 10, 2008, Petitioner underwent a lumbar fusion at L1-L2 on August 19, 2008, prior to the 2010 Arbitration Hearing. Petitioner continued to complain of no improvement after the surgery. On July 29, 2009, his lumbar surgeon, Dr. Malek, noted that Petitioner underwent a cervical MRI on May 16, 2008, and there was no focal disc herniation. The Arbitrator, the Commission on Review and the Circuit Court found Petitioner sustained permanent partial disability in the amount of 40% loss of use of a person as a whole and he was capable of employment with limitations following the surgery.

On April 13, 2016, Petitioner was treated at Cook County Health and Hospitals System emergency room for injuries sustained in a motor vehicle accident. Based upon Petitioner's testimony at the Arbitration Hearings and his testimony at the June 15, 2023, Commission Hearing on Petitioner's Petitions for benefits under §§19(h)/8(a) and the evidence presented at both Hearings, the Commission finds that Petitioner failed to prove a material change in his disability related to his 2007 and 2008 work accidents. Petitioner testified at both hearings that he could not walk, bend, twist or lift any significant weight. He testified that the only thing that changed between the hearings is his routine.

Further, the Commission finds Dr. Ghanayem's opinion that the cervical spine surgery was unrelated to the Petitioner's subject work accidents to be more persuasive than Dr. McNally's opinion. Dr. Malek's July 29, 2009, office note confirms that Petitioner had no cervical disc herniation on MRI on May 16, 2008 which comports with Dr. Ghanayem's 2018 report. Dr. McNally's April 22, 2016, office note confirms Petitioner reported all of his symptoms worsened after the motor vehicle accident. Petitioner's testimony at his discovery deposition in the civil litigation that was filed as a result of that accident comports with his complaints to Dr. McNally on April 22, 2016. The Commission also notes that Petitioner has other unrelated health conditions that could also be attributed to his health deterioration as suggested by Dr. Ghanayem.

As a result, the Commission finds that Petitioner failed to prove that his disability has materially increased since the prior Commission Decision and Opinion on Review. Thus, Petitioner's §19(h) and §8(a) Petition is denied.

The Commission notes that while its records do not contain a copy of a §§19(h)/8(a) Petition, the Commission computer records do show that a §§19(h)/8(a) Petition was timely filed on January 22, 2014, or within 30 months of the Commission's prior decision on February 21, 2012. Accordingly, the Commission maintained jurisdiction to hear this matter.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Petition under §19(h) and §8(a) of the Act is hereby 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.

February 8, 2024
O12/12/23
KAD/bsd
42

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	07WC055955
Case Name	Juan Ballesteros v. Chicago Hilton & Towers
Consolidated Cases	07WC055954; 08WC025987;
Proceeding Type	8(a)/19(h) Petition
Decision Type	Commission Decision
Commission Decision Number	24IWCC0074
Number of Pages of Decision	18
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Pro Se
Respondent Attorney	Dennis Noble

DATE FILED: 2/8/2024

/s/ Kathryn Doerries, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JUAN BALLESTEROS,

Petitioner,

vs. NOS: 07 WC 055955

CHICAGO HILTON & TOWERS,

Respondent.

DECISION AND OPINION ON §19(h) AND §8(a) PETITION

These consolidated cases, 07 WC 55954, 07 WC 55955 and 08 WC 25987, come before the Commission on Petitioner's §19(h) and §8(a) Petition, alleging a material increase in his disability since the Commission's previous Decision and Opinion on Review (12 IWCC 0187) dated February 21, 2012. A hearing on the Petition was held before Commissioner Kathryn A. Doerries on June 15, 2023, in Chicago, Illinois and a record was made. The Commission, having considered the entire record, finds that Petitioner failed to prove a material increase in disability and that as a result Petitioner's §19(h) and §8(a) Petition is denied, for the reasons set forth below.

BACKGROUND AND HISTORY OF THE CASES AT ARBITRATION AND APPEAL

Petitioner filed three Applications for Adjustment of Claim alleging he sustained accidental injuries that arose out of and in the course of his employment on three dates. The cases were consolidated and an Arbitration Hearing was held on multiple dates in Chicago before Arbitrator Milton Black on June 28, 2010, August 18, 2010, September 20, 2010, October 19, 2010, and November 17, 2010. (6/15/23 Illinois Workers' Compensation "IWCC" Hrng., RX5) In an Arbitration Decision filed February 15, 2011, the Arbitrator found that Petitioner sustained accidental injuries on November 3, 2007, and May 10, 2008, that arose out of and in

the course of his employment and, further, that Petitioner did not sustain his burden of proving an accident that arose out of and in the course of his employment on January 17, 2007 (07 WC 55954). *Id.* @Arb.Dec.[Form], p. 2. The Arbitrator found Petitioner's current condition of ill-being is not causally related to the claimed accident of January 17, 2007, because no accident occurred on that date.

The Arbitrator's Order states the following:

Respondent shall be given a credit of $11,712.64 for TTD, $0 for TPD, and $0 for maintenance benefits, for a total credit of $11,712.64.

Respondent shall be given a credit of $5,542.55 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 receive a credit for all amounts paid to or on behalf of Petitioner on account of said accidental injuries.

Respondent shall pay Petitioner temporary total disability benefits of $424.67 /week for 27 weeks, commencing December 1, 2007 through December 28, 2007, commencing May 11, 2008 through August 11, 2008, commencing August 17, 2009 through September 28, 2009, and commencing January 30, 2010 through February 26, 2010, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from December 1, 2007 through February 26, 2010, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall pay reasonable and necessary medical services of $321,809.36, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $382.20/week for 200 weeks, because the injuries sustained caused the 40% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

The Arbitrator found that "Petitioner's sustained substantial spinal injury, which resulted in fusion surgery. He appears to be able to return to work but with limitations. The medical opinions that Petitioner cannot work are unpersuasive. The vocational evaluation opinions that Petitioner cannot return to his past work as a saucier and that he is not a candidate for vocational rehabilitation are unpersuasive." (6/15/23 IWCC Hrng., RX5, Arb.Dec.[NATURE AND EXTENT], p.6)

Petitioner subsequently filed a Petition for Review of the Arbitration Decision pertaining to all three cases on March 18, 2011, and Respondent filed a cross-review of the cases on March 21, 2011.

In a Decision and Opinion on Review dated February 21, 2012, the Commission unanimously affirmed and adopted the Arbitrator's Decision in its entirety. (6/15/23 IWCC Hrng., RX5)

The Commission Decision was appealed to the circuit court. In an Order dated October 10, 2012, the circuit court affirmed the Commission's decision. (6/15/23 IWCC Hrng., RX5, Circuit Court Order) There were no further appeals and the Decision of the Commission was final.

§19(h) of the Illinois Workers' Compensation Act

> (h) An agreement or award under this Act providing for compensation in installments, may at any time within 18 months after such agreement or award be reviewed by the Commission at the request of either the employer or the employee, on the ground that the disability of the employee has subsequently recurred, increased, diminished or ended.
> However, as to accidents occurring subsequent to July 1, 1955, which are covered by any agreement or award under this Act providing for compensation in installments made as a result of such accident, such agreement or award may at any time within 30 months, or 60 months in the case of an award under Section 8(d)1, after such agreement or award be reviewed by the Commission at the request of either the employer or the employee on the ground that the disability of the employee has subsequently recurred, increased, diminished or ended. *820 ILCS 305/19.*

Petitioner timely filed his §19(h)/§8(a) Petition on January 22, 2014. Petitioner's attorney filed a Motion to Withdraw his representation of Petitioner in October 2015 and that Motion was granted on December 10, 2016. Petitioner proceeded pro se thereafter.

> In reviewing a section 19(h) petition, the evidence presented in the original proceeding must be considered to determine if the petitioner's position has changed materially since the time of the Industrial Commission's first decision. (*Howard*, 89 Ill. 2d 428, 433 N.E.2d 657.) Whether there has been a material change in a petitioner's disability is an issue of fact, and the Industrial Commission's determination will not be overturned unless it is contrary to the manifest weight of the evidence. *Howard*, 89 Ill. 2d 428, 433 N.E.2d 657; *United States Steel Corp*., 133 Ill. App. 3d 811, 478 N.E.2d 1108. *Gay v. Industrial Comm'n*., 178 Ill. App. 3d 129, 132, 532 N.E.2d 1149, 1151, 1989.

The parties stipulated to admission of the 2010 transcripts into evidence as Joint Exhibit 1 ("JtX1") at the Commission Hearing on June 15, 2023.[1]

Petitioner testified to the following at the Arbitration Hearing through an interpreter. Petitioner testified that he has diabetes and takes insulin, Metformin, Actos, Aspirin, pain medications, sleeping medication "maybe three times per week." (6/15/23 IWCC Hrng., JtX1, T. 116-117) Petitioner testified that he also takes medication for dizziness. He described his current pain level "from 8 to 9" on a scale of 1 to 10. He never had back pain or treatment before November 3, 2007. (6/15/23 IWCC Hrng., JtX1, T. 117) He was able to work full days.

When asked what he notices about his back and/or leg at the time of the Arbitration Hearing, Petitioner testified that he has pain in his back and cramping in his leg. He has to lay down after he takes his pain medication. He can sit about 15 minutes. He needs to stand and sit, stand and sit. (6/15/23 IWCC Hrng., Jt.X1, T. 118) He testified that he was sitting more than 15 minutes at the Arbitration Hearing because he thought he had to sit. He did not know he would be permitted to stand. (6/15/23 IWCC Hrng., JtX1, T. 118-119)

When asked how far he could walk unassisted without a cane, Petitioner testified that he had never attempted that. He testified he could not bend, could not lift any weight or twist and he sleeps on his left side. When asked if he could squat, Petitioner testified that, in order to maintain his "muscle sort of flexible," he does the exercises that he was ordered to do at home. He testified Dr. Malek ordered some exercises to keep doing "what I could and not to put too much effort." He was unsure if he could kneel on his knees but did not think he could. (6/15/23 IWCC Hrng., JtX1, T. 120)

Petitioner testified that he climbs six or seven stairs as part of therapy. He could drive before November 3, 2007, but he stopped driving a little over two years prior to the Arbitration Hearing. Petitioner testified that he stopped driving because, "I don't have that much strength or potency to slam on the brakes or-" (6/15/23 IWCC Hrng., JtX1, T. 121)

Petitioner testified as to how he spent his days at the time of the Arbitration Hearing. When he would wake, his wife was cooking breakfast for the kids. Petitioner testified that his wife is the one who takes the kids to school, and he waits for her in bed. *Id.*

After that, Petitioner testified that he sits on his lazy boy and watches the news and then they would go out and walk a little bit. He takes Tylenol medication daily for pain. He would also lie down during the day or take a nap. (6/15/23 IWCC Hrng., JtX1, T. 122)

On cross examination Petitioner testified that between the time of his surgery in

[1] To avoid referencing the multiple Arbitration Hearing dates, page references are from the June 15, 2023, Commission Hearing Transcript.

August of '08 and the time of his testimony, he had other health issues including diabetes and polycythemia. Petitioner explained he was told he produced a lot of blood, and he needed "to have it withdrawn to get it out." (6/15/23 IWCC Hrng., JtX1, T. 156-157)

When asked if he had any type of stroke within the last two years, Petitioner responded, "Something like that I might have-- I might have had because my mouth went sideways, but I don't remember. I don't remember when it happened, but it was in January sometime." It was after his surgery and it affected his ability to walk. He testified, "the way I would walk wasn't correct or wasn't good. I would either have to hold on to a cane or something else. I don't remember what it's called." He did not think that the incident where his mouth went sideways affected his ability to walk. Dr. Malek released him and indicated he should be doing some home exercises but not too much, just what he was able to do. (JtX1, Comm. T. 156-157)

Petitioner further testified that he did his exercises in the morning and the afternoon unless he does not feel good. He does them four or five days per week on average. Petitioner was still in therapy; he was doing home exercises and prescribed therapy. July 29, 2010, was the first time he went to Accelerated Rehabilitation Center. Dr. Malek referred him to this facility because Petitioner told Dr. Malek his legs "are very weak, and there's (sic) those times where I can't even hold." He saw Dr. Malek in July after the prior court appearance but had not seen him for quite some time prior to that visit. Petitioner planned to make an appointment to see Dr. Malek when he finished the six weeks prescribed therapy. (6/15/23 IWCC Hrng, JtX1, T. 159-162)

Petitioner rated his condition at the Arbitration Hearing compared to two weeks before the surgery. He testified, "[t]he pain wise it could be the same because back then I couldn't-I couldn't even sleep. I couldn't turn around, or I couldn't turn around or go on my side, and now it's about the same because the pain gets very strong, and it's on and off, and that's the way it's going." He reiterated his pain level remained pretty consistent from the time of accident to the date of the Arbitration Hearing adding, "[s]ometimes it gets stronger now." Prior to the surgery he did not use a cane but would sometimes use what he described as a girdle, different than what he was wearing which was a stronger device to help support his back. Petitioner conceded it would it be fair to say that his condition was worse since the surgery, "because now the pain is stronger and more consistent, and now my legs are not the same as from the surgery or before the surgery." He testified his legs were weaker now than they were before the surgery, "because I don't have the same activity as before. I feel them weaker, and I think they need more exercise." (6/15/23 IWCC Hrng., JtX1, T. 162-165)

§19(h) & §8(a) COMMISSION HEARING JUNE 15, 2023

Pro se Petitioner testified at the Commission Hearing through an interpreter. Regarding changes since the last trial, Petitioner testified that he did not "understand with the documents and when was my trial took place if it was 2010, 2011 or 2012. I do not understand that. The

reports show that there is temporary disability in 2010 through Mr. Black Milton (sic) and in 2011 partial permanent disability through Mr. Black Milton. So I do not understand what happened. I never got any money." (T. 7) The Commissioner asked, "since that last trial, with Arbitrator Milton Black, what changes, if any, have there been in your condition?" Petitioner responded that his cervical (spine) got worse. He testified that the pain is really bad and he does less activities compared to how he "was before." He testified, "I'm just not the same person anymore, I'm not 100% there." Further, Petitioner testified that he had "two fractures- well three fractures with my left arm and I'm not able to perform my activities, and like I said, I don't know how things are now. I only know that I am not there 100% and I am disabled permanently. Everything that I have going on is permanent it's not temporary." (T. 7-8)

Petitioner then recounted that he had a fracture in his lumbar spine from November 3, 2007 and a second fracture on May 10, 2008. Petitioner was asked a second time by the Commissioner to testify regarding the changes he had since the last trial. (T. 9)

Petitioner testified that his "condition is worse now, my lower back and my cervical; And I haven't been able to perform my activities; As a matter of fact, I don't do anything because I feel like it's going to get worse and I lost all my abilities. I'm not how I used to be. Things are worse for me. I have a chronic pain and it bothers me every day, 24 hours a day, and unable to do anything. I'm not able to do anything. With the kind of work and with the line of work that I have that's what I mean with my experience. So I'm not able to stay active." (T. 9-10)

The Commissioner asked how his condition is different from before the trial to after the trial. Petitioner responded that he is walking slowly, has pain all the time and he is "not able to perform my activities and my condition is worse and worse, it's not getting better period little by little I'm going to get worse, I know that." (T. 10)

When asked if he received any medical treatments since the last trial, Petitioner again testified that he had therapy and appointments with the doctor. Not with the doctor that performed the first surgery, but Dr. Thomas NcNally, who performed his cervical surgery, pain doctors, and a doctor that attends to his diabetes. (T. 11)

When asked if he was currently working, Petitioner responded, "No, I am permanently disabled." Petitioner testified that he "wanted to tell the people that represent the company to respond to this case because it's been many years now and they just I say one thing or another and they never say the truth. I'm a human and I have values but I no longer have them." *Id.*

Petitioner added, "I wanted today's show you the proof, the evidence that I have, the reports from the doctors." (T. 11-12)

The Commissioner asked if any medical bills are outstanding and Petitioner replied, "Yes, everything, is outstanding. Well, Medicaid and Medicare have been backing me up

because of the years that I've been working, so thank God for that. That's it. Otherwise I would go crazy." (T. 11-12)

On cross–examination Petitioner was questioned whether or not his testimony, that Medicare and Medicaid backed him up, meant that they paid all his bills. Petitioner responded that he "would not know what to tell you. I have put everything together that I got from hospital, but after that, I don't know." When asked whether or not he was still getting bills in the mail, Petitioner testified that he was not, because his wife "is asking for the bills three or four days after and she is collecting them. She's the one helping me. I don't have the capability to do that." (T. 13)

Petitioner testified that he did not remember testifying in his case in June 2010. He remembered his attorney asked him questions, but not the "question." (T. 13) He thought he recalled testifying that he could not return to work back in 2010 because his health would not permit it. He remembered testifying that his back pain in 2010 was 8 to 9 out of 10, 10 being the worst, confirming his pain was still the same, actually worse. He agreed that he testified that the pain in his back and his legs would cramp and then he had to lay down. At the time of the Arbitration Hearing he could only sit for about 15 minutes. (T. 14)

Petitioner agreed that he had testified that he could not walk without the cane in 2010. (T. 14-15) Petitioner agreed he probably testified in 2010 that he could not lift anything, but it has been many years, so he could not remember. He testified nothing has changed. He cannot lift anything heavy, maybe a bag of bread, "but that's it." He does not want to take the risk. Petitioner testified he does not know what his limit is, but Dr. McNally said his condition is permanent. He agreed that he testified in 2010 that he could not bend and that has not changed much. He could not recall testifying that he could not twist in 2010, but testified he cannot twist. He has to move "and accommodate so I don't hurt myself." (T. 15-16)

When asked on cross-examination if he could kneel right now, Petitioner responded that he has had therapy "for that but it has been awhile." He added, "[s]ometimes I have to go on my knees and hold myself from something, and then when I need to get up my wife or my children will help me." Petitioner can walk the stairs, but he takes his time doing that. He recalled his attorney asked him in 2010 what he did on a daily basis and that he testified that he waited for his wife to get back from taking the children to school in bed, and that has not changed. He testified that his "wife is with me 24 hours. She's the one that takes care of me." (T. 17) Nothing has changed since 2010 except their routine has changed. He testified it is "worse now because we do not go out. We only go out to doctor's appointments." (T. 17-18)

Petitioner testified he stopped using a back brace more than a year prior. He has been suffering from diabetes since 2005 but he does not understand how diabetes works and was not sure his was controlled. He thought he was tested for diabetes after the accident. He testified the diabetes did not cause him to have pain in his legs or feet and "everything I'm going through it happened after the accident." (T. 18)

Petitioner testified further on cross-examination that he did not remember the last time he saw Dr. McNally, but he "just saw him. It must have been May or June." Dr. McNally prescribed "[t]he pain doctor." Petitioner testified he was also sent to get therapy this year, "but they only gave me therapy for three days and then they cancelled it because they said they do not work with my insurance." (T. 19)

With respect to questions his attorney asked in 2010 regarding how he felt after surgery with Dr. Malek, Petitioner testified he did not remember much about his testimony but did remember testifying the pain was stronger and consistent after the surgery and his legs were not the same adding "my body will never be the same." Petitioner recalled being examined in June 2014 by Dr. Alexander Ghanayem at Loyola, at the request of Hilton. (T. 20)

In 2016 Petitioner was involved in a motor vehicle accident, testifying, "[p]art of my body was hurting, it wasn't because of the accident, it was just a pain that I got in my cervical and my lower back. (T. 20)

After the motor vehicle accident, he had surgery on his neck by Dr. McNally in July 2016 at Weiss. He denied testifying at a deposition that the cervical surgery was because of the car accident, stating he "already had it." Petitioner testified that he was represented by an attorney at the discovery deposition and under oath on June 5, 2019, in the motor vehicle accident case. (T. 21)

There was an attorney representing the police from the City of Chicago asking Petitioner questions. The discovery deposition transcript was admitted into evidence as Respondent's Exhibit 3. Respondent's attorney asked Petitioner about page 29 of the deposition when he was asked the following questions: "as part of the benefits that you are requesting does that include the surgery that you had from Dr. McNally in 2016. Your answer: There is a possibility, yes. Do you remember testifying to that?" Petitioner replied, "No." He testified that he remembered seeing Dr. McNally after the accident in 2016. He thought he saw him in April of 2016, right after the accident. (T. 22-23)

When he was asked if he remembered telling Dr. McNally that his pain was much worse ---and that it radiated from the neck to the lower back, Petitioner replied, "Yes, but we were always talking about that because we had spoken back in March after the accident before the accident." He agreed he did not have the surgery until after the motor vehicle accident, but testified that they had already spoken about the surgery. Respondent's attorney then asked if Petitioner remembered questions about the surgery itself at his 2019 deposition and whether he remembered testifying that he was not going to get the surgery by Dr. McNally before he got hurt in the motor vehicle accident. (T. 23) Petitioner denied that is what he said and what he was asked. He testified he spoke about the surgery with Dr. McNally, but they had not set up the day and the time when the surgery was going to take place. (T. 24)

Respondent's attorney read from page 117 of the deposition and asked Petitioner if he remembered when he was "asked the following question: "So, you were in the process between the date that McNally told you you're a surgical candidate at C3, C4 and the date of the accident, you were by no means going to get that surgery, is that correct? And your answer was; Correct." Petitioner replied, "[t] he pain but the fracture was already there." (T. 25) He recalled saying "correct" when asked if he felt after the accident that he really had no choice and had to try the surgery. *Id.* Respondent's attorney asked if Petitioner remembered the following questions asked of him. "Okay, but after the accident, the pain increased, is that what you are saying? And your answer was; correct." *Id.*

Respondent's attorney then asked if Petitioner remembered questions about the condition of his body after the motor vehicle accident at the deposition. Petitioner replied he could not remember. Respondent's attorney asked if he remembered the following question related to the motor vehicle accident from page 38 of the deposition, "so you don't remember if you have had any other pain other than your neck and lower back? And your answer was; "[n]o, I don't remember. It's pain in my neck all the time and my whole body." (T. 26) He was also asked if he remembered being asked at the deposition, "[y]ou are claiming all of that is related to the motor vehicle accident with the City of Chicago, and your answer was, "well, I worsen with everything. I think you have all the medical reports. I think they can explain better." Petitioner replied that, "[n]o, I don't remember but I probably said that. I don't know." He remembered being asked, how his back pain was before and after the accident with the City of Chicago, (T. 26)

Petitioner remembered them asking him questions. When asked if he remembered what he testified to about his pain levels before the motor vehicle accident with the City of Chicago on a scale of one out of 10, Petitioner replied he did. When asked if he remembered what pain levels he testified he had before the motor vehicle accident with the City of Chicago, he thought it could have been 10, 8 or 10. Respondent's attorney read from pages 38 and 39 of the deposition and his answer then was, "Well, before the accident it was less. It was less than a 10 or a 9 and I had to take medication for that after the accident. All I can tell you it was a terrible pain both in my back and my neck. Petitioner agreed he said that and reiterated, "Yes, it was terrible." (T. 27)

Respondent's attorney noted Petitioner's comment that the pain was terrible and asked, "so the pain was terrible after the motor vehicle accident with the City of Chicago, correct?" Petitioner responded that it could have been true. Further, "I don't understand how they are taking this. What I said was the pain was worse. The wound, what I had going on, but I was ready to get surgery. And what I'm saying is, like, why are they blaming it on the accident now. I don't understand. It happened years that I had that surgery in 2008 so I don't understand, the injury." (T. 27-28)

Petitioner testified back in 2019 he was taking Norco because of the accident and he was still taking Gabapentin and Norco. Respondent's attorney asked if Petitioner remembered the

questions in the deposition regarding activities that were impacted by the motor vehicle accident with the City of Chicago, to which he responded, "Well if they are in the report, I think so, but I don't remember which ones they were." (T. 27-28)

Petitioner agreed that his answer that he could no longer walk or exercise as a result of the motor vehicle accident was true, that he has not been walking. (T. 29) He thought he remembered when they asked him about lifting and he said he could lift up to 8 pounds and he feels horrible pain that comes up to his neck. He also agreed he had to stop folk dancing zapatear. He remembered that he testified that before the motor vehicle accident with the City of Chicago he used to tend to a garden, however, he qualified that he would do so sitting down "up until this date." *Id.* And when asked if he remembered testifying that after the motor vehicle accident he could not garden and that his wife and son took that over. Petitioner testified he was not working in the garden and that his son is doing that, sometimes both his children or his wife will do it, but he does not. He did not recall if he was admitted to the Shirley Ryan Ability Lab in 2017. (T. 30)

Petitioner agreed that in 2018, he had a second examination performed by Dr. Alexander Ghanayem at Loyola University, and he recalled attending that examination. (T. 30)

Petitioner testified he injured his left arm when the accident occurred in May 10, 2008. He had therapy on his arm, on his neck, and on his lower back, since 2008. He did not know the nature of the injury but he testified that he "has pain and that it's really strong. It's a chronic pain." (T. 31) Further, Petitioner testified that the pain in his left arm started from the accident. *Id*.

Petitioner has not been working since May 10th, 2008. (T. 32) Petitioner was shown Respondent's Exhibit 4 (RX4). He identified his signature on the back and testified that he signed the "Answers to Interrogatories" as part of his case against the City of Chicago. He thought he had copies of it given to him by his attorney. (T. 32-33) Petitioner testified as a result of that case he received a settlement. Petitioner testified that in total he received $11,000.00 for that accident "but that was for the car that was crashed but I don't know. I don't know what it was for, but then they took away the payment for the attorney, they said medical bills, and I got only like ($)2,000—I don't really remember, ($)2,300, something like that." (T. 33)

Petitioner was asked on cross examination if he did or did not get paid as a result of the Worker's Compensation award in the subject case. He was unsure if he was paid partial or temporary disability. He testified, "I mean, the benefits that I was supposed to get every week they only gave me $11,000, you have the record there, I imagine." (T. 34)

When asked again if he was paid a settlement, he replied, "The settlement that was given to me in 2013, and what I've heard, I heard from you that it's money towards the medical bills." Petitioner testified further he heard it from Respondent's attorney as well that "it was Court (sic)

for like money for medical bills." *Id.* When asked if he paid the medical bills, Petitioner responded, "How am I going to pay for those medical bills, they made me declare bankruptcy. I'm not supposed to pay for the bills because the Judge Black Milton gave the order that you have to pay the medical bills which was like $321,000 you were supposed to pay directly to the providers because his son (sic) didn't have the right to take the money for the medical bills because that was for the doctors. I was supposed to get $76,000 and I never got them. As a matter of fact, the check says partial permanent disability, and if you know how much it was, I can say it. It doesn't say there that the money was to pay the medical bills. The check or the pay stub didn't say that. It was partial permanent disability, that's what was written there; and the settlement from 2011, the money from the settlement was never given to me, what I'm supposed to get weekly for the time that I was out." (T. 34-35)

Petitioner testified that his lawyer told him he had to use the money for medical bills. Petitioner testified that his lawyer did not give him anything, and the check or pay stub did not say anything that the money was for the medical bills. He did not remember the amount of the pay stub, but had copies of everything. Petitioner testified that he had the bill. He testified the money was given to him for partial permanent disability. (T. 35-36)

On re-direct examination, Petitioner testified, "I don't know if there are more questions and if the doctor (sic) is going to accept the report that I have there from the doctor and the medical bills." (T. 36)

Petitioner was invited by the Commissioner to clarify or explain his testimony after cross examination. Petitioner responded, "Yes, I want to know why they made us responsible to pay the medical bills from the beginning until now if it was proved that everything I went through was because of the accident from 2007 and 2008. Why did they just get rid of me like an animal, and that's what I'm asking for here. I want the monetary benefits to pay to me and the medical benefits for life, all of that." (T. 37)

Petitioner was asked by the Commissioner Doerries to clarify which condition Petitioner currently experiences is causally related to the work accident and has changed materially since the last trial. (T. 37) Petitioner responded, "Well, what I know is that ever since the accident happened my body is weakening. I fell. Have fallen many times and I am not the same person that I was before. As time goes by, you know, the chronic pain gets worse, and, you know, I'm just going down." (T. 37-38)

Exhibits

As referenced above the parties entered into evidence as a joint exhibit the transcripts and exhibits from multiple Arbitration Hearing dates before Arbitrator Milton Black in 2010. At the subject hearing, Petitioner entered four exhibits into evidence without objection and Respondent entered nine exhibits into evidence without objection with his first two exhibits noted to be the same as Petitioner's exhibits 3 and 4.

On July 29, 2009, Dr. Malek's office note confirms that Petitioner's upper back was doing better. Dr. Malek also noted Petitioner had an evaluation at Rush University on April 16, 2009, in which it was noted by Dr. Madhu Soni that Petitioner had a history of polycythemia and possible Bell's Palsy. Number 17 on Dr. Malek's list of Diagnoses confirms Petitioner had a cervical spine MRI on May 16, 2008 showing desiccation at multiple levels, no focal disc herniation. On January 13, 2010, Petitioner returned to his surgeon, Dr. Malek and reported he had a work up at Rush for Bell's Palsy. He still had some residual symptoms that, according to Dr. Malek, were neuropathic in nature. (6/15/23 IWCC Hrng. JtX1, ArbHrng., PX6)

The Arbitrator's Decision was issued on February 5, 2011, and was affirmed by the Commission on February 21, 2012, and by the Circuit Court on October 16, 2012. (RX5) No further appeal was taken and the Commission Decision became final. On January 3, 2013, Petitioner consulted Dr. McNally for thoracolumbar back pain, bilateral leg weakness when he walks and left sided scapular and shoulder pain. Petitioner's past surgical history was positive for a 2008 lumbar fusion and a 1993 hip-reattachment. His lumbar spine exam looked "pretty normal." Under review of systems, Petitioner's past medical history was positive for diabetes Type II. Dr. McNally's Diagnoses included lumbar spinal stenosis, kyphosis, posterior spinal fusion with right sided TLIF, lumbar disc displacement and cervical disc displacement. He recommended a CT myelogram of the lumbar spine, EMG/NCS of the bilateral lower extremities and a follow-up to review those studies. (PX1)

Respondent entered into evidence Dr. McNally's April 22, 2016, office note. (RX8). Petitioner's chief complaint was sharp pain that radiated from his neck to his lower back. He was there to review his most recent cervical MRI and EMG/NCS of bilateral upper extremities. He reported he and his wife were involved in a vehicle collision on April 13, 2016. They reported they were hit in the left rear side behind the driver side back passenger door. They were driving at about 20 mph and the police car hit them at about the same speed. There were no tickets issued and no sirens or lights were in use by the police. The patient and his wife were taken to Stroger Hospital, he was evaluated and released. …The patient reports that he has a sharp pain that radiates from the back of his neck and into his lower back. He states that his neck pain is located mostly to the right side of his neck and is a stabbing pain. He reports tingling into his right arm that at times will travel into his right hand. He states that his neck pain can also radiate into his bilateral arms down to his fingers. The patient reports that his lower back is painful, he locates this pain across his lower back with the most intense pain to his left lower back. He states that he has sharp pain that radiates into his left leg and his left foot. Patient also reports he is now experiencing pain and weakness at times to his right leg. He states that he has fallen several times in the past few weeks. He reports some numbness and tingling in his bilateral lower extremities. He also reports headaches almost every day. *Id.*

Dr. McNally's April 22, 2016, Assessment and Plan section states:

> 53 year old male who has continued severe neck, mid back and low back pain with upper and lower extremity paresthesias. He states that since his MVC on 4/13/16, his symptoms have worsened.
>
> His current thoracolumbar issues are causally related to his work related injuries and subsequent treatment necessitated by the injuries. He has developed a disabling pain syndrome. His condition remains permanent.
>
> The patient's imaging studies were reviewed, including his cervical MRI and EMG/NCS of bilateral upper extremities. The patient's diagnoses were presented and reviewed. We discussed non-operative and operative treatment options at length. We discussed the risks of non-operative and operative treatment options in detail. We discussed the benefits of non-operative and operative treatment options extensively. All questions were answered. The patient expressed understanding that there are risks associated with both surgical and non-surgical treatment.
>
> Regarding the large disc herniation to the right at C3-4, we discussed the different surgical approaches that could be considered, including anterior only decompression and fusion, posterior only decompression alone or decompression and fusion, or a combined anterior and posterior approach.
>
> As we have before, we re-discussed that a large portion of his symptoms are permanent. He will require lifelong pain management. His is disabled and will not be able to return to work. (RX8)

On January 3, 2023, Dr. McNally's office note confirms Petitioner's back injury is superimposed on severe sensorimotor polyneuropathy (DM). Petitioner was here for chronic pain of the lower back. He was still getting pain occipital neuralgia pain, multiple times per week. He was unable to walk without pain. He also gets headaches and stiffness in his neck. He rated his pain as 7/10. Dr. McNally wrote, "Due to his work related trauma, he developed a permanent disabling pain syndrome. His work related conditions will be expected to wax and wane over the years. He will require lifelong pain management. He may benefit from a SCS (spinal cord stimulator) trial. He is disabled and has chronic pain. He is MMI (maximum medical improvement) from his work related injuries though, as above he will require lifelong pain management." (PX1)

There was only one other note from Dr. McNally in Petitioner's Exhibit 1, dated May 18, 2023. Petitioner returned following up on pain of the lower back, worse since past 3 days with no new injury or trauma. Pain radiated in both legs down to toes but left leg worse and numbness and tingling in both feet. Severe pain in his right shoulder reported to be new. He described occipital neuralgia type symptoms according to the office note. Dr. McNally wrote the same note that he wrote on January 3, 2023, "Due to his work related trauma, he developed a permanent disabling pain syndrome… " (PX1)

Petitioner tendered into evidence copies of medical bills. (PX2)

Petitioner tendered into evidence the Section 12 Independent Medical Examination reports of Dr. Alexander Ghanayem dated June 26, 2014 (PX 4) and February 12, 2018. (PX 3)

In his June 26, 2014, report, Dr. Ghanayem opined:

> My impression is that this gentleman has residual back pain and leg symptoms after a lumbar fusion, which apparently, per his report, did not help him back in 2008. His symptoms radiate all the way up his spine to the cervical base and would not be related to the lumbar fusion, In addition, the circumferential leg symptoms would be an excess of what would be expected from the residuals of a lumbar fusion. His current diagnosis is failed back syndrome. Apparently, it was felt that he could go back to work with restriction in the past. I see no objective reason why that should change at this time. l do not know what he is qualified for, and l would defer to the vocational specialist for that. The number of his current complaints with the back pain radiating all the way up to the cervical base would be unrelated to his work injury. The circumferential leg symptoms would also be unrelated. I wonder if his polycythemia vera and his stroke has caused some deterioration in his health, along with his diabetes, which could be responsible for his current subjective complaints. Relative to this fusion and failed back syndrome, and the use of hydrocodone, his work restrictions placed in the past would be all that is necessary. (PX4)

In his February 12, 2018, report Dr. Ghanayem opined:

> My impression relative to this gentleman is that his lumbar spine is unchanged from my report in 2014. So far as his cervical spine is concerned, he did not sustain a cervical spine injury when I evaluated him the first time and it appears he had an injury to his cervical spine unrelated to work back in 2016. The cervical fusion is not related to his work injury in 2008 or prior. While I am not established in the need for cervical spine surgery relative to the motor vehicle accident, I am breaking any causal connection between his cervical spine surgery and his work injuries from the prior decade. It is therefore my opinion relative to his ability to work is unchanged from my prior report in 2014. Looking at the reports of his cervical spine and MRI scans, it appears that the March 2016 MRI scan shows a new disk herniation at C3-C4. This was not present at the time of his work injury in 2008 or prior. Issues of MMI as it relates to the cervical spine are moot because he did not sustain a cervical spine injury at the workplace. (PX3)

On April 13, 2016, Petitioner presented with neck and back pain to Cook County Health and Hospitals System via ambulance after a motor vehicle collision just prior to arrival. (RX6) The history of present illness states as follows. "The patient presents following motor vehicle

collision. The onset was just prior to arrival. 53 yo M pmhx chronic back pain s/p work accident years ago p/w back and neck pain s/p low speed MVC. Pt was restrained drive at approx. 20 mph. Pt reports he was rear ended by police car on left rear of car. Pts wife was in passenger seat. Pt reports no head trauma or LOC, but is partially amnestic to accident. Reports back and neck pain. Denies abdominal pain." *Id.*

Respondent introduced into evidence a discovery deposition of Petitioner in the subsequent lawsuit filed against the driver of the vehicle that hit him, and as an agent of the City of Chicago, and Chicago Police Department and Petitioner's Answers to City of Chicago Interrogatories. (RX3, RX4) In the discovery deposition, Petitioner testified that he has fallen more than six or seven times per year since 2008. (RX3, 33) Petitioner also testified that related to the motor vehicle accident, he has "pain in my neck all the time and my whole body." (RX3, 38) When asked if he was claiming all of that is related to the motor vehicle accident with the City of Chicago employee, Petitioner replied, "Well, I worsened with everything. I think you have all the medical reports. I think that can explain better." *Id.* Petitioner testified that his neck pain prior to the motor vehicle accident was 7 on a scale of 1 to 10. He further testified after the motor vehicle accident, his neck pain was "a lot. A lot of pain. I don't know what they gave me at the hospital, but it did not calm it." He rated it a ten. (RX3, 40-41)

Petitioner further testified while he was at Stroger, Cook County Hospital, his pain level of his neck was 10 on a scale of 1 to 10. (RX3, 77) He saw Dr. McNally in April or May 2016 after the accident. (RX3, 80) He had been seeing Dr. McNally since January 2013 until 2018. *Id.* The first time they talked about surgery was in March of 2016. He testified that he had surgery in June or July 2016 at C3-C4 and after the car accident, everything was a lot more painful. (R3, 84-85) He wore a collar for three months more or less after he left the hospital. He stopped wearing it on the advice of a doctor that told him it could weaken the muscles in his neck. (RX3, 88) After he had the fusion of C3-C4 with Dr. McNally, he had therapy and rehabilitation. (RX3, 88-89) Petitioner testified that the car accident affected "his privacy and his disability more than anything." He cannot have a private life or a social life like he had before. Everything is worsening things. (RX3, 101)

Petitioner testified that after the automobile accident, he can no longer walk like he use to do before or do exercise, like lifting up eight pounds. He testified he feels horrible pain that comes up to his neck. He cannot do Zapatear which the interpreter explained is folk dancing, very typical of Mexican dances where you use your feet and stomp them really hard on the floor. (RX3, 107-108) Petitioner testified that before the motor vehicle accident he could garden but not after the accident. His sons and his wife do the gardening now. (RX3, 111)

On cross-examination Petitioner testified that between the date that Dr. McNally told him he was a surgical candidate at C3-C4 and the date of the motor vehicle accident, he was by not any means going to get that surgery. (RX3, 117-118) After the car accident, the pain increased. After the car accident he felt he really had no choice and had to try the surgery. (RX3, 118)

Conclusions of Law

As a result of his original work-related injuries Petitioner sustained on November 3, 2007, and May 10, 2008, Petitioner underwent a lumbar fusion at L1-L2 on August 19, 2008, prior to the 2010 Arbitration Hearing. Petitioner continued to complain of no improvement after the surgery. On July 29, 2009, his lumbar surgeon, Dr. Malek, noted that Petitioner underwent a cervical MRI on May 16, 2008, and there was no focal disc herniation. The Arbitrator, the Commission on Review and the Circuit Court found Petitioner sustained permanent partial disability in the amount of 40% loss of use of a person as a whole and he was capable of employment with limitations following the surgery.

On April 13, 2016, Petitioner was treated at Cook County Health and Hospitals System emergency room for injuries sustained in a motor vehicle accident. Based upon Petitioner's testimony at the Arbitration Hearings and his testimony at the June 15, 2023, Commission Hearing on Petitioner's Petitions for benefits under §§19(h)/8(a) and the evidence presented at both Hearings, the Commission finds that Petitioner failed to prove a material change in his disability related to his 2007 and 2008 work accidents. Petitioner testified at both hearings that he could not walk, bend, twist or lift any significant weight. He testified that the only thing that changed between the hearings is his routine.

Further, the Commission finds Dr. Ghanayem's opinion that the cervical spine surgery was unrelated to the Petitioner's subject work accidents to be more persuasive than Dr. McNally's opinion. Dr. Malek's July 29, 2009, office note confirms that Petitioner had no cervical disc herniation on MRI on May 16, 2008 which comports with Dr. Ghanayem's 2018 report. Dr. McNally's April 22, 2016, office note confirms Petitioner reported all of his symptoms worsened after the motor vehicle accident. Petitioner's testimony at his discovery deposition in the civil litigation that was filed as a result of that accident comports with his complaints to Dr. McNally on April 22, 2016. The Commission also notes that Petitioner has other unrelated health conditions that could also be attributed to his health deterioration as suggested by Dr. Ghanayem.

As a result, the Commission finds that Petitioner failed to prove that his disability has materially increased since the prior Commission Decision and Opinion on Review. Thus, Petitioner's §19(h) and §8(a) Petition is denied.

The Commission notes that while its records do not contain a copy of a §§19(h)/8(a) Petition, the Commission computer records do show that a §§19(h)/8(a) Petition was timely filed on January 22, 2014, or within 30 months of the Commission's prior decision on February 21, 2012. Accordingly, the Commission maintained jurisdiction to hear this matter.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Petition under §19(h) and §8(a) of the Act is hereby 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.

February 8, 2024
O12/12/23
KAD/bsd
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/s/*Kathryn A. Doerries*
Kathryn A. Doerries

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	08WC025987
Case Name	Juan Ballesteros v. Chicago Hilton & Towers
Consolidated Cases	07WC055954; 07WC055955;
Proceeding Type	8(a)/19(h) Petition
Decision Type	Commission Decision
Commission Decision Number	24IWCC0075
Number of Pages of Decision	18
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Pro Se
Respondent Attorney	Dennis Noble

DATE FILED: 2/8/2024

/s/Kathryn Doerries, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JUAN BALLESTEROS,

Petitioner,

vs. NOS: 08 WC 025987

CHICAGO HILTON & TOWERS,

Respondent.

DECISION AND OPINION ON §19(h) AND §8(a) PETITION

These consolidated cases, 07 WC 55954, 07 WC 55955 and 08 WC 25987, come before the Commission on Petitioner's §19(h) and §8(a) Petition, alleging a material increase in his disability since the Commission's previous Decision and Opinion on Review (12 IWCC 0187) dated February 21, 2012. A hearing on the Petition was held before Commissioner Kathryn A. Doerries on June 15, 2023, in Chicago, Illinois and a record was made. The Commission, having considered the entire record, finds that Petitioner failed to prove a material increase in disability and that as a result Petitioner's §19(h) and §8(a) Petition is denied, for the reasons set forth below.

BACKGROUND AND HISTORY OF THE CASES AT ARBITRATION AND APPEAL

Petitioner filed three Applications for Adjustment of Claim alleging he sustained accidental injuries that arose out of and in the course of his employment on three dates. The cases were consolidated and an Arbitration Hearing was held on multiple dates in Chicago before Arbitrator Milton Black on June 28, 2010, August 18, 2010, September 20, 2010, October 19, 2010, and November 17, 2010. (6/15/23 Illinois Workers' Compensation "IWCC" Hrng., RX5) In an Arbitration Decision filed February 15, 2011, the Arbitrator found that Petitioner sustained accidental injuries on November 3, 2007, and May 10, 2008, that arose out of and in

the course of his employment and, further, that Petitioner did not sustain his burden of proving an accident that arose out of and in the course of his employment on January 17, 2007 (07 WC 55954). *Id.* @Arb.Dec.[Form], p. 2. The Arbitrator found Petitioner's current condition of ill-being is not causally related to the claimed accident of January 17, 2007, because no accident occurred on that date.

The Arbitrator's Order states the following:

Respondent shall be given a credit of $11,712.64 for TTD, $0 for TPD, and $0 for maintenance benefits, for a total credit of $11,712.64.

Respondent shall be given a credit of $5,542.55 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 receive a credit for all amounts paid to or on behalf of Petitioner on account of said accidental injuries.

Respondent shall pay Petitioner temporary total disability benefits of $424.67 /week for 27 weeks, commencing December 1, 2007 through December 28, 2007, commencing May 11, 2008 through August 11, 2008, commencing August 17, 2009 through September 28, 2009, and commencing January 30, 2010 through February 26, 2010, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from December 1, 2007 through February 26, 2010, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall pay reasonable and necessary medical services of $321,809.36, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $382.20/week for 200 weeks, because the injuries sustained caused the 40% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

The Arbitrator found that "Petitioner's sustained substantial spinal injury, which resulted in fusion surgery. He appears to be able to return to work but with limitations. The medical opinions that Petitioner cannot work are unpersuasive. The vocational evaluation opinions that Petitioner cannot return to his past work as a saucier and that he is not a candidate for vocational rehabilitation are unpersuasive." (6/15/23 IWCC Hrng., RX5, Arb.Dec.[NATURE AND EXTENT], p.6)

Petitioner subsequently filed a Petition for Review of the Arbitration Decision pertaining to all three cases on March 18, 2011, and Respondent filed a cross-review of the cases on March 21, 2011.

In a Decision and Opinion on Review dated February 21, 2012, the Commission unanimously affirmed and adopted the Arbitrator's Decision in its entirety. (6/15/23 IWCC Hrng., RX5)

The Commission Decision was appealed to the circuit court. In an Order dated October 10, 2012, the circuit court affirmed the Commission's decision. (6/15/23 IWCC Hrng., RX5, Circuit Court Order) There were no further appeals and the Decision of the Commission was final.

§19(h) of the Illinois Workers' Compensation Act

> (h) An agreement or award under this Act providing for compensation in installments, may at any time within 18 months after such agreement or award be reviewed by the Commission at the request of either the employer or the employee, on the ground that the disability of the employee has subsequently recurred, increased, diminished or ended.
> However, as to accidents occurring subsequent to July 1, 1955, which are covered by any agreement or award under this Act providing for compensation in installments made as a result of such accident, such agreement or award may at any time within 30 months, or 60 months in the case of an award under Section 8(d)1, after such agreement or award be reviewed by the Commission at the request of either the employer or the employee on the ground that the disability of the employee has subsequently recurred, increased, diminished or ended. *820 ILCS 305/19.*

Petitioner timely filed his §19(h)/§8(a) Petition on January 22, 2014. Petitioner's attorney filed a Motion to Withdraw his representation of Petitioner in October 2015 and that Motion was granted on December 10, 2016. Petitioner proceeded pro se thereafter.

> In reviewing a section 19(h) petition, the evidence presented in the original proceeding must be considered to determine if the petitioner's position has changed materially since the time of the Industrial Commission's first decision. (*Howard*, 89 Ill. 2d 428, 433 N.E.2d 657.) Whether there has been a material change in a petitioner's disability is an issue of fact, and the Industrial Commission's determination will not be overturned unless it is contrary to the manifest weight of the evidence. *Howard*, 89 Ill. 2d 428, 433 N.E.2d 657; *United States Steel Corp*., 133 Ill. App. 3d 811, 478 N.E.2d 1108. *Gay v. Industrial Comm'n*., 178 Ill. App. 3d 129, 132, 532 N.E.2d 1149, 1151, 1989.

The parties stipulated to admission of the 2010 transcripts into evidence as Joint Exhibit 1 ("JtX1") at the Commission Hearing on June 15, 2023.[1]

Petitioner testified to the following at the Arbitration Hearing through an interpreter. Petitioner testified that he has diabetes and takes insulin, Metformin, Actos, Aspirin, pain medications, sleeping medication "maybe three times per week." (6/15/23 IWCC Hrng., JtX1, T. 116-117) Petitioner testified that he also takes medication for dizziness. He described his current pain level "from 8 to 9" on a scale of 1 to 10. He never had back pain or treatment before November 3, 2007. (6/15/23 IWCC Hrng., JtX1, T. 117) He was able to work full days.

When asked what he notices about his back and/or leg at the time of the Arbitration Hearing, Petitioner testified that he has pain in his back and cramping in his leg. He has to lay down after he takes his pain medication. He can sit about 15 minutes. He needs to stand and sit, stand and sit. (6/15/23 IWCC Hrng., Jt.X1, T. 118) He testified that he was sitting more than 15 minutes at the Arbitration Hearing because he thought he had to sit. He did not know he would be permitted to stand. (6/15/23 IWCC Hrng., JtX1, T. 118-119)

When asked how far he could walk unassisted without a cane, Petitioner testified that he had never attempted that. He testified he could not bend, could not lift any weight or twist and he sleeps on his left side. When asked if he could squat, Petitioner testified that, in order to maintain his "muscle sort of flexible," he does the exercises that he was ordered to do at home. He testified Dr. Malek ordered some exercises to keep doing "what I could and not to put too much effort." He was unsure if he could kneel on his knees but did not think he could. (6/15/23 IWCC Hrng., JtX1, T. 120)

Petitioner testified that he climbs six or seven stairs as part of therapy. He could drive before November 3, 2007, but he stopped driving a little over two years prior to the Arbitration Hearing. Petitioner testified that he stopped driving because, "I don't have that much strength or potency to slam on the brakes or-" (6/15/23 IWCC Hrng., JtX1, T. 121)

Petitioner testified as to how he spent his days at the time of the Arbitration Hearing. When he would wake, his wife was cooking breakfast for the kids. Petitioner testified that his wife is the one who takes the kids to school, and he waits for her in bed. *Id.*

After that, Petitioner testified that he sits on his lazy boy and watches the news and then they would go out and walk a little bit. He takes Tylenol medication daily for pain. He would also lie down during the day or take a nap. (6/15/23 IWCC Hrng., JtX1, T. 122)

On cross examination Petitioner testified that between the time of his surgery in

[1] To avoid referencing the multiple Arbitration Hearing dates, page references are from the June 15, 2023, Commission Hearing Transcript.

August of '08 and the time of his testimony, he had other health issues including diabetes and polycythemia. Petitioner explained he was told he produced a lot of blood, and he needed "to have it withdrawn to get it out." (6/15/23 IWCC Hrng., JtX1, T. 156-157)

When asked if he had any type of stroke within the last two years, Petitioner responded, "Something like that I might have-- I might have had because my mouth went sideways, but I don't remember. I don't remember when it happened, but it was in January sometime." It was after his surgery and it affected his ability to walk. He testified, "the way I would walk wasn't correct or wasn't good. I would either have to hold on to a cane or something else. I don't remember what it's called." He did not think that the incident where his mouth went sideways affected his ability to walk. Dr. Malek released him and indicated he should be doing some home exercises but not too much, just what he was able to do. (JtX1, Comm. T. 156-157)

Petitioner further testified that he did his exercises in the morning and the afternoon unless he does not feel good. He does them four or five days per week on average. Petitioner was still in therapy; he was doing home exercises and prescribed therapy. July 29, 2010, was the first time he went to Accelerated Rehabilitation Center. Dr. Malek referred him to this facility because Petitioner told Dr. Malek his legs "are very weak, and there's (sic) those times where I can't even hold." He saw Dr. Malek in July after the prior court appearance but had not seen him for quite some time prior to that visit. Petitioner planned to make an appointment to see Dr. Malek when he finished the six weeks prescribed therapy. (6/15/23 IWCC Hrng, JtX1, T. 159-162)

Petitioner rated his condition at the Arbitration Hearing compared to two weeks before the surgery. He testified, "[t]he pain wise it could be the same because back then I couldn't-I couldn't even sleep. I couldn't turn around, or I couldn't turn around or go on my side, and now it's about the same because the pain gets very strong, and it's on and off, and that's the way it's going." He reiterated his pain level remained pretty consistent from the time of accident to the date of the Arbitration Hearing adding, "[s]ometimes it gets stronger now." Prior to the surgery he did not use a cane but would sometimes use what he described as a girdle, different than what he was wearing which was a stronger device to help support his back. Petitioner conceded it would it be fair to say that his condition was worse since the surgery, "because now the pain is stronger and more consistent, and now my legs are not the same as from the surgery or before the surgery." He testified his legs were weaker now than they were before the surgery, "because I don't have the same activity as before. I feel them weaker, and I think they need more exercise." (6/15/23 IWCC Hrng., JtX1, T. 162-165)

§19(h) & §8(a) COMMISSION HEARING JUNE 15, 2023

Pro se Petitioner testified at the Commission Hearing through an interpreter. Regarding changes since the last trial, Petitioner testified that he did not "understand with the documents and when was my trial took place if it was 2010, 2011 or 2012. I do not understand that. The

reports show that there is temporary disability in 2010 through Mr. Black Milton (sic) and in 2011 partial permanent disability through Mr. Black Milton. So I do not understand what happened. I never got any money." (T. 7) The Commissioner asked, "since that last trial, with Arbitrator Milton Black, what changes, if any, have there been in your condition?" Petitioner responded that his cervical (spine) got worse. He testified that the pain is really bad and he does less activities compared to how he "was before." He testified, "I'm just not the same person anymore, I'm not 100% there." Further, Petitioner testified that he had "two fractures- well three fractures with my left arm and I'm not able to perform my activities, and like I said, I don't know how things are now. I only know that I am not there 100% and I am disabled permanently. Everything that I have going on is permanent it's not temporary." (T. 7-8)

Petitioner then recounted that he had a fracture in his lumbar spine from November 3, 2007 and a second fracture on May 10, 2008. Petitioner was asked a second time by the Commissioner to testify regarding the changes he had since the last trial. (T. 9)

Petitioner testified that his "condition is worse now, my lower back and my cervical; And I haven't been able to perform my activities; As a matter of fact, I don't do anything because I feel like it's going to get worse and I lost all my abilities. I'm not how I used to be. Things are worse for me. I have a chronic pain and it bothers me every day, 24 hours a day, and unable to do anything. I'm not able to do anything. With the kind of work and with the line of work that I have that's what I mean with my experience. So I'm not able to stay active." (T. 9-10)

The Commissioner asked how his condition is different from before the trial to after the trial. Petitioner responded that he is walking slowly, has pain all the time and he is "not able to perform my activities and my condition is worse and worse, it's not getting better period little by little I'm going to get worse, I know that." (T. 10)

When asked if he received any medical treatments since the last trial, Petitioner again testified that he had therapy and appointments with the doctor. Not with the doctor that performed the first surgery, but Dr. Thomas NcNally, who performed his cervical surgery, pain doctors, and a doctor that attends to his diabetes. (T. 11)

When asked if he was currently working, Petitioner responded, "No, I am permanently disabled." Petitioner testified that he "wanted to tell the people that represent the company to respond to this case because it's been many years now and they just I say one thing or another and they never say the truth. I'm a human and I have values but I no longer have them." *Id.*

Petitioner added, "I wanted today's show you the proof, the evidence that I have, the reports from the doctors." (T. 11-12)

The Commissioner asked if any medical bills are outstanding and Petitioner replied, "Yes, everything, is outstanding. Well, Medicaid and Medicare have been backing me up

because of the years that I've been working, so thank God for that. That's it. Otherwise I would go crazy." (T. 11-12)

On cross–examination Petitioner was questioned whether or not his testimony, that Medicare and Medicaid backed him up, meant that they paid all his bills. Petitioner responded that he "would not know what to tell you. I have put everything together that I got from hospital, but after that, I don't know." When asked whether or not he was still getting bills in the mail, Petitioner testified that he was not, because his wife "is asking for the bills three or four days after and she is collecting them. She's the one helping me. I don't have the capability to do that." (T. 13)

Petitioner testified that he did not remember testifying in his case in June 2010. He remembered his attorney asked him questions, but not the "question." (T. 13) He thought he recalled testifying that he could not return to work back in 2010 because his health would not permit it. He remembered testifying that his back pain in 2010 was 8 to 9 out of 10, 10 being the worst, confirming his pain was still the same, actually worse. He agreed that he testified that the pain in his back and his legs would cramp and then he had to lay down. At the time of the Arbitration Hearing he could only sit for about 15 minutes. (T. 14)

Petitioner agreed that he had testified that he could not walk without the cane in 2010. (T. 14-15) Petitioner agreed he probably testified in 2010 that he could not lift anything, but it has been many years, so he could not remember. He testified nothing has changed. He cannot lift anything heavy, maybe a bag of bread, "but that's it." He does not want to take the risk. Petitioner testified he does not know what his limit is, but Dr. McNally said his condition is permanent. He agreed that he testified in 2010 that he could not bend and that has not changed much. He could not recall testifying that he could not twist in 2010, but testified he cannot twist. He has to move "and accommodate so I don't hurt myself." (T. 15-16)

When asked on cross-examination if he could kneel right now, Petitioner responded that he has had therapy "for that but it has been awhile." He added, "[s]ometimes I have to go on my knees and hold myself from something, and then when I need to get up my wife or my children will help me." Petitioner can walk the stairs, but he takes his time doing that. He recalled his attorney asked him in 2010 what he did on a daily basis and that he testified that he waited for his wife to get back from taking the children to school in bed, and that has not changed. He testified that his "wife is with me 24 hours. She's the one that takes care of me." (T. 17) Nothing has changed since 2010 except their routine has changed. He testified it is "worse now because we do not go out. We only go out to doctor's appointments." (T. 17-18)

Petitioner testified he stopped using a back brace more than a year prior. He has been suffering from diabetes since 2005 but he does not understand how diabetes works and was not sure his was controlled. He thought he was tested for diabetes after the accident. He testified the diabetes did not cause him to have pain in his legs or feet and "everything I'm going through it happened after the accident." (T. 18)

Petitioner testified further on cross-examination that he did not remember the last time he saw Dr. McNally, but he "just saw him. It must have been May or June." Dr. McNally prescribed "[t]he pain doctor." Petitioner testified he was also sent to get therapy this year, "but they only gave me therapy for three days and then they cancelled it because they said they do not work with my insurance." (T. 19)

With respect to questions his attorney asked in 2010 regarding how he felt after surgery with Dr. Malek, Petitioner testified he did not remember much about his testimony but did remember testifying the pain was stronger and consistent after the surgery and his legs were not the same adding "my body will never be the same." Petitioner recalled being examined in June 2014 by Dr. Alexander Ghanayem at Loyola, at the request of Hilton. (T. 20)

In 2016 Petitioner was involved in a motor vehicle accident, testifying, "[p]art of my body was hurting, it wasn't because of the accident, it was just a pain that I got in my cervical and my lower back. (T. 20)

After the motor vehicle accident, he had surgery on his neck by Dr. McNally in July 2016 at Weiss. He denied testifying at a deposition that the cervical surgery was because of the car accident, stating he "already had it." Petitioner testified that he was represented by an attorney at the discovery deposition and under oath on June 5, 2019, in the motor vehicle accident case. (T. 21)

There was an attorney representing the police from the City of Chicago asking Petitioner questions. The discovery deposition transcript was admitted into evidence as Respondent's Exhibit 3. Respondent's attorney asked Petitioner about page 29 of the deposition when he was asked the following questions: "as part of the benefits that you are requesting does that include the surgery that you had from Dr. McNally in 2016. Your answer: There is a possibility, yes. Do you remember testifying to that?" Petitioner replied, "No." He testified that he remembered seeing Dr. McNally after the accident in 2016. He thought he saw him in April of 2016, right after the accident. (T. 22-23)

When he was asked if he remembered telling Dr. McNally that his pain was much worse ---and that it radiated from the neck to the lower back, Petitioner replied, "Yes, but we were always talking about that because we had spoken back in March after the accident before the accident." He agreed he did not have the surgery until after the motor vehicle accident, but testified that they had already spoken about the surgery. Respondent's attorney then asked if Petitioner remembered questions about the surgery itself at his 2019 deposition and whether he remembered testifying that he was not going to get the surgery by Dr. McNally before he got hurt in the motor vehicle accident. (T. 23) Petitioner denied that is what he said and what he was asked. He testified he spoke about the surgery with Dr. McNally, but they had not set up the day and the time when the surgery was going to take place. (T. 24)

Respondent's attorney read from page 117 of the deposition and asked Petitioner if he remembered when he was "asked the following question: "So, you were in the process between the date that McNally told you you're a surgical candidate at C3, C4 and the date of the accident, you were by no means going to get that surgery, is that correct? And your answer was; Correct." Petitioner replied, "[t] he pain but the fracture was already there." (T. 25) He recalled saying "correct" when asked if he felt after the accident that he really had no choice and had to try the surgery. *Id.* Respondent's attorney asked if Petitioner remembered the following questions asked of him. "Okay, but after the accident, the pain increased, is that what you are saying? And your answer was; correct." *Id.*

Respondent's attorney then asked if Petitioner remembered questions about the condition of his body after the motor vehicle accident at the deposition. Petitioner replied he could not remember. Respondent's attorney asked if he remembered the following question related to the motor vehicle accident from page 38 of the deposition, "so you don't remember if you have had any other pain other than your neck and lower back? And your answer was; "[n]o, I don't remember. It's pain in my neck all the time and my whole body." (T. 26) He was also asked if he remembered being asked at the deposition, "[y]ou are claiming all of that is related to the motor vehicle accident with the City of Chicago, and your answer was, "well, I worsen with everything. I think you have all the medical reports. I think they can explain better." Petitioner replied that, "[n]o, I don't remember but I probably said that. I don't know." He remembered being asked, how his back pain was before and after the accident with the City of Chicago, (T. 26)

Petitioner remembered them asking him questions. When asked if he remembered what he testified to about his pain levels before the motor vehicle accident with the City of Chicago on a scale of one out of 10, Petitioner replied he did. When asked if he remembered what pain levels he testified he had before the motor vehicle accident with the City of Chicago, he thought it could have been 10, 8 or 10. Respondent's attorney read from pages 38 and 39 of the deposition and his answer then was, "Well, before the accident it was less. It was less than a 10 or a 9 and I had to take medication for that after the accident. All I can tell you it was a terrible pain both in my back and my neck. Petitioner agreed he said that and reiterated, "Yes, it was terrible." (T. 27)

Respondent's attorney noted Petitioner's comment that the pain was terrible and asked, "so the pain was terrible after the motor vehicle accident with the City of Chicago, correct?" Petitioner responded that it could have been true. Further, "I don't understand how they are taking this. What I said was the pain was worse. The wound, what I had going on, but I was ready to get surgery. And what I'm saying is, like, why are they blaming it on the accident now. I don't understand. It happened years that I had that surgery in 2008 so I don't understand, the injury." (T. 27-28)

Petitioner testified back in 2019 he was taking Norco because of the accident and he was still taking Gabapentin and Norco. Respondent's attorney asked if Petitioner remembered the

questions in the deposition regarding activities that were impacted by the motor vehicle accident with the City of Chicago, to which he responded, "Well if they are in the report, I think so, but I don't remember which ones they were." (T. 27-28)

Petitioner agreed that his answer that he could no longer walk or exercise as a result of the motor vehicle accident was true, that he has not been walking. (T. 29) He thought he remembered when they asked him about lifting and he said he could lift up to 8 pounds and he feels horrible pain that comes up to his neck. He also agreed he had to stop folk dancing zapatear. He remembered that he testified that before the motor vehicle accident with the City of Chicago he used to tend to a garden, however, he qualified that he would do so sitting down "up until this date." *Id.* And when asked if he remembered testifying that after the motor vehicle accident he could not garden and that his wife and son took that over. Petitioner testified he was not working in the garden and that his son is doing that, sometimes both his children or his wife will do it, but he does not. He did not recall if he was admitted to the Shirley Ryan Ability Lab in 2017. (T. 30)

Petitioner agreed that in 2018, he had a second examination performed by Dr. Alexander Ghanayem at Loyola University, and he recalled attending that examination. (T. 30)

Petitioner testified he injured his left arm when the accident occurred in May 10, 2008. He had therapy on his arm, on his neck, and on his lower back, since 2008. He did not know the nature of the injury but he testified that he "has pain and that it's really strong. It's a chronic pain." (T. 31) Further, Petitioner testified that the pain in his left arm started from the accident. *Id*.

Petitioner has not been working since May 10th, 2008. (T. 32) Petitioner was shown Respondent's Exhibit 4 (RX4). He identified his signature on the back and testified that he signed the "Answers to Interrogatories" as part of his case against the City of Chicago. He thought he had copies of it given to him by his attorney. (T. 32-33) Petitioner testified as a result of that case he received a settlement. Petitioner testified that in total he received $11,000.00 for that accident "but that was for the car that was crashed but I don't know. I don't know what it was for, but then they took away the payment for the attorney, they said medical bills, and I got only like ($)2,000—I don't really remember, ($)2,300, something like that." (T. 33)

Petitioner was asked on cross examination if he did or did not get paid as a result of the Worker's Compensation award in the subject case. He was unsure if he was paid partial or temporary disability. He testified, "I mean, the benefits that I was supposed to get every week they only gave me $11,000, you have the record there, I imagine." (T. 34)

When asked again if he was paid a settlement, he replied, "The settlement that was given to me in 2013, and what I've heard, I heard from you that it's money towards the medical bills." Petitioner testified further he heard it from Respondent's attorney as well that "it was Court (sic)

for like money for medical bills." *Id.* When asked if he paid the medical bills, Petitioner responded, "How am I going to pay for those medical bills, they made me declare bankruptcy. I'm not supposed to pay for the bills because the Judge Black Milton gave the order that you have to pay the medical bills which was like $321,000 you were supposed to pay directly to the providers because his son (sic) didn't have the right to take the money for the medical bills because that was for the doctors. I was supposed to get $76,000 and I never got them. As a matter of fact, the check says partial permanent disability, and if you know how much it was, I can say it. It doesn't say there that the money was to pay the medical bills. The check or the pay stub didn't say that. It was partial permanent disability, that's what was written there; and the settlement from 2011, the money from the settlement was never given to me, what I'm supposed to get weekly for the time that I was out." (T. 34-35)

Petitioner testified that his lawyer told him he had to use the money for medical bills. Petitioner testified that his lawyer did not give him anything, and the check or pay stub did not say anything that the money was for the medical bills. He did not remember the amount of the pay stub, but had copies of everything. Petitioner testified that he had the bill. He testified the money was given to him for partial permanent disability. (T. 35-36)

On re-direct examination, Petitioner testified, "I don't know if there are more questions and if the doctor (sic) is going to accept the report that I have there from the doctor and the medical bills." (T. 36)

Petitioner was invited by the Commissioner to clarify or explain his testimony after cross examination. Petitioner responded, "Yes, I want to know why they made us responsible to pay the medical bills from the beginning until now if it was proved that everything I went through was because of the accident from 2007 and 2008. Why did they just get rid of me like an animal, and that's what I'm asking for here. I want the monetary benefits to pay to me and the medical benefits for life, all of that." (T. 37)

Petitioner was asked by the Commissioner Doerries to clarify which condition Petitioner currently experiences is causally related to the work accident and has changed materially since the last trial. (T. 37) Petitioner responded, "Well, what I know is that ever since the accident happened my body is weakening. I fell. Have fallen many times and I am not the same person that I was before. As time goes by, you know, the chronic pain gets worse, and, you know, I'm just going down." (T. 37-38)

Exhibits

As referenced above the parties entered into evidence as a joint exhibit the transcripts and exhibits from multiple Arbitration Hearing dates before Arbitrator Milton Black in 2010. At the subject hearing, Petitioner entered four exhibits into evidence without objection and Respondent entered nine exhibits into evidence without objection with his first two exhibits noted to be the same as Petitioner's exhibits 3 and 4.

On July 29, 2009, Dr. Malek's office note confirms that Petitioner's upper back was doing better. Dr. Malek also noted Petitioner had an evaluation at Rush University on April 16, 2009, in which it was noted by Dr. Madhu Soni that Petitioner had a history of polycythemia and possible Bell's Palsy. Number 17 on Dr. Malek's list of Diagnoses confirms Petitioner had a cervical spine MRI on May 16, 2008 showing desiccation at multiple levels, no focal disc herniation. On January 13, 2010, Petitioner returned to his surgeon, Dr. Malek and reported he had a work up at Rush for Bell's Palsy. He still had some residual symptoms that, according to Dr. Malek, were neuropathic in nature. (6/15/23 IWCC Hrng. JtX1, ArbHrng., PX6)

The Arbitrator's Decision was issued on February 5, 2011, and was affirmed by the Commission on February 21, 2012, and by the Circuit Court on October 16, 2012. (RX5) No further appeal was taken and the Commission Decision became final. On January 3, 2013, Petitioner consulted Dr. McNally for thoracolumbar back pain, bilateral leg weakness when he walks and left sided scapular and shoulder pain. Petitioner's past surgical history was positive for a 2008 lumbar fusion and a 1993 hip-reattachment. His lumbar spine exam looked "pretty normal." Under review of systems, Petitioner's past medical history was positive for diabetes Type II. Dr. McNally's Diagnoses included lumbar spinal stenosis, kyphosis, posterior spinal fusion with right sided TLIF, lumbar disc displacement and cervical disc displacement. He recommended a CT myelogram of the lumbar spine, EMG/NCS of the bilateral lower extremities and a follow-up to review those studies. (PX1)

Respondent entered into evidence Dr. McNally's April 22, 2016, office note. (RX8). Petitioner's chief complaint was sharp pain that radiated from his neck to his lower back. He was there to review his most recent cervical MRI and EMG/NCS of bilateral upper extremities. He reported he and his wife were involved in a vehicle collision on April 13, 2016. They reported they were hit in the left rear side behind the driver side back passenger door. They were driving at about 20 mph and the police car hit them at about the same speed. There were no tickets issued and no sirens or lights were in use by the police. The patient and his wife were taken to Stroger Hospital, he was evaluated and released. …The patient reports that he has a sharp pain that radiates from the back of his neck and into his lower back. He states that his neck pain is located mostly to the right side of his neck and is a stabbing pain. He reports tingling into his right arm that at times will travel into his right hand. He states that his neck pain can also radiate into his bilateral arms down to his fingers. The patient reports that his lower back is painful, he locates this pain across his lower back with the most intense pain to his left lower back. He states that he has sharp pain that radiates into his left leg and his left foot. Patient also reports he is now experiencing pain and weakness at times to his right leg. He states that he has fallen several times in the past few weeks. He reports some numbness and tingling in his bilateral lower extremities. He also reports headaches almost every day. *Id.*

Dr. McNally's April 22, 2016, Assessment and Plan section states:

> 53 year old male who has continued severe neck, mid back and low back pain with upper and lower extremity paresthesias. He states that since his MVC on 4/13/16, his symptoms have worsened.
>
> His current thoracolumbar issues are causally related to his work related injuries and subsequent treatment necessitated by the injuries. He has developed a disabling pain syndrome. His condition remains permanent.
>
> The patient's imaging studies were reviewed, including his cervical MRI and EMG/NCS of bilateral upper extremities. The patient's diagnoses were presented and reviewed. We discussed non-operative and operative treatment options at length. We discussed the risks of non-operative and operative treatment options in detail. We discussed the benefits of non-operative and operative treatment options extensively. All questions were answered. The patient expressed understanding that there are risks associated with both surgical and non-surgical treatment.
>
> Regarding the large disc herniation to the right at C3-4, we discussed the different surgical approaches that could be considered, including anterior only decompression and fusion, posterior only decompression alone or decompression and fusion, or a combined anterior and posterior approach.
>
> As we have before, we re-discussed that a large portion of his symptoms are permanent. He will require lifelong pain management. His is disabled and will not be able to return to work. (RX8)

On January 3, 2023, Dr. McNally's office note confirms Petitioner's back injury is superimposed on severe sensorimotor polyneuropathy (DM). Petitioner was here for chronic pain of the lower back. He was still getting pain occipital neuralgia pain, multiple times per week. He was unable to walk without pain. He also gets headaches and stiffness in his neck. He rated his pain as 7/10. Dr. McNally wrote, "Due to his work related trauma, he developed a permanent disabling pain syndrome. His work related conditions will be expected to wax and wane over the years. He will require lifelong pain management. He may benefit from a SCS (spinal cord stimulator) trial. He is disabled and has chronic pain. He is MMI (maximum medical improvement) from his work related injuries though, as above he will require lifelong pain management." (PX1)

There was only one other note from Dr. McNally in Petitioner's Exhibit 1, dated May 18, 2023. Petitioner returned following up on pain of the lower back, worse since past 3 days with no new injury or trauma. Pain radiated in both legs down to toes but left leg worse and numbness and tingling in both feet. Severe pain in his right shoulder reported to be new. He described occipital neuralgia type symptoms according to the office note. Dr. McNally wrote the same note that he wrote on January 3, 2023, "Due to his work related trauma, he developed a permanent disabling pain syndrome… " (PX1)

Petitioner tendered into evidence copies of medical bills. (PX2)

Petitioner tendered into evidence the Section 12 Independent Medical Examination reports of Dr. Alexander Ghanayem dated June 26, 2014 (PX 4) and February 12, 2018. (PX 3)

In his June 26, 2014, report, Dr. Ghanayem opined:

> My impression is that this gentleman has residual back pain and leg symptoms after a lumbar fusion, which apparently, per his report, did not help him back in 2008. His symptoms radiate all the way up his spine to the cervical base and would not be related to the lumbar fusion, In addition, the circumferential leg symptoms would be an excess of what would be expected from the residuals of a lumbar fusion. His current diagnosis is failed back syndrome. Apparently, it was felt that he could go back to work with restriction in the past. I see no objective reason why that should change at this time. l do not know what he is qualified for, and l would defer to the vocational specialist for that. The number of his current complaints with the back pain radiating all the way up to the cervical base would be unrelated to his work injury. The circumferential leg symptoms would also be unrelated. I wonder if his polycythemia vera and his stroke has caused some deterioration in his health, along with his diabetes, which could be responsible for his current subjective complaints. Relative to this fusion and failed back syndrome, and the use of hydrocodone, his work restrictions placed in the past would be all that is necessary. (PX4)

In his February 12, 2018, report Dr. Ghanayem opined:

> My impression relative to this gentleman is that his lumbar spine is unchanged from my report in 2014. So far as his cervical spine is concerned, he did not sustain a cervical spine injury when I evaluated him the first time and it appears he had an injury to his cervical spine unrelated to work back in 2016. The cervical fusion is not related to his work injury in 2008 or prior. While I am not established in the need for cervical spine surgery relative to the motor vehicle accident, I am breaking any causal connection between his cervical spine surgery and his work injuries from the prior decade. It is therefore my opinion relative to his ability to work is unchanged from my prior report in 2014. Looking at the reports of his cervical spine and MRI scans, it appears that the March 2016 MRI scan shows a new disk herniation at C3-C4. This was not present at the time of his work injury in 2008 or prior. Issues of MMI as it relates to the cervical spine are moot because he did not sustain a cervical spine injury at the workplace. (PX3)

On April 13, 2016, Petitioner presented with neck and back pain to Cook County Health and Hospitals System via ambulance after a motor vehicle collision just prior to arrival. (RX6) The history of present illness states as follows. "The patient presents following motor vehicle

collision. The onset was just prior to arrival. 53 yo M pmhx chronic back pain s/p work accident years ago p/w back and neck pain s/p low speed MVC. Pt was restrained drive at approx. 20 mph. Pt reports he was rear ended by police car on left rear of car. Pts wife was in passenger seat. Pt reports no head trauma or LOC, but is partially amnestic to accident. Reports back and neck pain. Denies abdominal pain." *Id.*

Respondent introduced into evidence a discovery deposition of Petitioner in the subsequent lawsuit filed against the driver of the vehicle that hit him, and as an agent of the City of Chicago, and Chicago Police Department and Petitioner's Answers to City of Chicago Interrogatories. (RX3, RX4) In the discovery deposition, Petitioner testified that he has fallen more than six or seven times per year since 2008. (RX3, 33) Petitioner also testified that related to the motor vehicle accident, he has "pain in my neck all the time and my whole body." (RX3, 38) When asked if he was claiming all of that is related to the motor vehicle accident with the City of Chicago employee, Petitioner replied, "Well, I worsened with everything. I think you have all the medical reports. I think that can explain better." *Id.* Petitioner testified that his neck pain prior to the motor vehicle accident was 7 on a scale of 1 to 10. He further testified after the motor vehicle accident, his neck pain was "a lot. A lot of pain. I don't know what they gave me at the hospital, but it did not calm it." He rated it a ten. (RX3, 40-41)

Petitioner further testified while he was at Stroger, Cook County Hospital, his pain level of his neck was 10 on a scale of 1 to 10. (RX3, 77) He saw Dr. McNally in April or May 2016 after the accident. (RX3, 80) He had been seeing Dr. McNally since January 2013 until 2018. *Id.* The first time they talked about surgery was in March of 2016. He testified that he had surgery in June or July 2016 at C3-C4 and after the car accident, everything was a lot more painful. (R3, 84-85) He wore a collar for three months more or less after he left the hospital. He stopped wearing it on the advice of a doctor that told him it could weaken the muscles in his neck. (RX3, 88) After he had the fusion of C3-C4 with Dr. McNally, he had therapy and rehabilitation. (RX3, 88-89) Petitioner testified that the car accident affected "his privacy and his disability more than anything." He cannot have a private life or a social life like he had before. Everything is worsening things. (RX3, 101)

Petitioner testified that after the automobile accident, he can no longer walk like he use to do before or do exercise, like lifting up eight pounds. He testified he feels horrible pain that comes up to his neck. He cannot do Zapatear which the interpreter explained is folk dancing, very typical of Mexican dances where you use your feet and stomp them really hard on the floor. (RX3, 107-108) Petitioner testified that before the motor vehicle accident he could garden but not after the accident. His sons and his wife do the gardening now. (RX3, 111)

On cross-examination Petitioner testified that between the date that Dr. McNally told him he was a surgical candidate at C3-C4 and the date of the motor vehicle accident, he was by not any means going to get that surgery. (RX3, 117-118) After the car accident, the pain increased. After the car accident he felt he really had no choice and had to try the surgery. (RX3, 118)

Conclusions of Law

As a result of his original work-related injuries Petitioner sustained on November 3, 2007, and May 10, 2008, Petitioner underwent a lumbar fusion at L1-L2 on August 19, 2008, prior to the 2010 Arbitration Hearing. Petitioner continued to complain of no improvement after the surgery. On July 29, 2009, his lumbar surgeon, Dr. Malek, noted that Petitioner underwent a cervical MRI on May 16, 2008, and there was no focal disc herniation. The Arbitrator, the Commission on Review and the Circuit Court found Petitioner sustained permanent partial disability in the amount of 40% loss of use of a person as a whole and he was capable of employment with limitations following the surgery.

On April 13, 2016, Petitioner was treated at Cook County Health and Hospitals System emergency room for injuries sustained in a motor vehicle accident. Based upon Petitioner's testimony at the Arbitration Hearings and his testimony at the June 15, 2023, Commission Hearing on Petitioner's Petitions for benefits under §§19(h)/8(a) and the evidence presented at both Hearings, the Commission finds that Petitioner failed to prove a material change in his disability related to his 2007 and 2008 work accidents. Petitioner testified at both hearings that he could not walk, bend, twist or lift any significant weight. He testified that the only thing that changed between the hearings is his routine.

Further, the Commission finds Dr. Ghanayem's opinion that the cervical spine surgery was unrelated to the Petitioner's subject work accidents to be more persuasive than Dr. McNally's opinion. Dr. Malek's July 29, 2009, office note confirms that Petitioner had no cervical disc herniation on MRI on May 16, 2008 which comports with Dr. Ghanayem's 2018 report. Dr. McNally's April 22, 2016, office note confirms Petitioner reported all of his symptoms worsened after the motor vehicle accident. Petitioner's testimony at his discovery deposition in the civil litigation that was filed as a result of that accident comports with his complaints to Dr. McNally on April 22, 2016. The Commission also notes that Petitioner has other unrelated health conditions that could also be attributed to his health deterioration as suggested by Dr. Ghanayem.

As a result, the Commission finds that Petitioner failed to prove that his disability has materially increased since the prior Commission Decision and Opinion on Review. Thus, Petitioner's §19(h) and §8(a) Petition is denied.

The Commission notes that while its records do not contain a copy of a §§19(h)/8(a) Petition, the Commission computer records do show that a §§19(h)/8(a) Petition was timely filed on January 22, 2014, or within 30 months of the Commission's prior decision on February 21, 2012. Accordingly, the Commission maintained jurisdiction to hear this matter.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Petition under §19(h) and §8(a) of the Act is hereby 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.

February 8, 2024
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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	19WC007902
Case Name	Dale Craine v. Forest Preserve of Dupage County
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0076
Number of Pages of Decision	15
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Charles Romaker, Frank Kress
Respondent Attorney	Daniel Flores

DATE FILED: 2/9/2024

/s/ Deborah Simpson, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Dale Craine,
Petitioner,

vs. NO: 19 WC 7902

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 27, 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 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.

February 9, 2024

o1/24/24
DLS/rm
046

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

/s/*Marc Parker*
Marc Parker

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC007902
Case Name	Dale Craine v. Forest Preserve of Dupage County
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	Michael Glaub, Arbitrator

Petitioner Attorney	Frank Kress
Respondent Attorney	Daniel Flores

DATE FILED: 4/27/2023

THE INTEREST RATE FOR THE WEEK OF APRIL 25, 2023 4.84%

/s/Michael Glaub, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Dale Craine
Employee/Petitioner

v.

Forest Preserve of DuPage County
Employer/Respondent

Case # **19** WC **7902**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Michael Glaub**, Arbitrator of the Commission, in the city of **Geneva**, on **2/24/2023**. 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. ☒ 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 13, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**38,072.58**; the average weekly wage was $**732.16**.

On the date of accident, Petitioner was **48** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of $**15,619.52** 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

Temporary Total Disability
Respondent shall pay Petitioner temporary total disability benefits of $ 488.11/week for 32 weeks, commencing 8/14/2018 through 3/25/2019, as provided in Section 8(b) of the Act, subject to its credit for temporary total disability benefits paid.

Medical benefits
Respondent shall pay the following medical providers for medical treatment to the petitioner's right shoulder and chest condition: $3,274.00 to Midwest Orthopaedics at Rush, $477.00 to Illinois Orthopaedic Institute, $4,000.00 to Oak Brook Imaging and $21,481.51 to Hines VA Hospital, pursuant to the Illinois Medical Fee Schedule, if unpaid, as provided in Sections 8(a) and 8.2 of the Act.

Prospective Medical benefits
Respondent shall authorize the surgery to repair the Petitioner's right shoulder as well as appropriate post-operative medical care, as recommended by Dr. Ryan Pizinger.

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

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

Michael Glaub **APRIL 27, 2023**
Signature of Arbitrator

Dale Craine v. Forest Preserve of DuPage County
19 WC 7902

MEMORANDUM OF DECISION OF ARBITRATOR

Findings of Fact

The Petitioner in this matter worked as a maintenance worker employed by the Respondent, Forest Preserve of DuPage County. (T. 10). The Petitioner testified his job duties included cutting in all of the forest preserves, cleaning up, and making tree rings around the parks. (T. 11). The Petitioner stated that he also performed all kinds of landscaping and lawn maintenance. Id. The Petitioner further explained that his job involved pushing, pulling, and lifting, including tree trunks and chippers. Id. The Petitioner testified that lifting duties included bags of grass seed, fertilizers, and occasionally big types of trees. Id.

The Petitioner testified that he was working for the Respondent on August 13, 2018. Id. On that date, the Petitioner had been sent to do a job that included the maintenance of "tree rings." Id. In order to perform this task, the Petitioner, was tasked with digging the tree rings around a tree and then putting mulch around the tree. Id. The Petitioner explained that he had to go to a location across the street from the tree in order to get the mulch for this job, but before retrieving the mulch, he had to move some tools that were in the back of his dump truck. Id. In order to move the tools, the Petitioner had to climb back into the dump truck. (T. 12). The Petitioner testified that after moving the tools, he had to climb out of the back of the truck. Id. As he attempted to climb out of the back of the truck, he slipped off of the side of the truck, catching himself with his right arm. Id. When he caught himself, the Petitioner felt a pop in his right shoulder that was accompanied by a burning sensation. Id.

The Petitioner first sought medical care at the emergency room of Central DuPage Hospital. Following the initial treatment, the Petitioner opted to seek care at the Hines VA Hospital on August 15, 2018. (Px 1, P. 200). On that date, Dr. Alexander Kedzierski noted that the Petitioner had presented for

an evaluation of a right shoulder injury that occurred at work…when he slipped off [of a] truck and grabbed [a] bar to prevent [a] fall. Id. Dr. Kedzierski noted that the Petitioner heard a popping sound and then [experienced] severe pain in [his] shoulder and arm. Id. Dr. Kedzierski noted that while the x-rays at Central DuPage Hospital showed no fracture or dislocation, he suspected that the Petitioner had injured his biceps/rotator cuff. Id. Accordingly, Dr. Kedzierski recommended that the Petitioner undergo an MRI and have a consultation with an orthopaedic doctor. Id. On August 21, 2018, the Petitioner underwent the prescribed MRI.

On September 10, 2018, Dr. Nikhil Verma of Midwest Orthopaedics at Rush examined the Petitioner on the behalf of the Respondent pursuant to Section 12 of the Illinois Workers' Compensation Act. (Px 2, P. 72). Dr. Verma noted that the Petitioner's report of injury indicated that he had injured his pectoral muscle while getting himself out of the back of his truck. Id. Dr. Verma further noted that the MRI of August 21, 2018, indicated rotator cuff tendinosis, subscapularis tendinosis, moderate glenohumeral osteoarthritis and a "concern" over a pectoralis injury. (Px 2, P. 73).

Dr. Verma diagnosed the Petitioner with a suspected pectoralis tear. Dr. Verma further noted that the injury sustained appeared to be a right shoulder suspected pectoralis injury with possible intrasubstance subscapularis tear and biceps subluxation. (Px 2, P. 75).

Dr. Verma recommended that the Petitioner undergo a pectoralis and chest wall dedicated MRI scan to evaluate for pectoralis injury, further noting that treatment could not be determined at that time pending the additional diagnostic imaging. Id.

On September 5, 2018, Dr. Daniel Schmitt of the Hines Orthopaedic clinic evaluated the Petitioner. (Px 1, P. 193). Dr. Schmitt noted that the Petitioner's initial MRI revealed a possible partial myotendinous tear of the right pec major. (Px 1, P. 194). Dr. Schmitt recommended that the Petitioner begin a regimen of physical therapy as a way to attempt nonoperative treatment, noting that that Petitioner may still need surgical repair in the future. Id.

On September 18, 2018, the Petitioner underwent a second MRI at Hines, this time of his chest. (Px 1, P. 27). The MRI revealed a poorly defined partial width tear of the musculotendinous junction of the superior one-third fibers of the right pectoralis major with surrounding edema. Id. The radiologist's report further noted that the inferior two-third fibers were still intact and that the findings in the shoulder joint were better evaluated on the recent MRI of the shoulder from August 12, 2018. Id. Based upon Dr. Schmitt's' recommendations, the Petitioner began a regimen of occupational therapy at Hines on September 28, 2018, (Px 1, P. 71).

On January 8, 2019, Dr. Verma conducted a records review at the request of the Respondent (Px 2, P. 64). Dr. Verma noted that the MRI, that he had prescribed during his Independent Medical Exam of petitioner, was completed on September 18, 2018 and revealed a partial tear of the pectoralis muscle. Id. Dr. Verma further noted that he concurred with the radiologist's interpretation that there was an upper border partial musculotendinous tear of the subscapularis, but that he did not see a frank detachment of the tendon from the bone. (Px 2, P. 65). Dr. Verma noted that as of the date of his addendum, the treatment options were twofold. (Px 2, P. 66). Dr. Verma wrote that treatment options at that point would be to consider a PRP injection with physical therapy for six weeks at a rate of three times per week. Id. However, Dr. Verma noted that if the Petitioner remained significantly symptomatic, he would recommend surgical intervention in the form of exploration of the tear site and primary repair. Id.

By February 4, 2019, the Petitioner had become frustrated with the pace of his treatment at the Hines VA. Accordingly, he opted to treat with Dr. Verma as patient rather than as the subject of an independent medical examination (Px 2, P. 9). Dr. Verma reiterated his assessment that the Petitioner had suffered a partial tear of his pectoralis major tendon. (Px 2, P. 10). Dr. Verma recommended that the Petitioner should undergo another MRI in order to hopefully obtain a better image of the pectoralis tendon. Id.

On February 11, 2019, the Petitioner underwent another MRI of his chest, this time at Midwest Orthopaedics at Rush (Px. 2, P. 88). The radiologist's interpretation of the MRI was that the Petitioner had sustained a minimal strain in the pectoralis major muscle with no evidence of tendon retraction or rupture. Id. It was also noted that the Petitioner had a small joint effusion within the right sternoclavicular joint with subchondral edema, a finding that was most likely degenerative; however, the possibility of septic arthritis could not be excluded. Id.

On February 20, 2019, the Petitioner was seen by an orthopaedic doctor at Hines. (Px 1, P. 123). Dr. Kevin Sonn noted that the Petitioner was now six months post-accident and that he discussed with the Petitioner that there was no role for surgical intervention for his partial pectoralis tendon tear. (Px 1, P. 124). Dr. Sonn also noted that recovery time is variable and also depends on the nature of the work to which the Petitioner needs to return. Id. Finally, Dr. Sonn noted that the Petitioner and his therapist believed they were still making progress and therefore it was appropriate to continue with therapy. Id.

The Petitioner returned to see Dr. Verma on February 22, 2019. (Px 2, P. 5). Dr. Verma noted that he reviewed the most recent MRI and that it indicated a minimal strain of the pectoralis muscle. Id. Dr. Verma noted that there was no evidence of chronic tendon disruption. Id. Dr. Verma further noted that despite the fact that the Petitioner continued to have pain over the anterior aspect of the shoulder, he did not see any obvious deformity. Id. Accordingly, Dr. Verma recommended that based upon the MRI, he certainly did not see anything that would be amenable to surgical intervention and that the Petitioner should continue seeing the VA hospital regarding any treatment recommendations. Id. Dr. Verma wrote that he did not have anything further to offer the Petitioner. Id.

The petitioner did not have any additional medical care for approximately two years. However, on February 26, 2021, the Petitioner was evaluated at the Illinois Orthopedic Institute by Dr. Ryan Pizinger. (Px 4, P. 2). Dr. Pizinger noted that the Petitioner reported to him that his pain severity was a six out of ten and that the Petitioner described his pain as constant and aching. Dr. Pizinger noted that

the Petitioner stated that the pain was always present but was more severe when lifting his arm. Id. Dr. Pizinger wrote that, as of the date of his evaluation, he was not convinced that the pectoralis had suffered a significant rupture. (Px 2, P. 3). Dr. Pizinger noted that there was a possibility of a musculotendinous injury in the past which would have been a non-surgical diagnosis. Dr. Pizinger noted that he did believe that the Petitioner's shoulder was the primary focal point and there was a possibility of a slap tear as well as a subscapularis tendon tear as well as a supraspinatus tear. Id. Based upon these possibilities, Dr. Pizinger recommended an MR arthrogram of the Petitioner's right shoulder to better assess his condition. Id.

On March 18, 2021, the Petitioner had the recommended MR arthrogram at Oak Brook Imaging (Px 5, P. 2). The MR arthrogram revealed a partial tear of the inferior surface of the supraspinatus at the distal insertion. (Px 5, P. 3). The MRI arthrogram also revealed a partial tear of the anterior aspect of the infraspinatus tendon. Id.

Following the MR arthrogram, the Petitioner returned to see Dr. Pizinger on March 26, 2021. (Px 4, P. 5). Dr. Pizinger reviewed the images from the MRI arthrogram, as well as images from the initial MRI from August of 2018. (Px 4, P. 6). Dr. Pizinger noted that the images did show a partial tearing of the superior subscapularis. Id. He noted that there was complex tearing of the superior labral tissue. Id. Dr. Pizinger noted there were signs of glenoid bone bruising along its central to inferior portion mainly along the posterior aspect consistent with the Petitioners described injury. Id. Dr. Pizinger also noted that images from November of 2020 as well as the most recent study from March of 2021 were examined. Id. Dr. Pizinger specifically noted that the images did not show significant differences and did not show a new injury. Id. Dr. Pizinger wrote that the current imaging did show a progression of the subscapularis tear where it had become more obvious along the superior aspect. Id.

Dr. Pizinger noted that as of March 31, 2021, the imaging just after the Petitioner's injury as well as the current imaging shows the exact same injury pattern and findings consistent with the

described injury at work. Id. Dr. Pizinger diagnosed the Petitioner with rotator cuff tearing of the subscapularis supraspinatus and infraspinatus tendons along with a slap tear. Id. Given that Dr. Pizinger felt that the MRI studies had not changed and showed no new injury, he was able to causally relate his diagnosis to the Petitioner's work accident of August 13, 2018. Id.

Dr. Pizinger recommended that based upon the Petitioner's limitations and his failure of conservative care, the Petitioner was a surgical candidate. Id. Dr. Pizinger wrote that surgery in this case would be in the form of a right shoulder arthroscopic debridement with subacromial decompression, biceps tenodesis, rotator cuff repair of the subscapularis and supraspinatus and infraspinatus tendons. Id.

On October 15, 2021, the Respondent arranged for the Petitioner to undergo another Section 12 examination. On this date, Dr. Hythem Shadid examined the Petitioner and concluded that Petitioner did not need a surgery as a result of his accident of August 13, 2018. (Rx 3, P. 17). Dr. Shadid diagnosed the Petitioner only with right shoulder glenohumeral joint arthritis and right shoulder degenerative rotator cuff tendinopathy. Based upon the discrepancy between the treatment recommendations of Dr. Pizinger and those of Dr. Verma and Dr. Shadid, the litigation in this matter ensued.

CONCLUSIONS OF LAW

The Arbitrator adopts the above findings of material facts in support of the following conclusions of law:

(F)

The primary disagreement between the parties is whether the Petitioner's current condition of ill-being causally related to the injury of August 13, 2018. The Respondent relies upon the opinions of Dr. Verma and Dr. Shadid that the Petitioner is not a surgical candidate and, at most, suffered a partial pectoralis tear. The Arbitrator notes that it is well documented that the earlier imaging of the Petitioner's shoulder was less than clear, suggesting that the films reviewed by Dr. Verma in 2018 failed to provide the best look at the injuries sustained.

The Arbitrator notes that Dr. Shadid's rendered the opinion that the Petitioner was suffering from degeneration and arthritis without reviewing *any* of the films. Dr. Shadid admitted that when he treats his own patients and performs a surgical repair of a SLAP tear, he reviews MRI films. (Rx 4, P. 27). He testified that it is beneficial to him to review MRI films when planning a surgery so that he can see where he will place sutures, but for diagnostic purposes a review of an MRI is "not as critical." Id. Dr. Shadid was asked at his deposition how often, in his practice, he rendered a diagnosis without personally reviewing an MRI film. He answered, "it's not very often, but it does happen." (Rx 4, P. 29). The Arbitrator finds that the medical opinions Dr. Shadid are less credible based on the fact that he had not reviewed the diagnostic films.

Dr. Pizinger is the only physician that reviewed the films from the MR arthrogram that was performed of the Petitioner's right upper extremity. In fact, at the hearing in this matter, the Arbitrator actually questioned the Petitioner as to which of his diagnostic studies were MR arthrograms versus standard MRIs. (T. 27). The Petitioner testified that only the final study

was an MR arthrogram. Id. The Arbitrator finds it vital that Dr. Pizinger reviewed the MR arthrogram and was able to diagnose shoulder pathology that may have been overlooked by the doctors at the VA as well as Dr. Verma. Dr. Pizinger specifically compared the finding of the MR arthrogram to the initial MRI images to conclude that the shoulder tears that he observed on the MR arthrogram existed in the initial MRI images leading him to conclude that the current condition of the ill-being regarding the Petitioner's right shoulder is causally related to the initial injury of August 13, 2018. The Arbitrator agrees.

Based on the above, the Arbitrator chooses to adopt the medical opinions of Dr. Pizinger over those of Dr. Shadid. Accordingly, the Arbitrator finds that the that the Petitioner's current right shoulder condition, for which Dr. Pizinger has recommended surgical intervention, is causally related to the Petitioner's accident of August 13, 2018.

(J)

The issue of whether the medical services provided to Petitioner were reasonable and necessary is in dispute. The Petitioner listed the following medical bills on the Trial Stipulation sheet (Arbitrator's Exhibit 1):

Midwest Orthopaedics at Rush (Pet. Ex. 2, P. 97)	$ 3,274.00
Illinois Orthopaedic Institute (Pet. Ex. 4, P. 7-8)	$ 477.00
Oak Brook Imaging (Pet. Ex 5, P. 7)	$ 4,000.00
Hines VA Hospital (Pet. Ex 6, P. 7-19)	$ 21,481.51

Having found that the Petitioner's current state of ill-being is causally related to the accident of August 13, 2018, the Arbitrator also finds that the bills of Illinois Orthopaedic Institute and Oak Brook Imaging are related to the accident. Accordingly, the Respondent is ordered to pay to these outstanding medical bills to Illinois Orthopedic Institute and Oak Brook Imaging pursuant to the Illinois Medical Fee Schedule, if unpaid. The Arbitrator also finds that petitioner's treatment of his right shoulder and chest at Midwest Orthopedics at Rush and at the Hines VA Hospital from August

13, 2018, through February 22, 2019, to be causally related to petitioner's work injury. The Arbitrator orders the Respondent to pay Midwest Orthopedics at Rush and Hines VA Hospital medical bills that are related to treatment of petitioner's right shoulder and chest condition pursuant to the Illinois Medical Fee Schedule, if unpaid. The Arbitrator notes petitioner submitted voluminous medical records from Hines VA regarding treatment for a variety of medical conditions. The Arbitrator specifically finds that the respondent is not responsible to pay for any treatment that involves body parts other than the petitioner's right shoulder and chest conditions.

(K)

The issue of whether the Petitioner is entitled to prospective medical care is in dispute. Having adopted the opinion of Dr. Pizinger regarding the causal relationship that Petitioner's right shoulder condition is causally related the work accident of August 13, 2018, the Arbitrator orders the Respondent to authorize the prospective medical treatment Dr. Pizinger has prescribed including surgery and post-operative care.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC028364
Case Name	Michelle Marshall v. State of Illinois - Illinois State University
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0077
Number of Pages of Decision	12
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	William Trimble
Respondent Attorney	Bradley Defreitas

DATE FILED: 2/9/2024

/s/ Deborah Simpson, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MCLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Michelle Marshall,
Petitioner,

vs. NO: 17 WC 28364

State of Illinois/Illinois State University,
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 and notice and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 12, 2023, is hereby affirmed and adopted.

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

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

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

February 9, 2024

o1/10/24
DLS/rm
046

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

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

SPECIAL CONCURRENCE

I agree with the outcome of the Decision of Majority affirming the Decision of the Arbitrator. I do so based on the Arbitrator's determination of Petitioner's lack credibility based on various inconsistencies, a finding which I do not believe the Commission should disturb on review. However, I do not agree with all the reasoning utilized by the Arbitrator and Commission.

Petitioner testified her accident occurred when she tripped over chairs in the break area. She also testified that at the time of the accident she was returning to the break area to retrieve her keys which she needed to perform her job, she was rushing to get back to work, and the tables/chairs were close together and tricky to maneuver around. The Arbitrator found that tripping while rushing to retrieve items necessary to perform one's job did not constitute a risk associated with the claimant's employment under the *McCallister* doctrine. The Majority affirmed and adopted the Decision of the Arbitrator. While I concur with the result of the majority decision, I would not have affirmed and adopted the Arbitrator's finding that an accident, based the acts about which Petitioner testified, could not have constituted a compensable accident under the Workers' Compensation Act. Therefore, I respectfully concur with the Decision of the Majority.

/s/*Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC028364
Case Name	Michelle Marshall v. State of Illinois/ISU
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	9
Decision Issued By	Bradley Gillespie, Arbitrator

Petitioner Attorney	William Trimble
Respondent Attorney	Bradley Defreitas

DATE FILED: 1/12/2023

THE INTEREST RATE FOR THE WEEK OF JANUARY 10, 2023 4.71%

/s/ Bradley Gillespie, Arbitrator

Signature

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

January 12, 2023

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation Commission

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Michelle Marshall
Employee/Petitioner

v.

State of Illinois/ISU
Employer/Respondent

Case # **17** WC **028364**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Bradley Gillespie**, Arbitrator of the Commission, in the city of **Bloomington**, on **June 30, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **April 4, 2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**40,833.00**; the average weekly wage was $**785.25**.

On the date of accident, Petitioner was **56** years of age, ***single*** with **0** dependent children.

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

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

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

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

ORDER

THE ARBITRATOR FINDS THAT PETITIONER DID NOT GIVE PROPER NOTICE TO RESPONDENT. THE ARBITRATOR ALSO FINDS THAT PETITIONER DID NOT SUSTAIN AN INJURY THAT AROSE OUT OF AND IN THE COURSE OF HER EMPLOYMENT WITH RESPONDENT. ALL BENEFITS ARE DENIED.

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

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

Bradley D. Gillespie **JANUARY 12, 2023**

Signature of Arbitrator

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MICHELLE MARSHALL,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No: 17 WC 028364**
	)	
STATE OF ILLINOIS/ ILLINOIS STATE UNIVERSITY,	)	
	)	
	)	
Respondent.	)	
	)	

19(b) DECISION OF THE ARBITRATOR

This matter proceeded to hearing on June 30, 2022, in Bloomington, Illinois under 19(b) of the Act. (Arb. 1). The following issues were in dispute:

- Accident
- Notice
- Causal Connection
- Medical Bills
- Prospective Medical Treatment

FINDINGS OF FACT

Witness Testimony

Petitioner testified that on April 4, 2017, she was employed by Illinois State University as a building service worker and she was assigned to Watterson Towers. (Tr. p. 9) She testified that on that date

> "I was working in the dining area; and I was taking my break; and I was sitting at the table in the dining area taking my break; and when the break was over, I got up to finish my work; and I realized that I didn't have my keys with me. So, I went back to the table where I was sitting; and as I picked up my keys, as I turned back, my leg – feet got caught into the tables, the chairs – the chairs; and I fell." (Tr. p. 10)

Petitioner testified that she needed her keys to perform her job and was rushing to return to work. (Tr. p. 11) She fell forward and put both hands out to catch herself. *Id.*. Petitioner testified that immediately following the accident her shoulder was a little sore. (Tr. p. 12) She was able to complete her job duties for the day. *Id.* Petitioner testified that she did not report her injury on that date because, "I was just starting my job, and I had never been in that situation before, and I didn't want to lose my job and I didn't have

sick time at the time." *Id*. She testified that she continued to work thinking it would go away. (Tr. pp. 12-13)

Petitioner testified that she went to OSF Prompt Care on April 6. (Tr. p. 13) She said that even though her medical record says she fell at home, she did not tell anyone that she fell at home and did not have a fall at home. *Id.* Petitioner testified that she followed up with Dr. Kantamneni on May 2, 2017, for right shoulder pain. (Tr. p. 14) She testified that the history reported in Dr. Kantamneni office notes was accurate. (Tr. pp. 14-15) She confirmed that she reported falling at work at ISU when she was rushing and tripped on one of the dining room chairs. *Id.* Petitioner testified that Dr. Kantamneni referred her for an MRI and to an orthopedist. (Tr. p. 16) She confirmed that she underwent an MRI on May 6, 2017. *Id.* Petitioner testified that she had an appointment with Dr. Newcomer on May 22, 2017. (Tr. p. 17) It was her understanding that he was recommending surgery. (Tr. pp. 17-18) Petitioner testified that she wanted the surgery but that her insurance wouldn't pay for it, that she would have to be off work and that she could not manage going without work at that time. (Tr. p. 18)

Petitioner testified that she did not miss work for doctors' appointments. (Tr. 18-19) She could not recall whether her boss knew she was attending doctors' appointments. (Tr. p. 19) Petitioner told her supervisor at her concurrent employment that she had problems related to her accident. *Id.* Petitioner claimed that she reported her injury to her supervisor at ISU. *Id.* She admitted that she did not report her injury close in time to its occurrence. (Tr. p. 20) Petitioner asserted that she told someone within 45 days of her injury. *Id.* She did not provide her supervisor with any restrictions because she could not work with restrictions. *Id.*

Petitioner was shown Petitioner's Exhibit #2 and she did not recognize it until she recognized her handwriting on the first two pages. (Tr. p. 21) Petitioner was asked about when she orally reported her injury and stated, "[i]t wasn't the same day…I can't tell… I don't remember how many days apart when I reported it, but it wasn't the same date that I had injured myself." (Tr. p. 22) She was then asked about the date of injury and responded that "[i]t's April but I don't know the exact date." *Id.*

On cross-examination, Petitioner agreed that the date of injury listed on her notice of injury was April 9, 2017. (Tr. p. 27) She disagreed that she filled out the notice of injury on July 26, 2017 and instead testified that she filled it out a month after the accident. *Id.* When asked whether she wrote July instead of May her response was "[i]t seems that way." *Id*.

When asked whether she remembers what specific day she fell she stated, "I don't remember the date I fell." (Tr. p. 27) She further stated that "I know in my report to the doctor I knew the date. I know the report when I gave to my boss I knew the date, but I don't recall the date down when I signed this." (Tr. p. 28)

Petitioner was shown the record from Dr. Jason Cash and did not recall who that Dr. Cash was. (Tr. p. 29) She denied that she told anyone she fell at home. *Id.* When she looked at the record, she agreed that it stated she fell at home. *Id.*

Petitioner admitted that her report of injury does list July 20, 2017, as the date she signed her report. (Tr. p. 30) She also agreed that her supervisor, Sonny Garcia, filled out his report of the injury on July 20, 2017, as well. *Id.*

Petitioner indicated that she worked Sunday through Thursday from 11:00 p.m. to 7:00 a.m. (Tr. p. 31) She confirmed that she was in the Watterson dining hall when she fell. (Tr. p. 32) Petitioner indicated that the dining hall is for the students. *Id.* Petitioner testified that no one witnessed the fall and that she did not tell any co-workers about her fall on the date of accident. *Id.*

Petitioner's exhibits

The deposition of Dr. Joseph Newcomer was entered as Petitioner's Exhibit 1. Dr. Newcomer opined that Petitioner had a full thickness tear in her supraspinatus near the far anterior insertion and that her labrum was torn. (PX #1 p. 7) He opined that the alleged fall at work was the cause of her injury and need for surgery. (PX #1 p. 12) Dr. Newcomer agreed that if Petitioner had another fall or prior fall then that could be the cause of her injury as well.

The notice of injury filled out by Petitioner and the supervisors report of injury were entered as Petitioner's Exhibit 2. Petitioner's notice of injury was dated July 26, 2017 and the date of injury noted was April 9, 2017. (PX #2) She reported that she fell while moving in between chairs at Watterson dining hall. (PX #2 p. 1) Petitioner's supervisor, Sonny Garcia, filled out a report of injury form on July 20, 2017, which showed a date of injury on April 9, 2017.

The MRI report from May 5, 2017, was entered as Petitioner's Exhibit 3. The impression is noted as 1) small full thickness rim rent tear of the distal supraspinatus tendon; 2) partial tear of the articular surface of the infraspinatus tendon; and 3) spurring at the acromioclavicular joint contributes to subacromial stenosis. (PX #3)

The records from OSF Medical Group from April 9, 2017, through September 21, 2017, were entered as Petitioner's Exhibit 4. These records reflect that on May 2, 2017, Petitioner was seen by Dr. Kantamneni and she reported to him that she fell at work while walking between chairs and fell forward on her right shoulder. The May 15, 2017, record notes that Petitioner received a cortisone injection into her right shoulder.

Records from OSF Prompt Care- Eastland were entered as Petitioner's Exhibit 6. The relevant records reflect that Petitioner was seen on April 6, 2017, by Dr. Jason Cash who recorded that the incident occurred at home and occurred two days before her visit. (PX #6 p. 5) The report notes that the history was provided by the patient.

A medical bill list is entered as Petitioner's Exhibit 7. The form 45 report of injury is entered as Petitioner's Exhibit 8. This record reflects a date of injury on April 9, 2017, and was completed on July 26, 2017. (PX #8)

Arbitrator Credibility Assessment

Petitioner did not answer all questions posed to her on direct or cross-examination in a consistent manner. She could not recall the date of her purported fall. When she first sought treatment for her injuries at OSF Prompt Care, Petitioner provided a history of falling at home. (PX #6 p. 5) However, she denied having told anyone that she was injured at home. Petitioner testified that she reported her injury prior to completing the report of injury on July 20, 2017. However, upon further inquiry, she could not recall who she told or when. Moreover, she testified that she did not provide any restrictions to her supervisor which does not support her having communicated about her injury to her supervisor before the completion of the report of injury over three months later. Based on the inconsistencies between Petitioner's testimony and the other records presented, the Arbitrator finds that Petitioner was not a credible witness.

Conclusions of Law

As an initial matter the Arbitrator notes Petitioner has the burden of proving all of his case by a preponderance of the evidence. *Chicago Rotoprint v. Industrial Comm'n*, 157 Ill.App.3d 996, 1000, 509 N.E.2d 1330, 1331(1st Dist. 1987).

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

For an injury to "arise[] out of" one's employment its origin must be in a risk connected with or incidental to the employment so that there is a causal relationship between the employment and the injury. The Petitioner must show that the risk of injury is specific to his employment or show that he was exposed to a greater degree than the general public. *Orsini v. Industial Comm'n*, 117 Ill.2d 38, 45 (1987). That analysis allows for three categories of risk that an employee may be exposed to: (1) risks distinctly associated with the job; (2) risk that are personal to the employee; and (3) neutral risks that have no personal or job related characteristics. *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill.App.3d 149, 162 (1st Dist. 2000).

The Arbitrator finds that Petitioner's injuries were not the result of an employment related risk nor a personal risk. The risk was neutral. Additionally, the Arbitrator notes that while testifying Petitioner was unable to recall the date of injury on direct or cross examination. Further the Arbitrator finds that Petitioner did not give a consistent history regarding where or when the accident occurred.

Injuries resulting from a neutral risk generally do not arise out of the employment and are compensable only where the employee was exposed to the risk to a greater degree than the general public. Such an increased risk may be either qualitative, such as some aspect of the

employment which contributes to the risk, or quantitative, such as when the employee is exposed to a common risk more frequently than the general public. *Springfield Urban League v. Illinois Workers' Compensation Comm'n*, 990 N.E.2d284, 290 (4th Dist. 2013)

Here, Petitioner was walking after her lunch break and tripped on a chair. There was no evidence presented that there was a defect in the chair or that she was exposed at a greater risk than the general public. Based on the above, the Arbitrator finds that Petitioner did not sustain an injury that arose out of and in the course of her employment with Respondent.

In addition, there is a dispute as to whether this injury occurred at work or at home. The note from April 6, 2017, says that the fall occurred at home. Petitioner did testify that she never told the doctor she fell at home but there was no evidence presented that the record was incorrect or the result of typographical error.

Based on the foregoing, the Arbitrator finds that Petitioner did not sustain an accident that arose out of and in the course of her employment with Respondent

Issue (E): Was timely notice of the accident given to Respondent?

The Illinois Workers' Compensation Act requires that "[n]otice of the accident shall be given to the employer as soon as practicable, but not later than 45 days after the accident." 820 ICLS 305/6(c). Further the Act states that "[n]o defect or inaccuracy of such notice shall be a bar to the maintenance of proceedings on arbitration or otherwise by the employee unless the employer proves that he is unduly prejudiced in such proceedings by such defect or inaccuracy. Id. "The purpose of the notice requirement is to enable the employer to investigate the employee's alleged industrial accident." *White v. Workers' Comp. Comm'n*, 374 Ill.App.3d 907 at 910-911.

Here, Petitioner did not give notice to her employer until July 20, 2017, which is 102 days from the written accident date of April 9, 2017. It is 107 days past the date of accident that now appears on the amended application for adjustment of claim. This is clearly past the 45 day notice requirement under the Act. Respondent has been unduly prejudiced by this delay as it was unable to investigate this unwitnessed fall until over three months after the alleged injury.

Petitioner testified at trial that she definitely gave notice within the 45 days required by the Act but when asked specifically when she gave notice, Petitioner was unable to come up with a date or even indicate who she told at Illinois State University. The credibility of Petitioner's testimony goes against her claim that she reported this injury within 45 days of the accident.

The medical record from OSF Prompt Care dated on April 6, 2017, notes that Petitioner fell at home and makes no mention of work. Petitioner first mentions a fall at work to Dr. Kantamneni on May 2, 2017.

In the instant case, no evidence was adduced showing that the Respondent had actual knowledge of the accident until well after the 45 day period had passed and Respondent has been actually prejudiced by this fact. Therefore, the Arbitrator finds that Petitioner did not give proper notice under the Act.

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 having found that Petitioner did not sustain accidental injuries arising out of and in the course of her employment denies the medical expenses incurred by Petitioner.

Issue (O): Prospective medical

The Arbitrator having found that Petitioner did not suffer an injury that arose out of and in the course of her employment with Respondent denies all prospective medical treatment.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC021005
Case Name	Kelly Jones v. Egyptian Health Dept
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0078
Number of Pages of Decision	13
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	Frank Johnston

DATE FILED: 2/9/2024

/s/ Deborah Simpson, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kelly Jones,

Petitioner,

vs. NO: 21 WC 21005

Egyptian Health Dept,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 21, 2022, is hereby affirmed and adopted.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $50,000.00. 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.

February 9, 2024
o1/10/23
DLS/rm
046

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

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

/s/*Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC021005
Case Name	Kelly Jones v. Egyptian Health Dept
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	10
Decision Issued By	William Gallagher, Arbitrator

Petitioner Attorney	Thomas Rich
Respondent Attorney	Frank Johnston

DATE FILED: 10/21/2022

THE INTEREST RATE FOR THE WEEK OF OCTOBER 18, 2022 4.24%

/s/ William Gallagher, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Kelly Jones
Employee/Petitioner

Case # 21 WC 21005

v.

Consolidated cases: n/a

Egyptian Health Dept
Employer/Respondent

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

DISPUTED ISSUES

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

FINDINGS

On the date of accident, December 16, 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 $27,567.25; the average weekly wage was $530.14.

On the date of accident, Petitioner was 51 years of age, married with 0 dependent child(ren).

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

Respondent shall be given a credit of $18,580.32 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $18,580.32.

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

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $353.43 per week for 81 2/7 weeks, commencing March 5, 2021, through May 3, 2021, and May 6, 2021, through September 27, 2022, as provided in Section 8(b) of the Act.

Respondent shall authorize and pay for prospective medical treatment including, but not limited to, the right carpal tunnel surgery as recommended by Dr. Steven Young.

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 21, 2022

William R. Gallagher, Arbitrator
ICArbDec19(b)

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged she sustained a repetitive trauma injury arising out of and in the course of her employment by Respondent. The Application alleged a date of accident of December 16, 2020, and that, as a result of "Repetitive Job Duties," Petitioner sustained an injury to her "Right Hand and Arm" (Arbitrator's Exhibit 2). This case was tried in a 19(b) proceeding and Petitioner sought an order for payment of medical bills and temporary total disability benefits as well as prospective medical treatment. In regard to temporary total disability benefits, Petitioner claimed she was entitled to temporary total disability benefits of 81 2/7 weeks, commencing March 5, 2021, through May 2, 2021, and May 6, 2021, through September 27, 2022 (date of trial). At trial, Petitioner and Respondent stipulated Petitioner was temporarily totally disabled during the aforestated periods of time. The prospective medical treatment sought by Petitioner was right upper extremity surgery, as recommended by Dr. Steven Young, an orthopedic surgeon. Respondent disputed liability on the basis of accident and causal relationship (Arbitrator's Exhibit 1).

Petitioner testified she worked for Respondent for approximately 16 years, the last two of which she worked as a billing specialist. Petitioner worked for Respondent in the remaining 14 years as both a secretary and office manager. Petitioner stated that during her entire career with Respondent, she performed data entry using a mouse and keyboard.

Petitioner testified her work day was seven hours which included two 15 minute breaks. As a billing specialist, Petitioner did data entry, met with client for financial intakes, prepared e-mails and inputted insurance data. As a secretary, Petitioner also lifted and placed files in cabinets. Petitioner estimated that when she worked as a secretary, she spent over one-half of each work day doing data entry. When she became a billing specialist, Petitioner did even more data entry and estimated she spent approximately 75% of each work day doing data entry especially at the end of a year.

In December, 2020, Petitioner was working at home because of the pandemic. On December 16, 2020 (the date of manifestation alleged in the Application), Petitioner experienced pain in her right hand when she picked up her coffee cup. She also experienced pain when she was typing. At home, Petitioner used a laptop and worked at her kitchen table. Because of this, Petitioner's arms were higher than what they were at her desk at the office. Petitioner described the position of her arms as being "pretty awkward" and, in December, 2020, was spending most of her work day preparing end of the year reports. Petitioner stated she spent at least six hours a day doing data entry. Petitioner reported the symptoms to Respondent and was given a cushion for her keyboard and mouse. Petitioner stated her symptoms improved when she was off work, but worsened when she returned.

Theresa Pickering testified for Respondent. Pickering is Respondent's Chief Information Officer, a position she has held for the past seven years. Pickering was in charge of all electronic health records and acted as the IT and billing supervisor. She had been Petitioner's immediate supervisor since July, 2019.

Pickering's testimony was consistent with the testimony of Petitioner in regard to Petitioner's job duties as a billing specialist. However, Pickering testified Petitioner's data entry/typing consisted of three to four hours per day and Petitioner was not required to perform any job duties on a constant/continuous basis. Pickering testified the office had a relaxed environment which allowed employees to pace themselves.

On cross-examination, Pickering agreed she had never worked as a billing specialist, but she had helped her subordinates with their job duties which included typing. She was not aware of any financial reports Petitioner was required to prepare at the end of the year which would have increased her typing.

Petitioner testified in rebuttal and stated she disagreed with Pickering's estimate of the actual time she spent doing data entry. In December, 2020, when Petitioner was working from home, she was assigned to prepare reports which required more data entry work than what she was accustomed to.

Petitioner initially sought medical treatment from Jason Churchill, a Physician Assistant, on January 28, 2021. At that time, Petitioner complained of right wrist/forearm pain which began in December, 2020. PA Churchill administered some trigger point injections into Petitioner's right forearm (Petitioner's Exhibit 3).

Petitioner again saw PA Churchill on March 5, 2021. At that time, Petitioner informed PA Churchill that when she typed at work, the pain worsened. PA Churchill ordered EMG/nerve conduction studies (Petitioner's Exhibit 3).

The EMG/nerve conduction studies of Petitioner's right hand were performed on March 16, 2021. The studies were normal and did not reveal any median neuropathy at the wrist (Petitioner's Exhibit 4).

PA Churchill subsequently ordered physical therapy which Petitioner received from March 22, 2021, through April 13, 2021. When initially seen on March 22, 2021, it was noted that when Petitioner was typing at work for billing at the end of the year, Petitioner had increased pain in the right hand, median nerve, forearm, elbow and occasional radiation into the shoulder (Petitioner's Exhibit 5).

PA Churchill referred Petitioner to Dr. Steven Young, an orthopedic surgeon, who initially evaluated Petitioner on April 8, 2021. At that time, Petitioner informed him she had right upper extremity pain since December 16, 2020, which she associated with typing and doing repetitive work. On examination, Dr. Young noted Petitioner's complaints of numbness were mainly in the median nerve distribution. He opined Petitioner might have carpal tunnel syndrome despite the negative nerve conduction study which was performed on March 16, 2021. He performed an injection into the right carpal tunnel. Dr. Young also prescribed medication and a splint and directed Petitioner not to use her right upper extremity at work (Petitioner's Exhibit 6).

Petitioner was again seen by Dr. Young on May 20, 2021. Petitioner continued to complain of right hand numbness and tingling and advised her pain was worse following the injection. Dr. Young's findings on examination were consistent with right carpal tunnel syndrome. He noted Petitioner was to be evaluated by a physician in St. Louis on June 8, 2021 (Petitioner's Exhibit 6).

At the direction of Respondent, Petitioner was examined by Dr. Ryan Calfee, an orthopedic surgeon, on June 8, 2021. Dr. Calfee was subsequently deposed on May 22, 2022, and his deposition testimony is reviewed herein.

On June 24, 2021, Petitioner was again seen by Dr. Young as well as Philip Erthall, a Physician Assistant. At that time, they noted Petitioner had been evaluated by a physician in St. Louis who noted Petitioner may have radiculopathy from the cervical spine and recommended evaluation by a spine specialist. At that time, they decided to refer her Petitioner to Dr. Jeffery Jones, a spine specialist in their office (Petitioner's Exhibit 6).

An MRI scan of Petitioner's cervical spine was performed on August 12, 2021. According to the radiologist, the MRI revealed mild multilevel degenerative disc disease and a reversal of the normal cervical lordosis (Petitioner's Exhibit 6).

EMG/nerve conduction studies were performed on Petitioner's right upper extremity on August 12, 2021. The studies were normal and there was no evidence of right median neuropathy or right ulnar neuropathy (Petitioner's Exhibit 7).

Petitioner was again seen by PA Erthall on August 30, 2021. At that time, he noted the nerve conduction studies were normal, but Petitioner continued to complain of symptoms in the right hand as well as her right elbow. PA Erthall administered an injection into Petitioner's right elbow (Petitioner's Exhibit 6).

Petitioner continued to be seen by PA Erthall and Dr. Young from October, 2021, through February, 2022. An MRI of Petitioner's right elbow was performed on November 18, 2021, which was negative for denervation or epicondylitis. When Dr. Young saw Petitioner on January 20, 2022, he opined Petitioner continued to have symptoms consistent with carpal tunnel syndrome. He administered an injection into her right elbow and ordered physical therapy (Petitioner's Exhibit 6).

Dr. Jones evaluated Petitioner on February 14, 2022, and reviewed the MRI which was previously performed on August 12, 2021. He noted the MRI revealed a severely degenerated disc at C5-C6, but Petitioner had no neck pain. He recommended Petitioner proceed with carpal tunnel surgery (Petitioner's Exhibit 6).

Petitioner was seen by David Mason, a Physician Assistant associated with Dr. Young on February 21, 2022. Petitioner's right upper extremity condition remained the same. Dr. Young subsequently recommended Petitioner undergo right carpal tunnel release surgery and an endoscopic ulnar nerve decompression (Petitioner's Exhibit 6).

At the direction of Respondent, Petitioner was examined by Dr. Kevin Rutz, an orthopedic surgeon, on February 8, 2022, in regard to her cervical spine condition. In connection with his examination of Petitioner, Dr. Rutz reviewed medical records and diagnostic studies provided to him by Respondent which included the MRI of August 12, 2021. Dr. Rutz opined Petitioner's right upper extremity symptoms were not coming from the cervical spine (Respondent's Exhibit 4).

Dr. Calfee was deposed on May 20, 2022, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Calfee testified Petitioner informed him she sustained discomfort/pain in her right arm while working at home toward the end of 2020. Dr. Calfee also obtained a history of Petitioner's employment and job duties (Respondent's Exhibit 1; pp 11-13).

Dr. Calfee testified he examined Petitioner and reviewed the results of diagnostic tests which were performed on her. Dr. Calfee stated Petitioner had symptoms consistent with carpal tunnel syndrome, but could not make a diagnosis. However, Dr. Calfee also testified that if Petitioner was ultimately diagnosed as having carpal tunnel syndrome, he opined it was not attributable to Petitioner's work duties. He attributed such a condition to other risk factors including Petitioner being female, middle aged, and having a BMI of 30. He also stated Petitioner's typing was not the type of manual labor or use of vibratory tools which would cause carpal tunnel syndrome (Respondent's Exhibit 1; pp 17-30).

On cross-examination, Dr. Calfee agreed the diagnosis of carpal tunnel syndrome was a clinical diagnosis and individuals could have such a diagnosis even with a negative EMG/nerve conduction study. He also conceded that if conservative treatment had failed, the next step would be a carpal tunnel release (Respondent's Exhibit 1; pp 53-54).

Dr. Young was deposed on May 31, 2022, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Young's testimony was consistent with his medical records and he reaffirmed the opinions contained therein. Specifically, Dr. Young testified that a negative nerve conduction study did not rule out the diagnosis of carpal tunnel syndrome and someone can have the condition even with a negative study. Dr. Young also testified that given that conservative measures had failed, Petitioner should undergo carpal tunnel release surgery. However, he also testified that an endoscopic ulnar nerve decompression procedure was not necessary (Petitioner's Exhibit 9; pp 17-23).

In regard to causality, Dr. Young testified Petitioner informed him that she had worked as a billing specialist the last couple of years and her job duties consisted primarily of data entry which included typing and writing for approximately 75% of her work day. He testified Petitioner's repetitive use contributed to the development of carpal tunnel syndrome or could worsen its symptoms. In explaining his opinion, Dr. Young stated that typing could contribute to or aggravate carpal tunnel syndrome because of the position of the wrist which can put pressure on the median nerve as well as repetitive flexion/extension of the wrist (Petitioner's Exhibit 9; pp 23-25).

On cross-examination, Dr. Young was interrogated about other risk factors and their relationship to carpal tunnel syndrome. He agreed Petitioner being female, her age and being overweight were such risk factors. He also agreed that it was more common for the condition to develop as a result of operating heavy machinery or vibratory tools (Petitioner's Exhibit 9; pp 37-39).

On redirect examination, Dr. Young was questioned about other risk factors which included diabetes, pregnancy, hypothyroidism/gout and being a smoker. Dr. Young testified Petitioner had none of these other risk factors (Petitioner's Exhibit 9; pp 41-42).

Petitioner testified she had not been able to return to work and continues to experience right hand symptoms and wants to proceed with the surgery recommended by Dr. Young. Petitioner also testified she had no right hand symptoms prior to December, 2020. She confirmed that she has never been diagnosed with diabetes, gout, or a thyroid condition and is a non-smoker.

Conclusions of Law

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

The Arbitrator concludes Petitioner sustained a repetitive trauma injury arising out of and in the course of her employment by Respondent which manifested itself on December 16, 2020, and her current condition of ill-being is causally related to her work activities.

In support of this conclusion the Arbitrator notes the following:

Petitioner credibly testified regarding her job duties as a billing specialist and the fact she spent approximately six hours a day doing data entry which included typing. Further, when Petitioner developed hand symptoms in December, 2020, she was also having to prepare end of the year reports.

When Petitioner developed her right hand symptoms, she was working at home using a laptop at her kitchen table which was higher than her desk at the office. Petitioner testified that, because of this, the position of her wrist was "pretty awkward."

Theresa Pickering, Petitioner's supervisor, testified regarding Petitioner's job duties as a billing specialist and stated Petitioner typically typed three to four hours per day and it was not constant/continuous. However, Pickering had no knowledge of Petitioner having to prepare end of the year reports in December, 2020, and did not observe Petitioner on a day-to-day basis because of Petitioner working at home.

Given the preceding, the Arbitrator finds the testimony of Petitioner regarding her job duties to be more persuasive than that of Pickering.

Petitioner's treating physician, Dr. Young, diagnosed Petitioner with the right carpal tunnel syndrome and opined it was related to her work as a billing specialist. He testified Petitioner's repetitive use of her right hand would contribute to or cause carpal tunnel syndrome symptoms. He specifically noted the position of the wrist could put pressure on the median nerve, which is consistent with Petitioner's description of the "awkward" position her wrist was in while working at home.

Both Dr. Young and Dr. Calfee, Respondent's Section 12 examiner, agreed individuals could be diagnosed with carpal tunnel syndrome even with a negative nerve conduction study.

Dr. Calfee did not opine as to a diagnosis, but testified that if Petitioner was found to have carpal tunnel syndrome, it was because of other risk factors, namely, Petitioner being female, middle aged, and having a BMI of 30. He opined Petitioner's typing was not the type of manual labor or use of vibratory tools which cause carpal tunnel syndrome.

Dr. Young admitted the factors noted by Dr. Calfee were risk factors for the development of carpal tunnel syndrome; however, he also noted there were other risk factors Petitioner did not have including diabetes, pregnancy, hypothyroidism/gout and being a non-smoker.

Based on the preceding, the Arbitrator finds the opinion of Dr. Young to be more persuasive than that of Dr. Calfee in regard to causality.

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

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

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

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

Based upon the Arbitrator's conclusion of law in disputed issues (C) and (F), the Arbitrator concludes Petitioner is entitled to prospective medical treatment including, but not limited to, right carpal tunnel surgery as recommended by Dr. Young.

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

The Arbitrator concludes Petitioner is entitled to temporary total disability benefits of 81 2/7 weeks, commencing March 5, 2021, through May 2, 2021, and May 6, 2021, through September 27, 2022.

In support of this conclusion the Arbitrator notes the following:

At trial, Petitioner and Respondent stipulated Petitioner was temporarily totally disabled during the aforestated periods of time.

William R. Gallagher

William R. Gallagher, Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC030530
Case Name	Alexander Ray v. Chicago Transit Authority
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0079
Number of Pages of Decision	12
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Charles Culbertson
Respondent Attorney	James Jackson

DATE FILED: 2/13/2024

/s/Marc Parker, Commissioner

Signature

24IWCC0079

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 §19(l), §19(k) Penalties	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ALEXANDER RAY,

Petitioner,

vs. NO: 21 WC 30530

CHICAGO TRANSIT AUTHORITY,

Respondent.

DECISION AND OPINION ON REVIEW

This matter comes before the Commission pursuant to Respondent's timely filed Petition for Review of the Decision of the Arbitrator. Notice having been given to all parties, the Commission, after fulfilling our mandate under §19(e) to consider all questions of fact and law appearing in the transcript, modifies 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

The Arbitrator found Petitioner sustained an accidental injury arising out of and occurring in the course of his employment on October 16, 2021, and his current psychological condition is causally related to the work accident. As to accident, the Arbitrator found Petitioner credibly testified to the events captured on the video, sought immediate treatment, and was diagnosed with post-traumatic stress disorder ("PTSD") as a result of the incident. Turning to causal connection, the Arbitrator highlighted the records of the treating psychiatrist, Dr. Leonard Elkun, "detail Petitioner's treatment for anxiety and PTSD caused by the October 16, 2021 accident." Arb.'s Dec., p. 4. The Arbitrator awarded Temporary Total Disability ("TTD") benefits as well as medical expenses and found Petitioner sustained 7.5% loss of use of the person as a whole; finding Respondent's dispute of the claim "was not unreasonable," the Arbitrator denied Petitioner's request for §19(l) and §19(k) penalties. While the Commission agrees with the resolution of the threshold issues and benefits award, we disagree that Respondent acted reasonably in disputing Petitioner's claim.

Initially, the Commission notes Respondent filed a Petition for Review but failed to file a Statement of Exceptions. As Respondent offered no argument in support of its Review, we have no direct statement of Respondent's basis for the denial of Petitioner's claim. Instead, the only indication of Respondent's rationale for disputing Petitioner's claim comes from Petitioner's penalties petition. Petitioner first filed a penalties petition in February 2022, seeking penalties under §19(l) and §19(k) (PX1); Respondent did not file a response. Among the allegations in the penalties petition is the following:

> 3. Respondent, after over a month of being pressed on the issue, decided to deny the claim. They had no medical opinion to deny this matter, only their policy that the accident did not meet their standards of injury. In fact, opposing counsel said, "No one died it wasn't an actual accident. There was only one medical treater in the case, Petitioner's treating physician, Dr. Elkun.["] PX1 (Emphasis added).

The Commission observes such a defense position is contrary to law.

To be clear, the standard for a mental-mental claim is the claimant suffer "a sudden, severe emotional shock traceable to a definite time, place and cause which causes psychological injury or harm" (*Pathfinder Co. v. Industrial Commission*, 62 Ill. 2d 556, 563 (1976)), and the claimant must present objective evidence supporting inferences of psychological injury, causation, and disability. *Chicago Transit Authority v. Illinois Workers' Compensation Commission*, 2013 IL App (1st) 120253WC, ¶ 21. Petitioner's unrebutted evidence satisfies all three requirements. The Commission emphasizes there is no further requirement that the shocking event must involve a death. Moreover, even if the Commission extends substantial charity to Respondent and infers its mental-mental accident policy is predicated on its employees routinely having near-misses and therefore being desensitized to such incidents, that provides no refuge, as the law is clear the event is to be considered under a reasonable person standard:

> Nothing in *Pathfinder* requires that the "sudden, severe emotional shock" which must be proved should be considered within the context of the claimant's occupation or training. On the contrary, the *Pathfinder* court specifically noted that the shock experienced by the claimant in that case "would be the reaction of a person of normal sensibilities." *Pathfinder*, 62 Ill. 2d at 567, 343 N.E.2d at 919. Accordingly, we believe that whether a worker has suffered the type of emotional shock sufficient to warrant recovery should be determined by an objective, reasonable-person standard, rather than a subjective standard that takes into account the claimant's occupation and training. *Diaz v. Illinois Workers' Compensation Commission*, 2013 IL App (2d) 120294WC, ¶ 33 (Emphasis added).

Here, Respondent's video shows a gentleman fall on the tracks as the L train operated by Petitioner is entering the station and Petitioner comes within literal inches of crushing the man. The record reflects Petitioner had an immediate psychological response, was taken to the emergency room where he was treated for a panic attack, and he was thereafter authorized off work while undergoing psychiatric care for diagnoses of anxiety and PTSD caused by the October 16, 2021 event. In the Commission's view, Respondent's denial of Petitioner's claim is unreasonable, particularly in light of its failure to offer any contrary evidence at trial. Moreover, given Respondent's additional failure to provide argument in support of its denial before the Commission, we find Respondent pursued a Review without a good faith purpose. As such, we find Respondent's conduct implicates the Act's penalties provisions.

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

> If the employee has made written demand for payment of benefits under Section 8(a) or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay…In case the employer or his or her insurance carrier shall without good and just cause fail, neglect, refuse, or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30 per day for each day that the benefits *** have been so withheld or refused, not to exceed $10,000. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay. *820 ILCS 305/19(l)*.

Section 19(k) of the Act provides, "In case[s] where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation *** then the Commission may award compensation additional to that otherwise payable under the Act equal to 50% of the amount payable at the time of such award." *820 ILCS 305/19(k)*. The purpose of sections 19(k) and 19(l) is to further the Act's goal of expediting the compensation of workers and penalizing employers who unreasonably, or in bad faith, delay or withhold compensation due an employee. *Avon Products, Inc. v. Industrial Commission*, 82 Ill. 2d 297, 301 (1980). Under §19(l), the penalties are in the nature of a late fee, and are mandatory if the payment of benefits is late and the employer cannot show an adequate justification for the delay. *Jacobo v. Illinois Workers' Compensation Commission*, 2011 IL App (3d) 100807WC, ¶ 20. The standard for determining whether an employer has good and just cause for a delay in payment is defined in terms of reasonableness: The employer has the burden of justifying the delay, and the employer's justification for the delay is sufficient only if a reasonable person in the employer's position would have believed that the delay was justified. *Id* (Emphasis added). The standard for awarding penalties under §19(k) requires more than an "unreasonable delay" in payment of an award; instead, §19(k) penalties 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." *Jacobo* at ¶ 24, quoting *McMahan v. Industrial Commission*, 183 Ill. 2d 499, 515 (1998).

Here, Respondent failed to pay any TTD benefits, and there is no evidence Respondent provided the written explanation of the basis for the denial as required by Rule 9110.70(a)(2). Respondent similarly failed to pay medical expenses despite Dr. Elkun's records relating Petitioner's acute onset of anxiety and PTSD directly to the October 16, 2021 incident. Respondent made no effort to explain or justify its denial and refusal to pay benefits and therefore failed to meet its burden on the penalties issue. As such, the Commission finds §19(l) penalties are warranted. Moreover, given Respondent's failure to offer any evidence to support its denial of this clearly compensable claim as well as its failure to present any argument on Review, the Commission finds Respondent's conduct meets the higher standard of deliberate delay and a Review taken for frivolous and improper purpose.

Section 19(l) imposes a penalty of $30 for each day payment is delayed or withheld, limited to a statutory maximum of $10,000. The Commission finds Petitioner's TTD benefits began to accrue on October 17, 2021, and Respondent withheld payment through the November 29, 2022 hearing, a period of 409 days. As the associated calculation ($30 x 409 = $12,270) exceeds the statutory maximum, the Commission finds Petitioner entitled to §19(l) penalties of $10,000.

The Commission finds Respondent vexatiously refused to pay $32,092.06 in benefits, representing $7,840.00 in medical expenses and $24,252.06 in TTD benefits (32 2/7 x $751.17 = $24,252.06). Therefore, the Commission finds Petitioner entitled to §19(k) penalties of $16,046.03 ($32,092.06 x 50% = $16,046.03).

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 7, 2023, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $751.17 per week for a period of 32 2/7 weeks, representing October 17, 2021 through May 31, 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 the sum of $7,840.00 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 $676.05 per week for a period of 37.5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 7.5% loss of use of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner §19(l) penalties in the amount of $10,000.00.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner §19(k) penalties in the amount of $16,046.03.

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

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.

February 13, 2024

MP/mck

O: 1/24/24

68

/s/ *Marc Parker*
Marc Parker

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC030530
Case Name	Alexander Ray v. Chicago Transit Authority
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	7
Decision Issued By	Elaine Llerena, Arbitrator

Petitioner Attorney	Charles Culbertson
Respondent Attorney	James Jackson

DATE FILED: 6/7/2023

THE INTEREST RATE FOR THE WEEK OF JUNE 6, 2023 5.25%

/s/Elaine Llerena, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Alexander Ray
Employee/Petitioner
v.
Chicago Transit Authority
Employer/Respondent

Case # **21** WC **030530**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Elaine Llerena**, Arbitrator of the Commission, in the city of **Chicago**, on **November 29, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **October 16, 2021**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**54,084.10**; the average weekly wage was $**1,126.75**.

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

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

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $751.17 per week for 32 & 2/7 weeks, commencing October 17, 2021, through May 31, 2022, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services of $7,840.00, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $676.05 per week for 37.5 weeks, because the injuries sustained caused the 7.5% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Petitioner's claim for penalties is denied.

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

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

Elaine Llerena **JUNE 7, 2023**

Signature of Arbitrator

FINDINGS OF FACTS

Petitioner's Testimony

Petitioner testified that on October 16, 2021, he worked as a train operator. (T. 12-13) While operating a train and arriving at the northbound Belmont stop, he was preparing to stop when an elderly gentleman with a walker fell on the train tracks. (T. 18-19) Petitioner testified that when he noticed the man on the tracks, he was traveling at about 15-20 miles per hour (MPH). (T. 19-20) Petitioner immediately tried to stop the train by pulling on the emergency brakes. (T. 13-14,21-22) Petitioner saw the man on the tracks as the train came to a stop. (T. 21-22) Petitioner also saw that the walker was underneath the train. (T. 21) The man was ultimately removed off the tracks by another person right before the train hit him. (RX6) Once the train stopped, Petitioner contacted control, let them know what had happened, and put his head down. (T. 22-23) Petitioner explained that he was questioned about the incident at that point, but his mind was not there, and he had to sit down. (T. 23) Petitioner was asked if he could continue working, to which Petitioner responded no, and was ultimately taken to the hospital by ambulance. (T. 23, 26)

Petitioner was off work from October 17, 2021, through May 31, 2022. (AX1) Petitioner testified he returned to work on June 1, 2022, due to financial issues. (T. 34-35)

Summary of Medical Records

Petitioner first treated at Advocate Health Care on October 16, 2021. (RX2) Upon discharge, he was diagnosed with an anxiety reaction and was to be provided referrals for management of his anxiety. Petitioner was also advised to seek additional assistance from Respondent as they might have resources to provide Petitioner.

Petitioner next treated with Dr. Leonard Elkun on October 25, 2021. (RX3) Petitioner described the October 16, 2021, incident to Dr. Elkun and relayed he was able to stop the train within an inch of hitting the man who fell on the tracks. Dr. Elkun diagnosed Petitioner with acute stress disorder. Petitioner followed up with Dr. Elkun on November 9, 2021,who noted that Petitioner's sleep patterns were improving and noted Lorazepam was beneficial. During Petitioner's follow up on November 30, 2021, Petitioner expressed that the idea of injuring or killing someone is very upsetting to him. Dr. Elkun diagnosed Petitioner as having post traumatic stress disorder (PTSD). On December 15, 2021, Dr. Elkun noted Petitioner was calmer. At the February 17, 2022, visit, Dr. Elkun noted Petitioner could not get the image of almost hitting the individual out of his mind. On March 3, 2022, Dr. Elkun noted that Petitioner was to begin exposure therapy to acclimate Petitioner back to working for Respondent. On March 17, 2022, Dr. Elkun noted Petitioner was still having periodic replaying of the traumatic event and anxiousness. Dr. Elkun noted Petitioner was still suffering from PTSD and could not return to work yet. Petitioner continued to follow up with Dr. Elkun through March and April of 2022. On May 4, 2022, Dr. Elkun noted that while Petitioner was still having periodic replaying of the traumatic event, he was readying himself to return to work in June 2022. Dr. Elkun indicated Petitioner still had anxiety, fearful thoughts, and PTSD, but to a lesser extent and intensity.

CONCLUSIONS OF LAW

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

The Arbitrator notes that the burden is on the party seeking an award to prove by a preponderance of the credible evidence the elements of his claim. Peoria County Nursing Home v. Industrial Comm'n. 115 N.E.2d 1026 (1987). The burden of proof is on a claimant to establish the elements of his right to the compensation, and

unless the evidence considered in its entirety supports a finding that the injury resulted from a cause connected with the employment, there is no right to recover. Board of Trustees v. Industrial Commission, 44 Ill. 2d 214 (1969).

The Arbitrator finds Petitioner's testimony credible and consistent with the evidence.

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

The Arbitrator finds that Petitioner credibly testified to the events captured on video on October 16, 2021. The Arbitrator notes that Petitioner sought medical treatment immediately following the events of October 6, 2021, and was ultimately diagnosed as having PTSD as a result of the October 16, 2021, accident. The medical records detail Petitioner's condition and treatment of the condition following the October 16, 2021, accident.

Based on the above, the Arbitrator finds that Petitioner sustained accidental injuries arising out of and in the course of his employment with Respondent on October 16, 20121.

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 the treatment records note the October 16, 2021, accident and Petitioner's resulting injury from the October 16, 2021, accident. The Arbitrator further notes that Dr. Elkun's records detail Petitioner's treatment for anxiety and PTSD caused by the October 16, 2021, accident. There is nothing in the record indicating another cause for Petitioner's conditions of ill-being.

Based on the above, the Arbitrator finds that Petitioner's conditions of ill-being are causally related to the October 16, 2021, work accident.

WITH RESPECT TO ISSUE (G), WHAT WERE THE PETITIONER'S EARNINGS, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator notes that Respondent provided a wage statement as Respondent's Exhibit 4. The wage statement confirms that Petitioner's earnings in the year preceding the accident were $54,084.10, making Petitioner's average weekly wage $1,126.75.

Based on the above, the Arbitrator finds that Petitioner's earnings were $54,084.10, and his average weekly wage was $1,126.75.

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 that the outstanding medical expenses are for the treatment provided by Dr. Elkun, totaling $7,840.00. (AX1)

Based on the above and the Arbitrator's findings regarding accident and causal connection, the Arbitrator finds that Respondent is liable for the medical expenses incurred in the treatment of Petitioner's conditions of ill-being as a result of the October 16, 2021, work accident.

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 notes that Petitioner was off work from October 17, 2021, through May 31, 2022. The Arbitrator further notes that Dr. Elkun had taken Petitioner off work due to Petitioner's conditions of ill-being and provided treatment for Petitioner's conditions through May 2022. Petitioner returned to work on June 1, 2022.

Based on the above and the Arbitrator's findings regarding accident and causal connection, the Arbitrator finds that Petitioner was temporarily and totally disabled from October 17, 2021, through May 31, 2022.

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 no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator gives this factor no 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 train operator at the time of the accident and that he was able to return to work in his prior capacity as a result of said injury. The Arbitrator gives this factor substantial weight.

With regard to subsection (iii) of Section 8.1b(b), the Arbitrator notes that Petitioner was 41 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 the record is silent regarding any effect this injury has had on Petitioner's future earnings 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 Dr. Elkun noted that while Petitioner has improved, he continues to periodically replay the traumatic event and continues to have anxiety, fearful thoughts, and PTSD, but to a lesser extent and intensity. The Arbitrator gives this factor great 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 7.5% loss of use of the person as a whole pursuant to Section 8(d)2 of the Act.

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

The Arbitrator notes that Respondent disputed this claim from the beginning. While the Arbitrator has found that the October 16, 2021, work accident occurred and that Petitioner's conditions of ill-being are causally related to the October 16, 2021, work accident, Respondent's dispute of Petitioner's claim was not unreasonable. Therefore, Petitioner's claim for penalties is denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC025991
Case Name	Adam Willison v. Howard's Disposal, Inc.
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0080
Number of Pages of Decision	16
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Daniel Jones
Respondent Attorney	Stephen Klyczek

DATE FILED: 2/13/2024

/s/Stephen Mathis, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF CHAMPAIGN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Adam Willison,

Petitioner,

vs. NO. 21WC 25991

Howard's Disposal, Inc.

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by both parties herein and notice given, the Commission, after considering the issues of accident, medical expenses, causal connection, Respondent credit, permanent disability, temporary disability, 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 September 6, 2022, is hereby affirmed and adopted.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $39,300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

February 13, 2024
SJM/sj
o-1/10/2024
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/s/ *Stephen J. Mathis*
Stephen J. Mathis

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

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC025991
Case Name	Adam Willison v. Howard's Disposal, Inc.
Consolidated Cases	
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	

Petitioner Attorney	Daniel Jones
Respondent Attorney	Stephen Klyczek

DATE FILED: 9/6/2022

/s/ Edward Lee, Arbitrator

Signature

INTEREST RATE WEEK OF AUGUST 30, 2022 3.23%

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

Adam Willison
Employee/Petitioner

v.

Howard's Disposal, Inc.
Employer/Respondent

Case # 21-WC-025991

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

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Is Respondent due a $600.00 credit for a Section 12 Exam that did not proceed?**

FINDINGS

On or about **June 9, 2021**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $44,200.00; the average weekly wage was $850.00.

On the date of accident, Petitioner was **48** years of age, **married** with **0** dependent children.

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

Respondent **has not** stipulated it will pay all appropriate charges for all reasonable and necessary medical services.

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

FACTS

On June 9, 2021, Petitioner, ADAM WILLISON, was employed working for Respondent, HOWARD'S DISPOSAL, INC., in Mattoon, Illinois (Tr. pp. 8-9; Arb. Exh. 1). He had earned $44,200.00 in the year prior, and had an Average Weekly Wage of $850.00 (Tr. p. 9; Arb. Exh. 1). He worked in recycling, transferred trucks from Mattoon to the dump when they were full, and would sometimes run routes when they were short on drivers (Tr. p. 9). He has a high school education, and a CDL, but no other formal education (Tr. p. 9). He has been with Howard's since 2014, when he started as a garbage truck driver (Tr. p. 10).

Respondent is a garbage collection company that collects trash (Tr. p. 11). Three days a week, Petitioner would get in the truck he used for recycling, called a "roll-off truck," go to the 6 pick up lots on his route, deliver an empty garbage tank, and pick up a full tank (Tr. pp. 12-13, 21). If there was material on the ground at the pick up point, he would pick it up and put it in the empty tank to keep the area clean (Tr. p. 12). He would then take the full tank back to Respondent's central yard, and dump it on the ground (Tr. p. 12). He would then get out of the truck, go through each and every thing, and remove everything that was not recyclable material (Tr. pp. 12-16). Recyclable material included plastics, steel, paper, and cardboard, and he needed several different containers (Tr. pp. 14-15). As a lot of non-recyclable material was also put in the tanks, he had to all that material out by hand (Tr. p. 13). In order to go through the material on the ground, he would bend, and squat, and crab walk through it in order to grab materials and put them in their proper place (Tr. p. 16). He would then get in a skid steer, gather some recyclable material, put it in a bailer, and bail that material (Tr. p. 12). Once the material was in the bailer, it would rotate and compact the material, and then he would wire it together by hand, tie it off, and stack it (Tr. p. 18). He would then repeat the process (Tr. p. 12). He would do this his entire shift (Tr. p. 16). When he was not working on the recycling truck, he would replace people in a regular garbage truck if someone called in (Tr. p. 19). At times he would operate the garbage truck, or he would "work off the back," meaning he would stand on the back of the truck, and when it stopped, he would get off the truck, pick up the garbage, put it in the truck, and then get back on the truck and go to the next stop (Tr. p. 19). If a truck was full while out on a route, he would shuttle a new truck out to the crew so they could finish

their route (Tr. pp. 19-20). At other times, he would get in a pickup truck and pick up extra things a crew could not pick up in their garbage truck, or he would deliver tanks, or wash the trash cans so they could be delivered (Tr. p. 20).

Petitioner had never had a hernia before June 9, 2021 (Tr. p. 10). He had never missed work due to a hernia, never had hernia-related pain, and had never had medical treatment for a hernia prior to June 9, 2021 (Tr. p. 10). He had never suffered from swelling in his groin area before this date, nor had he ever had problems with tingling or pain in the groin area (Tr. pp. 10-11). His only prior workers' compensation claims were a carpal tunnel claim, and a claim for an eye injury, which both came while working for a different employer (Tr. p. 11).

He used the same roll-off truck for recycling all the time (Tr. p. 22). It had always been a hard riding truck (Tr. pp. 20-21). It has a lift on the back that tilts up and down so big, heavy boxes can be picked up (Tr. p. 21). A cable is used to hook onto the box, and it is lifted until the material in the box until it is emptied (Tr. p. 21). It was a bouncy, banging truck, and it was difficult to maneuver, especially at Respondent's facility (Tr. pp. 22-23).

On the day of his injury, June 9, 2021, the roll-off truck also had a split tire on the front on the driver's side, which made it hard to drive (Tr. pp. 23-26). His boss changed just that one tire, and replaced it with a used tire, but when Petitioner left on his route to Windsor, it was a very hard ride (Tr. pp. 23-34, 26). The truck was very had to control and operate (Tr. p. 24). The truck would bounce around all over the road, and would bounce him around in the truck (Tr. p. 24) When he returned from Windsor, Petitioner hurt really bad (Tr. p. 24). It was about 5:00 in the evening, and he had been working since 6:00 or 7:00 that morning, and he had been working 12-hour days previously (Tr. p. 24). He had been working with this roll-off truck all that day, and been bouncing around in the truck the whole shift (Tr. p. 25). At the end of his shift, Petitioner felt pain like he had never felt before, and felt like he pulled something in the right groin area near the hip (Tr. p. 26).

Petitioner's job is a physical one, and he has worked through pain before (Tr. p. 27). The next day, June 10, 2021, he reported to work and did his shift, which lasted 9 to 10 hours (Tr. p. 27). He did not run the roll-off truck, as it was not a recycle day (Tr. p. 27). He also reported the injury to his boss, Kevin Howard of Howard's Disposal, this day (Tr. p. 31). The next day was June 11, 2021, and he was still sore (Tr. p. 28). He worked his entire shift, and by 8:00 or 9:00 that night, he discovered a knot in the same area where he was experiencing pain (Tr. p. 28). He then sought medical care that night from the Emergency Room at St. Anthony's Memorial Hospital in Effingham, Illinois (Tr. pp. 28-29; Pet. Exh. 1). He reported having pain the last 2 days in his right groin that had been worsening (Pet. Exh. 1, p. 2). It was worse when he was on his feet at work, and better when he was lying flat (Pet. Exh. 1, p. 2). The Emergency Room doctor noted abdominal tenderness on examination, and diagnosed him with a reducible right inguinal hernia (Tr. p. 29; Pet. Exh. 1, pp. 4-5). The doctor found no suspicion for incarceration or strangulation at the time (Pet. Exh. 1, p. 5). Petitioner was prescribed pain medication and advised to follow up with a surgeon, Dr. Kevin Malone of Sarah Bush Lincoln Health Center (Tr. p. 29; Pet. Exh. 1, p. 5).

Petitioner met with Dr. Malone on June 17, 2021 (Tr. p. 29; Pet. Exh. 2, p. 16). Dr. Malone noted that Petitioner indicated on Wednesday of the previous week he began to notice discomfort in his right groin area (Pet. Exh. 2, p. 16). "The patient indicates that he does a lot of heavy lifting related to his job" (Pet. Exh. 2, p. 16). On Friday of the previous week, the Petitioner noted a large lump in the right groin area that went away when he laid down (Pet. Exh. 2, p. 16). On exam, Dr. Malone discovered an "obvious right inguinal hernia," which was reducible (Tr. p. 30; Pet. Exh. 2, p. 18). Dr. Malone recommended right inguinal hernia repair surgery (Tr. p. 30; Pet. Exh. 2, p. 18). Surgery was originally scheduled for July 6 or July 7, 2021 (Pet. Exh. 2, pp. 7-10; Pet. Exh. 7). He was released to return to work without restriction until the hernia was repaired (Pet. Exh. 2, p. 33).

The surgery did not happen on July 6 or July 7, 2021, as the surgery was not approved by the workers' compensation insurance company (Tr. p. 30; Pet. Exh. 7). The Sarah Bush Lincoln Health Center records reveal that on June 30, 2021, Adjuster Mary Kopecky had called Janice Shonkwiler of Sarah Bush, ;and requested the records of St. Anthony's Emergency Room (Pet. Exh. 7, p. 4). The staff at Sarah Bush gave Ms. Kopecky the fax number at St. Anthony's to request those records (Pet. Exh. 7, p. 4). On July 6, 2021, Ms. Shonkwiler noted that, "After several calls to Mark Kopecky, Adjuster, we still have not received the request for St. Anthony ER records. I called and spoke to Dr. Malone's office and advised that surgery for 07/07/21 will need to be rescheduled as we have no authorization from the workers' compensation plan" (Pet. Exh.7, pp. 3-4). The July 7, 2021, surgery was cancelled and rescheduled for July 29, 2021 (Pet. Exh. 7, p. 3). Sarah Bush Lincoln LPN Barbara Phillips sent an email to Effingham Surgery Nurse pool later on July 6, 2021, stating, "Janice from prior auth called and stated that they have not received prior auth from wok comp; pt is supposed to have surgery tomorrow 7-7-21 at EASC with Dr. Malone; pt needs rescheduled due to not having prior auth; Janice stated that she has been trying to get this prior auth done for over a week…" (Pet. Exh. 7, p. 2). Later that same day, Nurse Phillips noted, "pt returned call; this nurse explained to pt that the surgery needed to be rescheduled due to not having prior auth; pt then stated 'do they not understand I'm climbing in and out trash truck with a huge know by the crotch that feels like it is on fire' this nurse apologized to pt about the inconvenience; pt then stated 'I know its not your guys fault, but those people need to do their damn job.' this nurse explained that we can reschedule that procedure for a different date…" (Pet. Exh. 7, p. 2). Immediately thereafter, Nurse Phillips "called and spoke to Angie at EASC informing that procedure was needing rescheduled due to prior auth not being approved yet" (Pet. Exh. 7, p. 2). Later on July 6, 2021, Nurse Phillips sent another email to the Effingham Surgery Nurse Pool and Dr. Malone, stating "pt was scheduled to have hernia surgery on 7-6-21 due to work comp not giving prior auth approval it was rescheduled for 7-29-21 (Pet. Exh. 7, p. 1).

Petitioner's condition continued to worsen. On July 14, 2021, he presented to Dr. Janice Vandeveer of the Sarah Bush Lincoln Neoga Clinic (Pet. Exh. 4, p. 10). He reported that after about 2 hours of work he started to develop a bulge in his groin, and by the end of the day he was having a fire sensation in his groin (Pet. Exh. 4, p. 10). Lying down for an hour usually helped the pain, but he did a manual labor job, and was not able to work short shift or in a sitting position that also does not aggravate the swelling (Pet. Exh. 4, p. 10).

Approval for the surgery scheduled for July 29, 2021, never came from the worker's compensation insurer. On July 15, 2021, Ms. Shonkwiler noted in the Sarah Bush files, "I have left 2 messages for adjuster, Mary, Kopecky to return my call for upcoming surgery on 7/29/21" (Pet. Exh. 7, p. 2). On July 28, 2021, Ms. Shonkwiler noted, "Per Alex Nicholas, supervisor of Mary Kopecky, with ESIS insurance he is not able to authorize the right inguinal hernia repair surgery. Adjuster Mary Kopecky is on maternity leave. I left several messages for her during the last three weeks and finally found out she is on leave. Alex Nicholas indicated the claim would be disputed if surgery is done" (Pet. Exh. 8, p. 1). LPN Amy Merritt of Sarah Bush noted, "Janice from prior auth called stating that this pt's right inguinal hernia repair scheduled for 07/29/21 has not been authorized at this time. The worker in charge of his work comp case is out on maternity leave. Janice stated that she is going to still work on this auth to try to get it completed before tomorrow. I called and spoke with Angie R at the EASC. Pt was originally scheduled as the first case of the day tomorrow. I requested this pt be moved to the last case of the day to allow for more time for the auth to be completed. This pt's procedure has already been canceled and rescheduled once due to no authorization. Angie stated she will call and inform pt of time change. Janice informed me of the time change also" (Pet. Exh. 8, pp. 1-2). Later that same day, Nurse Merritt added an Addendum to the Sarah Bush Lincoln file which read, "Janice from prior auth called and informed insurance has denied this work comp claim. Additional paperwork will be filled out and sent to the appropriate parties. I called and asked Angie R EASC if self pay was an option. She informed me that it is, however the full balance would be due tomorrow (07/29/21) I called and spoke with pt's wife-Shelly. I informed her of the insurance denial. I asked if self pay was an option, she informed me no, it is not. I informed her I would cancel the procedure. Instructed if they had any additional questions to call Dr. Malone's office. I also explained that as soon as we got the go ahead, we would do our best to get this procedure

rescheduled within a few days. Pt's wife voiced understanding and thanked" (Pet. Exh. 8, p. 1). On July 30, 2021, Ms. Shonkwiler noted in the Sarah Bush Lincoln records on July 30, 2021, "Surgery is cancelled due to insurance" (Pet. Exh. 7, p. 3).

Petitioner continued to work for Respondent, but reports that the pain and swelling got worse (Tr. p. 32). Petitioner testified he did see his doctor a few times following this cancelled surgery (Tr. pp. 32-33; Pet Exh. 4). Petitioner still did not have the surgery, because he could not afford it (Tr. p. 33).

On November 17, 2021, Petitioner saw Dr. Vandeveer again, still complaining of right inguinal hernia pain (Pet. Exh. 4, p. 32). He reported having the problem for several months, and that surgery scheduled for July 29, 2021, had not been approved by the insurance company (Pet. Exh. 4, p. 32). Petitioner reported having worked at Howard's for 7 years, and had a long history of heavy lifting (Pet. Exh. 4, p.32). He had lately been able to work 5 days a week, but was avoiding heavy lifting (Pet. Exh. 4, p. 32). He had increased swelling and pain within 10 minutes of standing, which would improve if he was able to lay down (Pet. Exh. 4., p. 32). The pain was once again described as a burning sensation, and he was taking Ibuprofen, Aleve, Tylenol 3 and tramadol to deal with the pain (Pet. Exh. 4, p. 32). Dr. Vandeveer concluded that she agreed with Dr. Malone that surgery for right inguinal hernia repair was needed (Pet. Exh. 4, p. 33). She "strongly recommended surgery to avoid bowel incarceration" (Pet. Exh. 4, p. 33).

On December 10, 2021, Dr. Malone noted, "The hernia has increased in size and become more symptomatic. Physical examination today demonstrates a large right inguinal hernia extending down to the right hemiscrotum. The hernia remains soft and completely reducible" (Pet. Exh. 2, p. 141). The doctor continued to recommend right inguinal hernia repair (Pet. Exh. 2, p. 141). In an addendum to this report dated January 12, 2022, Dr. Malone again noted "right inguinal hernia," and stated his plan was to "proceed forward with right inguinal hernia repair today" (Pet. Exh. 2, p. 137).

All this time, Petitioner continued to work, but did not have his surgery (Tr. p. 34). The recycling program was shut down, and he spent most of the time transferring trucks and driving other workers around (Tr. p. 34). He could not drive the recycling truck once he was injured (Tr. pp. 34-35). The recycling program is still shut down (Tr. p. 35).

Respondent's counsel did not send out a request for records until November 29, 2021, four months after the second surgery date was forced to be cancelled, and some 12 days after a pre-trial before the Arbitrator took place, when Attorney Lauren Hall send a Subpoena to Sarah Bush Lincoln Hospital (Tr. p. 34; Pet. Exh. 2, 9). On December 3, 2021, Sarah Bush Lincoln employee Lisa Fearday noted "Legal medical records request sent to medical records Attn Lindsey Starwalt for work comp lawyer paperwork Hennessy & Roach" (Pet. Exh. 10). By January 18, 2022, Ms. Fearday had faxed a second request for records to "Lindsay in Medical Records" (Pet. Exh. 11).

Petitioner finally had his hernia repair surgery with Dr. Malone on January 12, 2022 (Tr. p. 35; Pet. Exh. 3, pp. 57-59). The pre-operative diagnosis and post-operative diagnosis were both of a right inguinal hernia (Pet. Exh. 3, p. 57). The findings were of a "large indirect right inguinal hernia" (Pet. Exh. 3, p. 57). The procedure was a right inguinal hernia repair with Malex patch and plug (Pet. Exh. 3, pp. 57-59).

Petitioner took approximately 6 weeks off work, and had no income during that time (Tr. p. 36). He was released to go back to work without restriction on February 24, 2022 (Tr. p. 36; Pet. Exh. 2, p. 91). All told, Petitioner was off work from January 12, 2022, through February 24, 2022, a period of 6 2/7 weeks (Tr. pp. 36; Arb. Exh. 1; Pet. Exh. 2, p. 91)

Petitioner returned to work right away following his release, and since he has been back, he has been driving trash trucks to the dump and dumping the contents (Tr. pp. 36-37). He also drives other workers on

regular pick up routes (Tr. p. 37). The groin area is sore, but is better than it has been (Tr. p. 37). Long work hours will make the area sore (Tr. p. 37).

Petitioner's attorney, Daniel Jones, was also sworn in as a witness to testify regarding the issue of whether Respondent is entitled to a credit of $600.00 for a Section 12 Examination of Petitioner that was cancelled (Tr. p. 40). Petitioner's Exhibit 13 is a letter that was sent to Attorney Jones by Respondent's counsel, Laurel Hall, who did not represent Respondent during this trial (Tr. p. 41; Pet. Exh. 13). Attorney Jones was previously employed by Tapella & Eberspacher LLC, but stopped being employed there around November 20, 2021, and began working for his current employer, Smith Law, Ltd. (Tr. p. 41). Petitioner's Exhibit 13 is a letter dated December 3, 2021, and includes a notice of a Section 12 Examination for Petitioner on December 16, 2021 (Tr. p. 41; Pet. Exh. 13). On December 3, 2021, the bookkeeper was still working at Tapella & Eberspacher LLC (Tr. p. 42). She was continuing to get the mail, and keeping the accounts (Tr. p. 42).

Petitioner's Exhibit 16 is a letter from Attorney Jones to Attorney Hall (Tr. pp. 43-2-43; Pet. Exh. 16). Pet. Exhibit 16 is dated December 23, 2021, and states that Petitioner's counsel had just received a call from the Tapella & Eberspacher LLC bookkeeper, and the letter of December 3, 2021, and the check for the Section 12 exam had just arrived in the Tapella & Eberspacher LLC post office box, and that the bookkeeper would forward the letter (Tr. pp. 42-43; Pet. Exh. 16). Petitioner did not attend the December 16, 2021, Section 12 exam because Petitioner and his counsel were not aware of the exam prior to December 16, 2021 (Tr. p. 44). Petitioner's Exhibit 15 is a similar letter Petitioner's counsel sent to Petitioner on December 23, 2021, informing him of the December 3, 2021, letter from Attorney Hall (Tr. p. 49; Pet. Exh. 15).

Respondent's Exhibit 1 is a Substitution of Attorney form, and states Attorney Jones is no longer at Tapella & Eberspacher LLC (Resp. Exh. 1). It is dated December 27, 2021, the day it was filed with the Commission (Tr. p. 45; Resp. Exh. 1). A copy of such form was emailed to Attorney Hall on the day it was filed on Compfile (Tr. p. 50). Attorney Jones did not send anything specific to Attorney Hall announcing his change of law firms, but knows that Ms. Hall knew of the change of firms, and already had Attorney Jones' new address and email address (Tr. p. 45). A pre-trial hearing in this case took place on November 17, 2021, before the Arbitrator, with Attorney Jones and Ms. Hall present (Tr. p. 46). Attorney Jones announced he was changing firms, and told everyone his new address and email address; as well as stating that he had sent the Stipulation to Substitute Attorney form to Petitioner, and was waiting to get the signed form back from Petitioner (Tr. p. 46). At the pre-trial, Ms. Hall indicated the case would be a contested matter, and that the Respondent was going to schedule a Section 12 exam for Petitioner (Tr. p. 47).

Petitioner's Exhibit 12 is an email from Attorney Hall that Petitioner's counsel received on November 18, 2021 (Tr. p. 47; Pet. Exh. 12). Although the letter sets forth the Tapella & Eberspacher LLC address, the top of Exhibit 12 shows that it was sent by Ms. Hall to the email address of "djones@rsmithawltd.com," which is the new email address of Attorney Jones at Smith Law, Ltd. (Tr. p. 47; Pet. Exh. 12). Ms. Hall emailed Petitioner's Exhibit 12 on November 18, 2021, to Attorney Jones at his current email address (Tr. p. 47; Pet. Exh. 12). Said letter from Ms. Hall states that there is a pre-trial set with the Arbitrator on November 17, 2021, that she was finishing her review, and should have a response regarding her client's position at that time (Tr. p. 47; Pet. Exh. 12). Petitioner's counsel felt this letter was strange to send on November 18, as the pre-trial conference had taken place by that time, and she had announced the Respondent was contesting the matter (Tr. p. 47; Pet. Exh. 12). Petitioner's counsel responded later on November 18, 2021, saying he was not sure why he was getting this letter a day after the pre-trial conference had taken place, and asking if Respondent was reconsidering its position in the matter (Tr. p. 48; Pet. Exh. 12). Said November 18, 2021, response was also set to Attorney Hall from Petitioner's counsel's email address at Smith Law, Ltd. (Tr. p. 48; Pet. Exh. 12). Said response also had a signature block at the end containing counsel's address, telephone number, fax number, and email address at Smith Law, Ltd. (Tr. p. 48; Pet. Exh. 12). Attorney Hall responded to said response of

November 18, 2021, later that same day, again using counsel's Smith Law, Ltd. email address, with the message "Please disregard" (Pet. Exh. 12).

Attorney Jones also testified he retains control of his email address from Tapella & Eberspacher LLC, and that if Attorney Hall had emailed her December 3, 2021, letter to him at that email address, he would have received it (Tr. p. 49). Instead, Attorney Hall mailed the letter to the Tapella & Eberspacher physical address, when she knew Petitioner's counsel no longer worked there (Tr. p. 49; Pet. Exh. 12).

Petitioner's Exhibit 14 is an email from Attorney Jones sent from his Smith Law, Ltd. email address, to Attorney Hall dated December 20, 2021 (Pet. Exh. 14). In that email, Petitioner's counsel told Attorney Hall that, at the pre-trial conference, she stated a Section 12 exam had been set up on January 5, 2022, but that to date, neither Petitioner nor his legal counsel had received anything regarding such an exam, and Petitioner had not received anything for his travel expenses (Pet. Exh. 14). Said letter further asked if an exam had been scheduled and for some details if it had (Pet. Exh. 14).

Petitioner's Exhibit 17 is a letter from Attorney Hall to Attorney Jones dated January 13, 2022, stating that a Section 12 exam of Petitioner had been set for February 1, 2022 (Pet. Exh. 17). Said letter was mailed to Attorney Jones' correct email address (Pet. Exh. 17). Petitioner's Exhibit 18 is a letter from Attorney Jones to Attorney Hall, returning the check sent with Petitioner's Exhibit 13, and advising that Petitioner had his hernia surgery on January 12, 2021, and may not be able to travel to the February 1, 2022, Section 12 exam (Pet. Exh. 18). Petitioner's Exhibit 19 is an email from Attorney Jones to Attorney Hall, dated January 24, 2022, informing Attorney Hall that Petitioner had not recovered from his surgery enough to drive to the Section 12 exam in Chicago. Petitioner's Exhibit 20 is an email from Melissa Strickler of Hennessy & Roach, informing Attorney Jones that the February 1, 2022, Section 12 exam had been cancelled, and would be rescheduled (Pet. Exh. 20). Petitioner's Exh. 21 is an email letter from Attorney Jones counsel to Attorney Hall, asking about a rescheduled Section 12 exam, and informing her that Petitioner had been cleared to return to work (Pet. Exh. 21). Petitioner's Exh. 22 is an email letter to Attorney Jones from Attorney Hall, dated March 9, 2022, stating that the Section 12 exam had been rescheduled for March 21, 2022 (Pet. Exh. 22). Petitioner's Exhibit 23 is an email letter from Attorney Hall to Attorney Jones dated March 16, 2022, stating that the scheduled Section 12 exam had been cancelled, and requesting a settlement demand (Pet. Exh. 23).

DISPUTED ISSUES

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

As to the issue of credibility, the Arbitrator finds that Petitioner's testimony at arbitration was credible. His history of accident, complaints, and treatment were consistent with the medical records introduced into evidence. His complaints, both in the medical records, and at arbitration did not appear out of proportion to his objective physical findings.

The evidence demonstrates that an accident occurred on June 9, 2021, which arose out of and in the course of Petitioner's employment with Respondent. The unrebutted and credible evidence shows that Petitioner suffered an injury to his right groin on June 9, 2021, at the end of working an eleven or twelve hour shift for Respondent.

To obtain compensation under the Workers' Compensation Act, a claimant must show, by a preponderance of the evidence, that he or she suffered a disabling injury that arose out of and in the course of the claimant's employment. 820 ILCS 305/2. An injury "arises out of" one's employment if it originates from a risk connected with, or incidental to, the employment and involves a causal connection between the employment and the accidental injury. Mores-Harvey v. Industrial Comm'n, 345 Ill.App.3d 1034, 1037, 804 N.E.2d 1086, 1090 (3d Dist. 2004). "In the course of" refers to the time, place, and circumstances under which the accident occurred. Suter v. Illinois Workers' Compensation Comm'n, 2013 IL App (4th) 130049WC, ¶ 18, 998 N.E.2d 976, 971. Accidental injuries sustained on an employer's premises within a reasonable time before and after work are generally deemed to arise in the course of the employment. Mores-Harvey, 345 Ill.App.3d at 1037, 804 N.E.2d at 1090; Suter, at ¶ 18, 998 N.E.2d at 971.

The unrebutted evidence demonstrates that Petitioner suffered a disabling injury on June 9, 2021. Petitioner had never suffered from a hernia type injury prior to that date, and had never received medical treatment for a hernia prior to that date (Tr. pp. 10-11). Petitioner has a very physically demanding job that requires him to bend, stoop, crab walk, and continuously lift containers of garbage, all while working shifts that are longer than 8 hours per day (Tr. pp. 20-27). Petitioner demonstrated that he began to feel pain in his groin area at the end of his shift on June 9, 2021, after being bounced around in the recycling roll-off truck for 11 or 12 hours (Tr. pp. 23-26). Petitioner had never felt pain like this before, and after trying to "work through it" the next 2 days, went to the Emergency Room at St. Anthony's hospital on the evening of June 11, 2021, where he was diagnosed with a right inguinal hernia (Tr. pp. 26-29). No evidence was offered as to any other cause of Petitioner's injury other than the events of June 9, 2021, and Petitioner has demonstrated that he suffered a disabling injury on that date.

Petitioner has also demonstrated that his injury "arose out of" his employment, in that it undoubtedly originated from a risk connected with his job with Respondent. Petitioner is required to lift, bend, crab walk, and carry containers of garbage (Tr. pp. 11-20). He was diagnosed with an inguinal hernia, which is a risk connected with his employment as a garbage collector. Petitioner has met his burden of showing his injury "arose out of" his employment with Respondent.

Petitioner has also met his burden of showing his injury was suffered "in the course of" his employment. Petitioner has shown that the injury incurred while he was working for Respondent, under circumstances which could lead to injury. Petitioner has shown that he was injured while operating Respondent's roll-off truck, and performing his usual duties as a garbage collector (Tr. pp. 23-27). Petitioner has established that an accident occurred that arose out of, and in the course, of his employment with Respondent.

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

The evidence demonstrates that Petitioner's condition of a right inguinal hernia was causally related to his work injury of June 9, 2021. The testimony and medical records show that Petitioner has been consistent in his testimony and in his reports to his medical providers. Petitioner was also credible in his testimony.

The evidence demonstrates that June 9, 2021, Petitioner was injured within the course and scope of his employment with Respondent while operating the recycling roll-out truck (Tr. pp. 23-27). He had never had a hernia type injury before, and had never suffered from hernia like symptoms prior to this date (Tr. pp. 10-11). The unrebutted evidence also shows that Petitioner's employer had replaced one of the tires on the truck with a used tire that morning, which caused the truck to bounce and become more difficult to handle than usual (Tr. pp. 24-26). After attempting to "work through" the pain that only got worse for two days, Petitioner went to the Emergency Room at St. Anthony's Memorial Hospital in Effingham, Illinois (Tr. pp. 28-29; Pet. Exh. 1). The Emergency Room doctor noted abdominal tenderness, and diagnosed Petitioner as suffering from a reducible

right inguinal hernia (Pet. Exh. 1, pp. 2, 4-5). The Emergency Room doctor advised Petitioner to follow up with a surgeon, Dr. Malone (Pet. Exh. 1, p. 5).

Petitioner followed up with Dr. Malone on June 17, 2021, and was consistent in his history, noting he had been noticing discomfort in his right groin area the previous week, and two days later noted a large lump in the right groin area (Tr. p. 29; Pet. Exh. 2, p. 16). The doctor also noted "The patient indicates that he does a lot of heavy lifting relating to his job" (Pet. Exh. 2., p. 16). Dr. Malone diagnosed an "obvious right inguinal hernia," and recommended surgical repair (Tr. p. 30; Pet. Exh. 2, p. 18). Surgery was originally scheduled for July 6, 2021, rescheduled for July 29, 2021, and then cancelled, all because the workers' compensation insurance company would not approve the surgery (Pet. Exh. 2, pp. 7-10; Pet. Exhs. 7, 8).

Petitioner could not afford to pay for the surgery (Tr. p. 33), and he continued to work for Respondent, but the pain and swelling got worse (Tr. p. 32; Pet. Exhs 2, 3, and 4). On November 17, 2021, Petitioner saw Dr. Vandeveer of Sarah Bush Lincoln, and still complained of right inguinal hernia pain (Pet. Exh. 4, p. 32). Dr. Vandeveer concluded that she "strongly recommended surgery to avoid bowel incarceration" (Pet. Exh. 4, p. 33). On December 10, 2021, Dr. Malone noted the hernia had increased in size and become more symptomatic (Pet. Exh. 2, p. 141). The doctor continued to recommend right inguinal hernia repair (Pet. Exh. 2, p. 141).

Dr. Malone finally performed the hernia repair surgery on January 12, 2022 (Tr. p. 35; Pet Exh. 3, pp. 57-59). The findings were of a "large right inguinal hernia," and the procedure performed was a right inguinal hernia repair with Malex patch and plug (Pet. Exh. 3, pp. 57-59). Petitioner was off work for 6 2/7 weeks following his surgery, at which time he had no income, and received no TTD (Tr. p. 36). He was released to go back to work without restriction on February 24, 2022, and Petitioner resumed working for Respondent right away (Tr. pp. 36-37; Pet. Exh. 2, p. 91). In total, Petitioner was off work from January 12, 2022, through February 24, 2022 (Tr. p. 36; Arb. Exh. 1; Pet Exh. 2, p. 91).

No evidence was offered to challenge Petitioner's consistent and credible testimony, and the testimony provided was consistent with the medical records introduced into evidence. The evidence demonstrates that Petitioner's right inguinal hernia condition was caused by his work injury of June 9, 2021.

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

Based on the consistent and credible medical evidence presented by Petitioner, and the medical records introduced into evidence, the medical treatment provided to Petitioner for his work injury from the date of injury on June 9, 2021, until he was placed at MMI on February 24, 2022, was all reasonable and medically necessary.

The unrebutted evidence also shows that Respondent has not paid any of the appropriate charges for such reasonable and necessary medical services. As such, Respondent shall be solely responsible for all reasonable and related medical bills associated with Petitioner's medical care related to his work injury for the time period of June 29, 2021, through February 24, 2022. Respondent shall pay any remaining medical expenses which are still outstanding for such related medical.

K. TTD Benefits

Section 8(b) of the Act provides that an employee that suffers from temporary total incapacity for more than 3 days is entitled to compensation at a rate of 66 2/3% of his Average Weekly Wage, and shall continue so long as the total temporary incapacity lasts. 820 ILCS 305/8(b). As noted above, Petitioner was off work following his hernia surgery from January 12, 2022, until the date he was placed at MMI, a period of 6 2/7 weeks.

As Petitioner's Average Weekly Wage was $850.00, and therefore his Temporary Total Disability rate is $566.67 per week for the time period of January 12, 2022, through February 24, 2022. Therefore, Respondent owed Petitioner Temporary total Disability payments in the total amount of $3,561.93.

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

Petitioner has proven that he sustained a permanent partial disability as a result of this work injury, consisting of a right inguinal hernia. The medical evidence reveals that Petitioner had to endure many painful months until his surgery was approved. He has returned to full duty work, but his work duties are different, as he now drives garbage trucks to the dump and dumps the contents (Tr. pp. 36-37). He also drives other workers on regular pick up routes (Tr. p. 37). His groin area is still sore, but has improved (Tr. p. 37). Long work hours will make the area sore (Tr. p. 37), although Petitioner may no longer be working for Respondent, he continues to suffer from serious and permanent restrictions.

According to Section 8.1(b) of the Illinois Workers' Compensation Act, in determining the level of permanent partial disability, the Commission shall base its determination on the following factors:

1. The reported level of impairment pursuant to the AMA Guidelines;
2. The occupation of the injured employee;
3. The age of the employee at the time of the injury;
4. The employee's future earning capacity; and
5. Evidence of disability corroborated by the treating medical records.

820 ILCS 305/8.1b. No single enumerated factor shall be the sole determinant of disability. Id. As there was no AMA impairment report made in this case, only factors 2 through 5 should be considered.

The occupation of the injured employee is an important factor. Here, the evidence shows both the physical requirements of being a garbage collector. The job requires bending, lifting, crab walking and a lot of examining of materials that have been dumped out on a floor (Tr. pp. 12-21). Petitioner continues to suffer from the results of this work injury from this very physical job.

The next Section 8.1(b) factor to consider is Petitioner's age at the time of injury. At the time he was injured, Petitioner was 48 years old, and was 49 at the time of the final hearing. He would be expected to work for 17 more years before he attains the age of 65, and could think of retiring. Given the nature of Petitioner's injuries, the physical requirements of the job, his age is a significant factor.

The next Section 8.1(b) factor to consider is the employee's future earning capacity. Petitioner has returned to work at his former salary, so this factor should receive little weight.

The final Section 8.1(b) factor to consider is evidence of disability corroborated by the treating medical records. As noted above, the medical records demonstrate that Petitioner suffered from a right inguinal hernia, and continues to suffer soreness in the groin area. The Arbitrator gives significant weight to this factor.

Section 8(b) of the Workers' Compensation Act provides that, if after the accidental injury has been sustained, the employee becomes partially incapacity from pursuing his usual and customary line of employment, he shall receive compensation equal to 60% of his average weekly wage. As Petitioner's Average weekly wage was $850.00, his Permanent Partial Disability rate is $510.00. Petitioner is entitled to Permanent Partial Disability based on 3% loss of a person as a whole. The maximum number of weeks of loss for a person who is disabled as a persona as a whole is 500 weeks. 3% of this amount equal payment for 15 weeks. Therefore, Petitioner is entitled to Permanent Partial Disability payments from Respondent for 15 weeks at his Permanent Partial Disability rate, or $7,650.00.

M. Should penalties or fees be imposed upon Respondent?

The Respondent put the issues of accident and causal connection in dispute as a basis for their denial of compensation. While the Respondent did not prevail by raising these defenses, the Arbitrator finds the Respondent was not unreasonable or vexatious in doing so and therefore, denies 19(k&l) penalties and 16 attorney fees.

O. Is Respondent due a $600.00 credit for a Section 12 Exam that did not proceed?

The evidence shows that Respondent is not entitled to a $600.00 credit for the Section 12 examination that Respondent scheduled to take place on December 16, 2021. The evidence clearly shows that neither Petitioner nor Attorney Jones was aware of the scheduled exam prior to December 16, 2021. Section 12 requires that Petitioner must submit himself to an examination by a doctor of Respondent's choosing at a time and place which is reasonable convenient for the employee. Here, Attorney Hall mailed a letter to Attorney Jones on December 3, 2021, advising him of an exam scheduled to take place in Chicago on December 16, 2021, a distance of over 150 miles from Petitioner's home in a period of less than 2 weeks later (Pet. Exh. 13). Even had the letter been delivered to Attorney Jones, such a request is not reasonable.

Furthermore, the evidence shows that neither Petitioner nor Attorney Jones received Petitioner's Exhibit 13. Attorney Jones' testimony on the issue is credible and unrebutted (Tr. pp. 41-48). Attorney Jones had stopped working for Tapella & Eberspacher LLC, around November 20, 2021, and began working for his current employer, Smith Law, Ltd. (Tr. p. 41). On December 3, 2021, the bookkeeper was still working at Tapella & Eberspacher LLC, and was still collecting accounts and getting the mail (Tr. p. 42). Petitioner's Exhibit 16 is a letter from Attorney Jones to Attorney Hall, dated December 23, 2021, stating that Attorney Jones had just received a call from the Tapella & Eberspacher bookkeeper, stating that Petitioner's Exhibit 12 had just arrived (Pet. Exh. 16). Petitioner did not attend the Section 12 exam on December 16, 2021, because Petitioner and his counsel were unaware that such an exam had been scheduled (Pet. Exhs. 15, 16).

Finally, the evidence shows that Attorney Hall was aware of Attorney Jones' change of firms, and had Attorney Jones' correct address and email address, and simply sent Petitioner's Exhibit 12 to Attorney Jones' former address. Petitioner's Exhibit 12 is an email sent by Attorney Hall to Attorney Jones on November 18, 2021, the day after a pre-trial conference had taken place in this Cause (Pet. Exh. 12). At that hearing, Attorney Jones had made Attorney Hall aware of his new address and email address (Tr. pp. 46-47). Support for Attorney Jones' assertion that Attorney Hall was aware of Attorney Jones' new address and email address is found in Petitioner's Exhibit 12, which was sent by Attorney Hall to Attorney Jones' Smith Law, Ltd. email address (Tr. pp. 46-47; Pet. Exh. 12). Furthermore, Attorney Jones responded to this November 18, 2021, letter from his Smith Law, Ltd. email address, and the signature block contained all of Attorney Jones' new contact information (Pet. Exh. 12). Attorney Hall responded to Attorney Jones' response, thereby demonstrating that she had received Attorney Jones' email, and was aware of his new contact information (Pet. Exh. 12). Furthermore, Attorney Jones testified that he retains his Tapella & Eberspacher LLC email address, and if

Attorney Hall had emailed Petitioner's Exhibit 13 to that email address, he would have received it. The evidence is clear that Attorney Hall sent the letter to the wrong address, even though she had been made aware of Attorney Jones' new address and email address. The Section 12 Exam never took place, as Respondent cancelled the exam (Pet. Exhs. 16-23). Respondent is not entitled to a credit of any kind for the Section 12 exam of December 16, 2021, that did not take place.

CONCLUSION

The Arbitrator has carefully reviewed the medical records, all of the Exhibits submitted by the Petitioner and the Respondent, and has carefully observed the demeanor and credibility of the witnesses during testimony. The Arbitrator finds that the Petitioner has met his burden of proof to demonstrate that an accident occurred that arose out of and in the course of his employment with Respondent, and that a work-related accident occurred on June 9, 2021, causing Petitioner to suffer a right inguinal hernia injury. The Arbitrator further finds that all medical services provided to Petitioner were reasonable and necessary. The Arbitrator finds that Respondent shall pay for all medical services, pursuant to the Illinois medical fee schedule, associated with Petitioner's related medical treatment from June 9, 2021, through February 24, 2022, as provided in Sections 8(a) and 8.2 of the Act. The Arbitrator finds that Petitioner is entitled to Temporary Total Disability Payments, as provided in Section 8(b) of the Act, in the amount of $566.67 per week for the time period of January 12, 2022, through February 24, 2022, a period of 6 2/7 weeks, for a total amount of $3,561.93. Petitioner is further entitled to an award of Permanent Partial Disability, as provided in Section 8(d) of the Act, at a rate of $510.00 per week, based on 3% loss of person as a whole. Petitioner is entitled to his Permanent Partial Disability rate for 15 weeks, for a total amount of $7,650.00. Finally, Respondent is not entitled to any credit for the Section 12 exam of December 16, 2021, that did not take place.

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 6, 2022**

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC001677
Case Name	Daniel Rodriguez v. Ford Motor Company
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0081
Number of Pages of Decision	6
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	George Tamvakis
Respondent Attorney	Brian Raterman

DATE FILED: 2/13/2024

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Daniel Rodriguez,
Petitioner,

vs. No. 21 WC 001677

Ford Motor Company,
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 whether an accident arose out of and in the course of Petitioner's employment, and being advised of the facts and law, reverses the Decision of the Arbitrator as stated below.

The Arbitrator found Petitioner proved his January 8, 2020, accident arose out of and in the course of his employment with Respondent and that his current condition of ill-being is causally related to that accident. The Arbitrator awarded Petitioner medical and total temporary disability benefits and 35% loss of use of his right foot pursuant to Section 8e of the Act. The Commission views the evidence and the law differently and finds Petitioner failed to show he suffered an accident that arose out of his employment with Respondent.

I. Findings of Fact and Procedural History

On January 8, 2020, Petitioner, a line operator for Ford Motor Company, left work around 4:30pm, and walked across the pedestrian bridge to a parking lot used exclusively by Respondent's employees. Connecting the pedestrian bridge to the parking lot was a concrete sidewalk with guardrails and striping for employees to traverse. The concrete sidewalk was clearly the designated walkway designed by Respondent for safely getting employees from the bridge to the parking lot. Respondent maintained and cleared the designated walkway when necessary.

To the west of the parking lot and designated walkway was a natural area where Respondent had planted native grasses and trees. Respondent did not maintain this area, did not remove the natural vegetation from the area, did not level or grade the area, and did not place

gravel in the area. In 2014, when grading and pouring the parking lot described above, Respondent pushed rocks, dirt and other spoils into the grassy area. From the testimony, photos, and videos introduced at trial it is evident that at some undetermined point in time, employees began cutting off the main designated walkway and traversing through this natural area to the parking lot. As a result, a makeshift path emerged. From the photos it appears that path surface was a combination of gravel, grass, and debris. Although Respondent did not authorize use of the makeshift path, the path was traversed by employees daily.

Petitioner testified that on the date of accident, Petitioner was walking along the makeshift path when he stepped on a rock or other large object, twisted his ankle, and fell. Petitioner was assisted by co-workers also walking on the path. Petitioner felt immediate pain but was able to walk to his car and drive home using both feet.

Petitioner had immediate bruising and swelling in his right foot/ankle and began treatment the following day with Dr. Wood of the Foot Health Institute. Petitioner sustained several injuries to his right foot and underwent a ORIF right talar neck fracture, right ankle arthroscopy with extensive debridement, collateral ligament repair, secondary repair of calcaneal fibular ligament, peroneus longus tenosynovectomy and peroneus brevis tenosynovectomy on January 29, 2020, with Dr. Wood. Petitioner continued intermittent physical therapy with little improvement and eventually underwent a right ankle arthroscopy with debridement, right screw removal, and right talus exostectomy on September 20, 2020. Petitioner resumed physical therapy and was released to work light duty on November 9, 2020, and returned full duty by March 1, 2021. Petitioner is no longer employed with Respondent for reasons unrelated to the January 8, 2020, incident. At trial, Petitioner testified he experienced daily pain in his foot and could no longer participate in certain activities as he did prior to the work injury.

The Arbitrator found Petitioner sustained an accident that arose out of and in the course of his employment on January 8, 2020. The Arbitrator acknowledged Petitioner walked along the makeshift path because it was more convenient for him. Nevertheless, in finding a compensable accident, the Arbitrator relied on her finding that Respondent knew or should have known employees were regularly using the path, did not take steps to prevent employees from using the path, contributed to the hazards on the path by pushing spoils into the area, and failed to clear the hazards from the area. She noted that the condition of the makeshift path on Respondent's premises, which its employees easily and customarily accessed, exposed Petitioner to a heightened risk. In addition, the Arbitrator determined that Petitioner proved he encountered a hazard while leaving his place of employment along a customary and permitted route. The Arbitrator relied on Williams v. Country Mut. Ins. Co, 28 Ill. App. 3d 274; 328 N.E. 2d 117 (1st Dist. 1975) and Union Starch Div. of Miles Laboratories, Inc v. Industrial Com., 56 Ill. 2d 272, 307 N. E. 2d 118 (1974), in support of her finding of accident.

Based on the evidence, the Arbitrator found accident and awarded medical, temporary total disability benefits, and 35% loss of use of the right foot.

II. Conclusions of Law

The Commission views the evidence differently and concludes that although Petitioner suffered an injury to his right ankle on January 8, 2020, Petitioner failed to meet this burden to prove that the injury arose out of his employment with Respondent.

The Commission initially notes that Petitioner was in the course of his employment at the time he fell as he had just left the plant for the day and was walking back to his car. It has long been held that injuries which occur on an employer's premises within a reasonable time before and after work arise "in the course of" employment. Archer Daniels Midland Co. v. Industrial Comm'n, 91 Ill. 2d 210, 437 N.E.2d 609 (1982).

However, for an employee's injuries to be compensable under the Act, the injuries must arise out of and in the course of his or her employment, and both elements must be present at the time of the accident to justify compensation. Orsini v. Industrial Comm'n, 117 Ill. 2d 38, 509 N.E.2d 1005 (1987). An injury does not arise out of the employment where an employee voluntarily exposes himself to an unnecessary personal danger solely for his own convenience. Orsini, 117 Ill. 2d at 47. When an employee voluntary exposes themselves to a danger for their own convenience, that has no benefit to the employer, the accident does not arise out of their employment. Dodson v. Industrial Commission, 308 Ill App. 3d 572, 577 (5th Dist. 1999).

Here, Petitioner clocked out and was walking to the parking lot through a natural grassy area, not maintained or authorized by Respondent for pedestrian traffic, when he fell and sustained his ankle injury. It is undisputed Respondent had provided a concrete walkway with guardrails and striping so its employees had a safe designated route from the pedestrian bridge to the parking area. It is also undisputed there were no defects or barriers on the concrete walkway which forced Petitioner to leave the walkway and walk through the grassy area.

The Commission finds this case on point with the appellate court decisions in Dodson v. Industrial Commission, 308 Ill. App. 3d 572 (5th Dist. 1999), Hatfill v. Indus. Com., 202 Ill. App. 3d 547, 560 N. E. 2d 369, 148 Ill. Dec. 67 (4th Dist 1990), and Purcell v. Illinois Workers' Compensation Commission, 2021 IL App (4th) 200359WC.

In *Dodson*, Petitioner clocked out and was walking to the parking lot along a concrete sidewalk. It was raining heavily so Petitioner left the concrete sidewalk and walked down a grassy slope because it was a more direct route to her car. While on the grassy slope, Petitioner fell and broke her ankle. The Court held Petitioner voluntarily exposed herself to a danger separate from her employment duties when she left the concrete sidewalk to walk down the grassy slope for her own convenience and without any benefit to her employer.

In *Purcell*, Petitioner was en route to the personnel building to turn in her timecard before her workday began. Instead of taking the designated walkway to the personnel building, she hopped over a chain length fence because it was a more direct route for her. Her foot caught on the fence, and she was injured. Petitioner admitted there was an area without a fence 10 to 15 feet away from where she jumped, and it was the safer route. There were no barricades or other defects

forcing Petitioner to hop the fence. She chose that route for her own convenience. The court found Petitioner voluntarily exposed herself to a danger separate from her employment.

In *Hatfill*, Petitioner was en route to the parking lot after leaving work. Instead of using the designated walkways situated close to him, he jumped across water that had accumulated at the bottom of a five-foot incline because it was a more direct route to his car. The Court held Petitioner voluntarily exposed himself to a danger that only benefitted him, not his employer.

In this case, Petitioner's decision to leave the designated walkway for the makeshift path because it was a more direct route to the parking lot was a voluntary act separate from Petitioner's employment. Petitioner had left work for the day, he was not carrying anything in his hands related to his job duties, he was not in a hurry to complete a task or clock in, and he was not engaged in any other activity to benefit his employer. There were no defects or other barriers on the designated walkway forcing Petitioner off the sidewalk and onto the grassy area. By taking the makeshift path, the Commission finds Petitioner voluntarily exposed himself to a danger for his own convenience thus failing to prove the necessary element of "arising out of" his employment.

In so finding, the Commission is not persuaded by Petitioner's argument his accident was compensable because Respondent knew or should have known employees were regularly using the makeshift path. There is no evidence Respondent acquiesced to use of the makeshift path and even if it did, Courts have held employer acquiescence alone cannot convert a personal risk into an employment risk." Orsini, 117 Ill. 2d at 47, citing Yost v. Industrial Comm'n, 76 Ill. 2d 548, 31 Ill. Dec. 812, 394 N.E.2d 1189 (1979), and Lynch Special Services v. Industrial Comm'n, 76 Ill. 2d 81, 27 Ill. Dec. 738, 389 N.E.2d 1146 (1979). Neither court in the Dodson and Hatfill cases were persuaded by this acquiescence argument. Rather, the courts held the fact some people may choose to leave work in an unsafe manner does not make those voluntary acts compensable, nor was Respondent required to police all exit routes to prevent unsafe voluntary acts. Dodson, 308 Ill. 3d at 577 citing Hatfill, 202 Ill. App. 3d at 553.

Lastly, the Commission finds this case distinguishable from Union Starch, Division of Miles Laboratories, Inc. v. Industrial Comm'n, 56 Ill. 2d., 307 N.E.2d 118 (1974). In *Union Starch*, the Petitioner was injured when taking a break from his hot, stuffy factory position on top of a roof when it collapsed. The Court found Petitioner's injury clearly "arose out of" his employment because he was taking a break from his work conditions; therefore, his accident arose from his employment environment. Id. at 276. The central issue in *Union Starch* was whether the accident occurred "in the course of" his employment. To answer that question, the Court found compelling that it was the custom and practice of employees to seek relief on that roof for the past 15 years and there was no express prohibition against using the roof. Id. at 277. However, as noted in the instant matter, the question is arising out of employment as opposed to whether Petitioner was in the course of his employment while using the path to get to his car after work.

Accordingly, based on the record in its entirety, the Commission reverses the Decision of the Arbitrator and finds the Petitioner failed to prove his injury arose out of his employment for Respondent.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on May 10, 2023, is hereby reversed. The Commission finds Petitioner failed to prove that he sustained an accident on January 8, 2020, that arose out of his employment.

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

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

The bond requirement in Section 19(f)(2) of the Act is only applicable when the Commission has entered an award for the payment of money. Therefore, no bond is set by the Commission. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

February 13, 2024

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/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	22WC005925
Case Name	Ihor Khreptak v. Valentyn Consulting Inc. and Active Painting Inc.
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0082
Number of Pages of Decision	12
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Richard Victor
Respondent Attorney	W. Britt Isaly, James Jannisch

DATE FILED: 2/13/2024

/s/Maria Portela, Commissioner

Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ihor Khreptak,

Petitioner,

vs. No. 22 WC 05925

Valentyn Consulting, Inc., and Active Painting, Inc.,

Respondents.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent Active Painting and notice given to all parties, the Commission, after considering the issues of employment relationship, accident, notice, causal connection, medical expenses, prospective medical care, temporary disability, permanent disability, and "[w]hether or not Petitioner is excluded from coverage under the IL WC Act," and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

As a threshold matter, we consider Respondent Active Painting's argument that Petitioner is excluded from coverage of the Workers' Compensation Act (the Act). Petitioner's application for adjustment of claim alleges that on February 21, 2022, Petitioner injured his left arm when he fell off a ladder. It is undisputed that Petitioner is the sole proprietor, executive and employee of Valentyn Consulting. As an owner and executive, Petitioner opted out of workers' compensation coverage for himself, although he did purchase a workers' compensation policy for Valentyn Consulting. The insurance carrier for Valentyn Consulting therefore stepped up to defend against Petitioner's claim. Respondent Active Painting is an unrelated entity for which Petitioner performed painting work at the time of the accident. The Arbitrator found Petitioner was an employee of Active Painting and the claim is compensable against Active Painting.

On review, the essence of Active Painting's argument is: "It is clear from Sections 3(17) and 3(20) of the Act that petitioner's decision to exclude himself from his workers' compensation policy excludes Petitioner from the protections of the Act. Accordingly, the Arbitrator erred in considering any issues related to Petitioner's claim for benefits under the Illinois Workers' Compensation Act as the Act does not apply to him." Put differently, Active Painting maintains that "by excluding himself from his company's workers' compensation policy, Petitioner as a matter of law, loses the opportunity to argue that he is not an independent contractor, but an employee who is entitled to benefits under the Illinois Workers' Compensation Act."

Valentyn Consulting responds thusly: "Active's extremely broad interpretations of the Act do not come from the Act or from case law cited by Active Painting. Such a public policy of exclusion from any workers' compensation benefits when one is legitimately employed by another employer is unconscionable, as it prevents coverage of workers' compensation by other employers when the employee has a compensable worker injury for that employer. It is difficult to believe that Active Painting would stand by its argument if, for example, the Petitioner went to work as a cook for a large, covered employer such as McDonald's and while working exclusively as an employee for McDonald's would be barred from any workers' compensation for a compensable work accident based on Active Painting arguments. It is hard to understand how McDonald's could look back in time to when the Petitioner excluded himself from coverage as an owner of Valentyn's policy and say that McDonald's own workers' compensation insurance therefore does not cover him for a work injury sustained while working for McDonald's."

Petitioner responds similarly: "Sections 3(17)(b) and 3(20) of the Act and the Virginia Surety Company case cited by counsel, would only apply as to Valentyn and not apply to Active. As there clearly is an employee-employer relationship between Petitioner and Active, this case is no different than any other worker's compensation case where an employee is injured in an accident which arises out of and in the course of employment for Respondent and therefore compensable based on causation."

The Commission agrees with Valentyn Consulting and Petitioner.

In reviewing the Arbitrator's Decision, the Commission finds that modifications are needed. On the issue of medical expenses, the Arbitrator's findings in the Conclusions of Law are as follows (page 6):

> "Based on the Arbitrator's findings regarding employment and accident, the Arbitrator awards total reimbursement to be paid by Respondent Active to Petitioner for the bills he paid contained in PX 2,3,4,5,6 and 7 in the amount of $8,390.80. Similarly, the Arbitrator awards the unpaid bills per the fee schedule to be paid by Active, as follows:
>
> | | |
> |---|---|
> | Village of Arlington Heights | $1,574.00 PX8 |
> | CEP America (x-rays at ER) | $3,558.00 PX9 |

Midwest Anesthesia Partners	$5,347.00 PX10
Northwest Community Hospital	$20,373.00 PX12
Northwest Orthopedic Surgery	$165.00 PX13."

However, the Order part of the Decision states:

> "Respondent, Active Painting, shall pay reasonable and necessary medical services for bills related to the EMS service and Emergency Room at Northwest Community Hospital, Dr. Ross and Illinois Bone & Joint, as provided in Sections 8(a) and 8.2 of the Act. Medical bills for treatment after Illinois Bone & Joint are hereby denied and Respondent is not liable as they fall outside of the two doctor choice of Section 8(a)."

The Commission notes the Conclusions of Law and the Order are inconsistent. Furthermore, the Commission disagrees with the part of the award of "total reimbursement to be paid by Respondent" as contrary to sections 8(a) and 8.2 of the Act.

The Commission finds that Petitioner did not exceed his two choices of medical providers. Emergency room records from Northwest Community Hospital show Petitioner requested a Russian/Ukrainian speaking orthopedic surgeon for follow-up care and was referred to Dr. Coach or Dr. Kachar. The medical records and bill from Dr. Ross (Northwest Orthopedic surgery) show Petitioner was referred by Dr. Kachar and/or Northwest Community Hospital. These records are consistent with Petitioner's testimony that Northwest Community Hospital referred him to Dr. Ross. Thus, Dr. Ross is not Petitioner's choice of medical providers. Illinois Bone and Joint Institute, whose records are not in evidence, could be Petitioner's first choice of medical providers, unless Dr. Coach or Dr. Kachar saw patients there.[1] Dr. Brochin is at most the second choice of medical providers. Having found that Petitioner did not exceed his two choices of medical providers, the Commission awards the medical bills in evidence pursuant to sections 8(a) and 8.2 of the Act. The Commission accordingly modifies the Arbitrator's Decision.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 7, 2023, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent Active Painting shall pay to Petitioner the sum of $739.36 per week for a period of 17 3/7 weeks, from February 22, 2022 through June 23, 2022, that being the period of temporary total incapacity for work under §8(b) of the Act.

[1] Petitioner testified the emergency room staff referred him to Dr. Ross and to the Illinois Bone and Joint Institute.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent Active Painting shall pay the medical bills in evidence pursuant to §§8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent Active Painting shall pay to Petitioner the sum of $665.43 per week for a further period of 113.85 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the loss of use of the left arm to the extent of 45 percent thereof.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent Active Painting 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 Active Painting 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.

February 13, 2024

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

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

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC005925
Case Name	Ihor Khreptak v. Valentyn Consulting Inc. and Active Painting Inc.
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	7
Decision Issued By	Raychel Wesley, Arbitrator

Petitioner Attorney	Richard Victor
Respondent Attorney	James Jannisch, W. Britt Isaly

DATE FILED: 2/7/2023

THE INTEREST RATE FOR THE WEEK OF FEBRURY 7, 2023 4.75%

/s/ Raychel Wesley, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Ihor Khreptak
Employee/Petitioner
v.
Valentyn Consulting Inc. and Active Painting Inc.
Employer/Respondent

Case # **22** WC **005925**

Consolidated cases:

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

DISPUTED ISSUES

A. ☒ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☒ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **whether or not Petitioner is excluded from coverage under the Illinois WC Act**

FINDINGS

On **2/21/22**, 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 $**57,512.00**; the average weekly wage was $**1,109.05**.

On the date of accident, Petitioner was **53** years of age, ***single*** with **1** dependent child.

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

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

Respondent shall be given a credit of $**0** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0** 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

Medical benefits

Respondent, Active Painting, shall pay reasonable and necessary medical services for bills related to the EMS service and Emergency Room at Northwest Community Hospital, Dr. Ross and Illinois Bone & Joint, as provided in Sections 8(a) and 8.2 of the Act. Medical bills for treatment after Illinois Bone & Joint are hereby denied and Respondent is not liable as they fall outside of the two doctor choice of Section 8(a).

Temporary Total Disability

Respondent, Active Painting, shall pay Petitioner temporary total disability benefits of $739.36/week for 17 1/7 weeks, commencing 2/22/22 through 6/23/22, as provided in Section 8(b) of the Act.

Permanent Partial Disability

The Arbitrator finds that the Petitioner sustained permanent partial disability to the extent of 45% loss of use of the left arm 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.

/s/ Raychel A. Wesley **FEBRUARY 7, 2023**

Signature of Arbitrator

FINDINGS OF FACT:

Petitioner testified that he was the owner and sole employee of Valentyn Consulting Inc. (Valentyn) which is a painting company, and he was a painter, and as such he opted out, or excluded himself from coverage under Valentyn's worker's compensation insurance policy with Berkshire Hathaway (Respondent Valentyn RX1). Petitioner testified that he had a relationship with Respondent Active Painting (Active) for four years, specifically with the owner of Active, Mariusz Sepak. Petitioner testified that Active was also a painting company, and the work he personally performed for Active was as a painter. Petitioner testified he speaks Ukranian, Polish and Russian and that he communicated with Sepak in Polish. Petitioner testified he was paid $27.00 per hour, which is consistent with the wage information in Respondent Valentyn RX2. Petitioner testified that he was paid by check from Active to Valentyn, as this was the arrangement which Sepak decided and was not up to him. Petitioner identified checks for work he personally performed for Active from October 19, 2021 to February 8, 2022 (PX1). Those checks represented the gross amount, and on which he paid the taxes due.

Petitioner testified he received his job assignments from Sepak for Active via text, usually the evening before the assignment. Petitioner testified the texts specified the location of the assignment. Petitioner testified that Active set the work schedule as starting at 8:00 a.m. until 5:00 p.m. to 5:30 p.m., with a 30 minute lunch break. Petitioner testified he would meet Sepak at the job assignment with Sepak's team of workers, including Sepak's assistant, Matek, at which time Sepak and Matek would direct Petitioner as to what specific painting work was to be performed. Petitioner testified that Matek supervised the work he performed. Petitioner testified that while he used his own paint brush and rollers, Active provided all other tools and equipment to perform the work, including ladders, tarps, tape and paint. Petitioner testified he never refused a job assignment, and would ask permission from Sepak, whom he called the "boss", for time off, which Sepak then decided and which was then unpaid. Petitioner testified this occurred about once a year. On one occasion, he asked Sepak to not assign him jobs for about a month while he attempted to learn a trade as a mechanic, which was not successful. Petitioner testified he never had any conversations with Sepak about performing work for other companies during the time he worked for him. Petitioner testified in performing painting work for Active, he considered himself to personally be an employee of Active, and not acting as an employee of Valentyn, and he considered Sepak to be his "boss" as owner of Active.

Petitioner testified that this was the arrangement as to the work he personally performed for Active on February 21, 2022. Petitioner testified he received a text from Sepak to meet at a private residence at 2061 W. Bridge Ave. in Arlington Heights. On that date, Petitioner testified he met Sepak and Matek there, and that he knew Matek from previous job assignments. At that time, Sepak and Matek directed him as to what work was to be performed. At that time, Active provided the ladder and paint to be used, as on the prior job assignments. Petitioner testified that during the morning he was on the ladder provided by Active on the second floor painting on a wall when the ladder moved and he fell about 10 feet with an outstretched left hand to break his fall, and as a result he injured his left elbow. Petitioner testified he told Matek, who was present as Sepak had left the job site, in Polish to call Sepak to tell him what happened, and to call an ambulance. Petitioner testified that he saw Matek make the telephone call and that the next day he also spoke with Sepak by phone regarding what occurred.

Petitioner testified he was taken by ambulance to Northwest Community Hospital, where the history of the accident was taken. The x-rays revealed a comminuted fracture of radial head and nondisplaced avulsion fracture, supracondylar fracture dislocation of the elbow, humerus and radius. Petitioner testified he was referred to Dr. John Ross, which he saw on February 23, 2022. Dr. Ross recommended surgery, but as Petitioner was not able to pay, he did not return to see Dr. Ross (PX13). Petitioner testified he was also referred

by the hospital to Illinois Bone and Joint Institute, where he was seen on February 24, 2022, but did not pursue treatment there. Petitioner testified he then sought treatment with Dr. Robert Brochin of Chicago Hand and Orthopedic Surgery.

Petitioner remained under Dr. Brochin's care from February 28, 2022 to June 23, 2022. Dr. Brochin noted Petitioner's history of the accident, diagnosed Petitioner with a closed displaced fracture of the left radius and partial tear of the radial collateral ligament of the left elbow. On March 4, 2022, Dr. Brochin performed surgery to repair the traumatic rupture of the radial collateral ligament, specifically an arthroplasty of the left elbow radial head. Dr. Brochin ordered occupational therapy which Petitioner had from March 9, 2022 to May 2, 2022. Dr. Brochin ordered a brace on May 10, 2022, which Petitioner obtained through Lantz Medical. On June 23, 2022, Dr. Brochin recommended to improve Petitioner's range of motion further surgery for an elbow debridement and contracture release. As Petitioner testified he did not wish to pursue further surgery, Dr. Brochin discharged Petitioner at maximum medical improvement with the 10 pound lifting restriction he placed on May 2, 2022. (PX12 and 14).

Petitioner testified and identified the bills he paid for the treatment due to the work accident, for which he has not been reimbursed as follows:

Chicago Hand and Orthopedic of	$6,121.60	PX2
Northwest Community Healthcare	$500.00	PX3
Lantz Medical	$175.00	PX4
Northwest Orthopedic Surgery	$300.00	PX5
Envision Medical Imaging	$555.40	PX6
Illinois Bone and Joint Institute	$350.00	PX7.

Petitioner identified the unpaid medical bills he received as a result of the work accident, as follows:

Village of Arlington Heights	$1,574.00	PX8
CEP America (x-rays at ER)	$3,558.00	PX9
Midwest Anesthesia Partners	$5,347.00	PX10.

The bill of Northwest Orthopedic Surgery $465.00 is part of PX13, for which Petitioner paid $500.00, leaving a balance of $165.00 and the usual and customary charges from Northwest Community Hospital are contained in PX11, but the fee schedule amounts of $20,373.20, are contained in their records (PX12).

Petitioner testified that he remained off work per the notes from Dr. Brochin (PX14), from February 22, 2022 through June 23, 2022. Petitioner testified he has had not other injuries to his left elbow. Petitioner testified he continues to perform work for Active as a painter. Petitioner testified that he notices a loss of strength and range of motion, pain and weakness in his non-dominant left arm, in carrying and lifting objects. Therefore, Petitioner testified he uses his left arm less. Petitioner testified he talks non-prescription medications, and pays $175.00 a month for a device to stretch his left arm to relieve pain.

CONCLUSIONS OF LAW

The Arbitrator finds Petitioner's rebutted testimony as to the nature of his work for Active, to be credible and consistent with the relevant caselaw regarding employment. Therefore, the Arbitrator finds as follows:

A. With Respect to Paragraph (A), Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act, the Arbitrator finds as follows:

Based on the nature of Petitioner's work as a painter, including the use of ladders at a height of 10 feet, to be hazardous. Thus, Petitioner and Respondent Active were operating under the Worker's Compensation Act.

B. With respect to Paragraph (B), was there an employee-employer relationship, the Arbitrator finds as follows:

Active exercised a high degree of direction and central over Petitioner's work activities, as follows: setting the schedule, providing the tools to perform the work (including ladders on which Petitioner was injured and the paint), the method by which Petitioner was given the job assignments and the direction as to what work was to be performed, that Petitioner had to ask permission for time off, that no job assignment was refused, and that Petitioner personally performed the work for Active and considered himself to be Active's employee, in doing so, and not as an employee for Valentyn, and therefore he considered Sepak as "the boss".

Based on these facts, the preponderance of the evidence establishes that the relationship between Petitioner and Active was one of employee and employer and the Arbitrator so finds.

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

Based on the Arbitrator's findings regarding Petitioner's employment relationship with Active, and the undisputed evidence as to how the accident occurred, the Arbitrator finds that on February 21, 2022 Petitioner sustained accidental injuries that arose out of and in the course of his employment for Active.

E. With respect to Paragraph (E) Was timely notice of the accident given to Respondent, the Arbitrator finds as follows:

Based on the unrebutted testimony be Petitioner that he asked and saw Matek call Sepak regarding the accident, and that he spoke to Sepak the following day, the Arbitrator finds Active was given notice of the accident within the time limits stated in the Act.

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

Based on the undisputed medical evidence and no other injuries to Petitioner's left elbow occurred, the Arbitrator finds Petitioner's current condition of ill-being to causally connected to his injury.

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

Based on the Arbitrator's findings regarding employment and accident, the Arbitrator awards total reimbursement to be paid by Respondent Active to Petitioner for the bills he paid contained in PX 2,3,4,5,6 and 7 in the amount of $8,390.80. Similarly, the Arbitrator awards the unpaid bills per the fee schedule to be paid by Active, as follows:

Village of Arlington Heights	$1,574.00	PX8
CEP America (x-rays at ER)	$3,558.00	PX9
Midwest Anesthesia Partners	$5,347.00	PX10
Northwest Community Hospital	$20,373.00	PX12
Northwest Orthopedic Surgery	$165.00	PX13

K. With respect to Paragraph (K) What temporary benefits are in dispute, the Arbitrator finds as follows:

Based on the Arbitrator's finding regarding employment, the Arbitrator finds Petitioner was temporarily and totally disabled from February 22, 2022 through June 23, 2022 and awards 17 1/7 weeks T.T.D. to be paid by Respondent Active.

L. With respect to Paragraph (L) What is the nature and extent of the injury, the Arbitrator finds as follows:

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 (i) of §8.1b(b), the Arbitrator notes that no opinion comporting with the specific requirements of §8.1b(a) was submitted into evidence. However, the Arbitrator has considered the doctor's comments as a factor in the evaluation of Petitioner's permanent partial disability as required by §8.1b(b)(i). The doctor noted permanent work restrictions. Because of this, the Arbitrator therefore gives *greater* 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 painter at the time of the accident and that he was able to return to work in his prior capacity as a result of said injury. The Arbitrator notes Petitioner continues to work with difficulty. Because of this, the Arbitrator therefore gives *greater* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 53 years old at the time of the accident. Because of this, the Arbitrator therefore gives *greater* weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes thee possibility of diminished earnings because of the permanent restrictions of the Petitioner and therefore the Arbitrator therefore gives some 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 recommendations for further surgery. Because of this, the Arbitrator therefore gives *greater* weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 45% loss of use of left arm pursuant to §8e of the Act.

Based on the notice of the injury and the permanent restrictions of Dr. Brochin, and Petitioner's ongoing symptoms the Arbitrator awards a 45% loss of use of Petitioner's left arm under section 8e, or 113.85 weeks at $665.43 which equals $75,759.20 to be paid by Respondent Active.

O. With respect to Paragraph (O), whether or not Petitioner is excluded from coverage under the Illinois WC Act, the Arbitrator finds as follows:

Regarding whether or not Petitioner is excluded from coverage under the Illinois Worker's Compensation Act, the Arbitrator finds that although Petitioner excluded himself from coverage under Valentyn's policy with Berkshire Hataway, based on the Arbitrator's findings that the relationship between Petitioner and Active was one of employee and employer and on the date of accident February 21, 2022, Petitioner was acting as an employee of Active, with Sepak as his "boss", Petitioner is therefore not excluded from coverage under the Illinois Worker's Compensation Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC002215
Case Name	Terri Mae Owens v. DHL Express USA, Inc.
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0083
Number of Pages of Decision	14
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Bryan Merce
Respondent Attorney	Mitzi Westerhoff

DATE FILED: 2/14/2024

/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

Terri Mae Owens,

Petitioner,

vs. No. 22 WC 02215

DHL Express USA, Inc.,

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 causal connection, medical expenses, prospective medical care and temporary disability, and being advised of the facts and law, corrects the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission 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 Comm'n*, 78 Ill.2d 327 (1980).

The Commission corrects the award of temporary total disability benefits in the Conclusions of Law (page 10, Paragraph K, sentence 4) to state: "As a result, the Arbitrator finds that, based on the medical records submitted into evidence, Petitioner's testimony, and the Arbitrator's finding of causal connection of the January 2, 2022 work injury, Petitioner is entitled to TTD benefits from January 3, 2022 through the date of the arbitration hearing on December 1, 2022." The Commission further adds the following to the Conclusions of Law and to the Order part of the Decision: "Respondent shall have credit for the TTD benefits it paid from January 3, 2022 through May 8, 2022."

In the Order part of the Decision, the Arbitrator awarded "continued perspective medical care related to the January 2, 2022 work accident." In the Conclusions of Law, however, the Arbitrator ordered Respondent "to approve and pay for the treatment recommendations made by Dr. Poepping and Dr. Grochowski as they relate to Petitioner's January 2, 2022 work injuries." The Commission corrects the Order part of the Decision to be consistent with the specific award of prospective medical care in the Conclusions of Law.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 7, 2023, is hereby corrected, 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.

February 14, 2024
MEP/sk
o-1/24/2024
49

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

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

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC002215
Case Name	Terri Mae Owens v. DHL Express USA, Inc.
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	11
Decision Issued By	Raychel Wesley, Arbitrator

Petitioner Attorney	Bryan Merce
Respondent Attorney	Mitzi Westerhoff

DATE FILED: 2/7/2023

THE INTEREST RATE FOR THE WEEK OF FEBRUARY 7, 2023 4.75%

/s/ Raychel Wesley, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Terry Mae Owens Case # **22** WC **002215**
Employee/Petitioner

v.

DHL Express USA, Inc.
Employer/Respondent

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

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **1/2/2022**, 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 $**10,894.08 (over 16 weeks)**; the average weekly wage was $**680.88**.

On the date of accident, Petitioner was **65** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a future credit of $5,000.00 for other benefits, for a total credit of $5,000.00

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

ORDER

Petitioner's current condition of ill-being is causally related to her January 2, 2022 work accident.

Respondent shall pay reasonable and necessary medical treatment in the amount of $16,235.00 as noted in Petitioner's Exhibits 12, 13, 14, 15 and 16. Respondent is not entitled to an 8(j) credit because Petitioner's work injury related medical bills, to the extent that any have been paid, have been paid by Petitioner's Medicare benefits.

Respondent is responsible for Petitioner's continued perspective medical care related to the January 2, 2022 work accident.

Respondent is responsible for TTD benefits from January 3, 2022 through the date of Arbitration.

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

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

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

/s/ Raychel A. Wesley **FEBRUARY 7, 2023**

Signature of Arbitrator

TERRI OWENS V DHL EXPRESS USA, INC.
CASE NO.: 22 WC 002215

FINDINGS OF FACT

On January 2, 2022 Terri Mae Owens, Petitioner, was employed as a domestic sorter for DHL Express USA, Inc. (hereinafter Respondent). Petitioner is a 66-year-old female who worked for Respondent for approximately three and half months. (Transcript pg. 12). Her job duties included sorting packages from mail carts into mailbags. Once the mailbags were full, she would seal the bags and carry or drag them to another area for further processing. Petitioner testified that the job was repetitive in terms of having to bend over into the cart to take out packages and then placing them in the correct bags. She also stated that it was repetitive in the sense of having to then wrap the mail bags up, picking them up off the rack on which they were held, and then taking them to another location. (Id. at pg. 59, 60). She testified that she was told the bags should be filled to a marked line and she stated that the full bags could weigh up to 70lbs. (Id. at pg. 14, 63). Petitioner testified that prior to her work with Respondent, she had worked at Amazon where she also had to sort packages, scan them and was also required to lift and move mail and packages. (Id. at Pg. 12-13). Petitioner testified that she had no physical issues with her back, groin, hips, knees or shoulders while working for Amazon. (Id. at Pg. 13).

Petitioner testified that she normally worked in a location where the mail bags, once full, and moved to a nearby location were left for other individuals to take to the next area of processing. However, on January 2, 2022 she was working in the same-day bags area, which required her to lift these full mailbags, into a mail cart to be taken to another location. (Id. at pg. 15). She loaded these same-day bags and had to fill the carts up and it was while working in this area that she felt pain in her low back and some pain on the left side of her chest. (Id. at pg. 16, 17). She notified her employer and was then taken to Gottlieb Memorial Hospital via ambulance. She advised the EMS personnel that she had pain in her lower back and groin and hip area and, she also complained of pain in her chest on the left side. (Pet. Ex. 5, pg. 11; Trans. Pg. 17). She testified that once she reached the emergency room, she was given an EKG and was there for 27 hours without being examined by a physician. (Trans. Pg. 19, 20). She was provided some medications and advised that she might be sent for an MRI by her employer. Petitioner, thereafter, contacted Respondent and was advised to seek treatment at Concentra.

She testified that she first went to Concentra on January 5, 2022 where she complained of left hip, left groin and low back injury and a left knee strain. (Pet. Ex. 6, pg. 132, Trans. Pg. 21). She saw Concentra in their Franklin Park location before eventually transitioning to the Elk Grove Village location. Petitioner was advised to begin physical therapy, which she did for a single visit at Concentra before moving on to Northwest Physical Therapy for the month of January 2022. Concentra also ordered an MRI of her low back, which she underwent on February 2, 2022. Petitioner testified that she continued to treat with Concentra and was eventually referred to Dr. Sean Salehi for her continued low back complaints. (Trans. Pg. 22-26).

Petitioner saw Dr. Sean Salehi on a single occasion on February 3, 2022. He reviewed Petitioner's lumbar spine MRI and diagnosed Petitioner with SI joint dysfunction. (Pet. Ex. 6, pg. 68, 69). Dr. Salehi advised her to continue physical therapy and he suggested a SI joint injection to be administered by Dr. Sajid Murtaza. Petitioner initially saw Dr. Murtaza on February 15, 2022 where she continued to complain of low back and groin pain. He also recommended the injection, however, Petitioner did not wish to undergo the injection. She was advised that she should proceed with physical therapy. (Trans. pg. 28). Petitioner testified that she has a fear of injections and that she did not want to undergo any injections or shots. (Id. at pg. 29). Petitioner saw Dr. Murtaza on one other occasion and she was advised that there was little more he could do for her without the injection.

Petitioner continued to be in pain and requested another doctor to help her with her complaints in and around her hip, groin and lower back area. She was then sent for treatment with Dr. Kathleen Weber of Midwest Orthopaedics at Rush. (Id. at pg. 30). Petitioner testified that she had been under the impression that this was a Section 12 examination, however, she later found out that Dr. Weber was actually a treating physician. (Id. at pg. 30). Petitioner testified that she first saw Dr. Weber on April 4, 2022 where she complained about bilateral hip pain. Dr. Weber believed that she had osteoarthritis in her hip. (Pet. Ex. 8, pg. 312, 313). During a follow-up visit, Dr. Weber recommended an MRI of her pelvic area, which she underwent on May 6, 2022. (Id. at pg. 321). Dr. Weber opined that Petitioner's examination was most consistent with an aggravation of her left hip osteoarthritis. (Id. at pg. 313). Dr. Weber recommended hip injections, however, Petitioner did not want to proceed with the injections. Dr. Weber also informed Petitioner that she would likely need a hip replacement within one to ten years. (Trans. pg. 31). She was ultimately released from Dr. Weber's care.

In February, Petitioner's physical therapy transitioned to Quest Physical Therapy as it was closer to her residence and easier for her to attend. (Id. at pg. 24, 25). She testified that her treatment from January to April 2022 initially focused on her low back, left knee and hip area to the detriment of her left shoulder pain. Petitioner testified that she had informed the EMS providers that she had had pain in her left chest area. She described the left sided chest pain as being a little below her clavicle bone and going into her shoulder bone. (Id. at pg. 18). Her left shoulder pain had continued to bother her and she was noticing it causing issues while at physical therapy when she was lying down and attempting to get up. (Id. at pg. 34).

Petitioner continued to have left shoulder pain complaints and no one was treating that injury. As a result, she decided that she would find a physician on her own to help her left shoulder pain. She found Dr. Arkadiusz Grochowski, who was located very close to her home. (Id. at pg. 33, 34). She first saw Dr. Grochowski in April 2022, complaining of her left shoulder pain since the injury at work in January 2022. Dr. Grochowski' s notes reflect a history of the chest, left shoulder, and lower back pain complaints. (Pet. Ex. 11, pg. 505). He recommended physical therapy for the left shoulder. He also had the Petitioner undergo an MRI of the left shoulder, which showed a torn rotator cuff tear involving the supraspinatus tendon. (Pet. Ex. 10, pg. 475). Petitioner testified that due to her continued left shoulder complaints, Dr. Grochowski recommended she see an orthopedic physician and suggested Dr. Thomas Poepping. (Trans. pg. 35).

Petitioner first saw Dr. Poepping on May 25, 2022 where she complained of her left shoulder pain, which had caused her pain since the work injury on January 2, 2022. (Pet. Ex. 10, pg. 482). Dr. Poepping's records reflect a description of injury of Petitioner lifting bags overhead when she felt pain on the left side of her chest in the interior shoulder. It also noted that it had gotten progressively worse. (Id. at pg. 482). Dr. Poepping recommended an injection, however, Petitioner did not wish to proceed with any injections. As a result, physical therapy for her left shoulder was ordered. Petitioner testified that on a follow-up visit she also advised Dr. Poepping of her bilateral knee complaints. (Id. at pg. 481). She complained that her right knee pain was now greater than the initial left knee pain she sustained on January 2, 2022. Petitioner testified that in having to alter her gait and how she walked because of the pain on the left side of her hip and groin, she ended up putting more weight and pressure on the right side of her lower body, which started to cause pain in her right knee. (Trans. pg. 36). Dr. Poepping thereafter recommended physical therapy to begin on Petitioner's right knee. Dr. Poepping opined that she had bursitis in her knees. (Id. at pg. 37).

Petitioner testified that physical therapy at Quest Physical Therapy continued until the end of October of 2022. She testified that after seeing Dr. Poepping Quest began treatment to her left shoulder and her right knee. (Id. at pg. 38). She testified that while she began to feel a little bit stronger in her left shoulder, she still had very limited range of motion, which continued to be an issue at the time of the trial. (Id. at pg. 40, 41). She testified

that she wanted to try aqua therapy to help with her joint pain and Dr. Poepping referred her to Rush Aqua Therapy in Streamwood, Illinois. She started going there in November of 2022. (Id. at pg. 39). She testified that this newest therapy was helping with her stamina and helping her put less pressure on her joints, while also trying to improve the strength in her left shoulder, right knee, her low back, and hip and groin areas. (Id. at pg. 39).

Petitioner testified that she continues to have limited range of motion and strength in her left shoulder and her dominant hand. She testified that her right knee still causes pain that shoots up to her hip area. She also testified that her lower back and hip and groin, mostly on the left side, are still painful. When asked if she had any of these issues prior to January 2, 2022, Petitioner credibly testified that she had not had any issues in her knees, shoulders, and hips or groin area. (Id. at pg. 41, 42, 43). She admitted that she did previously have some occasional pain in her lower back, but nothing that ever caused long-lasting pain or required her to take time off from work. (Id. at pg. 47). She testified that she continues to treat with Dr. Poepping and Dr. Grochowski for her work injuries. (Id. at pg. 43, 44).

Petitioner testified that she attended a Section 12 examination with Dr. Bryan Neal on May 4, 2022. She testified that she advised Dr. Neal about her pain complaints. Petitioner testified that after May 8, 2022 her Temporary Total Disability (TTD) wage loss benefits and medical benefits were cut off. (Id. at pg. 44, 45). Petitioner testified that, prior to the work injury, she had never had issues with her knees, hips and groin area or left shoulder and that she did not have to take time off from Respondent for physical issues. (Id. at pg. 47). Petitioner credibly testified that she was unable to return to her pre-injury job for Respondent at the time of the trial. (Id. at pg. 48). Dr. Neal was of the same opinion. (Resp. Ex. 4, pg. 52-53). On cross-examination, Petitioner was asked about a note in Dr. Weber's medical records which reflected a doctor's appointment in May of 2020 which referenced potential long-standing low back complaints. Petitioner testified that she did not recall meeting with a doctor, but did recall a video conference appointment with a physician. (Id at pg. 53). She did not recall ever having back complaints that caused her long-term pain, caused her to miss any work, or required treatment. Petitioner was also asked to review a photograph of the postal bags that she worked with. (Resp. Ex. 8). She testified while those were the bags she worked with, they did not accurately reflect what they normally looked like when they were full. She noted that she sealed the bags and moved them once they were filled up to the dotted line noticeable on the picture. (Resp. Ex. 8).

Respondent's witness, Darius Brown, testified that he was the Area Senior HR Manager with Respondent's Melrose Park location. (Trans. pg. 67). He testified to the job duties of a domestic sorter, Petitioner's position. He also described the area where a domestic sorter would work. Mr. Brown testified domestic sorters were to fill mailbags and then move them to another area. (Id. at pg. 70, 71). Mr. Brown also described the duties of the same day domestic sorters and how they would have to lift the full mail bags and place them in a cart before they are taken to another location. (Id. at pg. 75, 76). He recalled that Petitioner's initial complaint was on the left side of her chest. (Id. at pg. 76). On cross-examination, Mr. Brown admitted that he had seen Petitioner on the work floor on occasions. He also admitted that he had seen her do her job and do so without any issues. (Id. at pg. 80). He testified that he did not know of any instances where Petitioner was written up because of issues with her job performance or doing her physical duties. (Id. at pg. 80). Mr. Brown admitted that when the filled mailbags were placed in the mail carts, they would be stacked higher than the edge of the cart. (Id. at pg. 79).

Dr. Neal testified that he did not find any of Petitioner's symptoms be related to her work injury. He opined that Petitioner had symptomatic osteoarthritis in multiple joints including her hips and knees, which he found to be pre-existing, degenerative conditions. He found that they were unrelated to her work injury. He also stated that due to her physical and arthritic conditions, he did not believe that Petitioner would be able to work in her pre-injury regular duty job on a full-time basis without restrictions. (Resp. Ex. 4, pg. 52-53). He testified that

he believed she could do sedentary duty work or a job with intermittent, but not continuous, ambulation, with a 20lbs weight limit. (Id. at pg. 53).

CONCLUSIONS OF LAW

With respect to Paragraph (F), whether Petitioner's current condition is causally related to the injury, the Arbitrator finds as follows:

Workers need only prove some act or phase of employment was a causative factor in the ensuing injuries. *Land & Lakes Co. vs. Industrial Commission,* 359 Ill. App. 3d 582, 592 (2005). The work-related task need not even be the sole or principal causative factor of the injury, as long as the work is a causative factor. *Sisbro vs. Industrial Commission*, 207 Ill. App. 2d 193, 205 (2003). Even if Petitioner had a pre-existing degenerative condition, which makes him more vulnerable to injury, recovery for accidental injury cannot be denied as long as he can show that his employment was a causative factor. *Sisbro vs. Industrial Commission*, 207 Ill. App. 2d 193, 205 (2003).

The Arbitrator has carefully reviewed and considered all the medical evidence along with the testimony. The Arbitrator concludes that Petitioner has proven by the preponderance of the evidence that her current conditions of ill-being in the left groin and left hip areas, lower back, left shoulder and right and left knees are all causally related to the January 2, 2022 work accident. Causal connection between work duties and an injured condition may be established by a chain of events, including Petitioner's ability to perform duties before the date of an accident and an inability to perform the same duties following the date of an accident. *Darling vs. Industrial Commission*, 176 Ill. App. 3d 186, 530.

Following the Petitioner's injury, she was provided work restrictions by Concentra, Dr. Weber and Dr. Grochowski. The medical records corroborate Petitioner's testimony, documenting that she felt pain in her left hip and left groin area and left knee on the day of the injury and she has consistently complained about these injuries to her doctors since. She received significant physical therapy treatment for those body parts. Additionally, the Gottlieb Memorial Hospital medical records and Petitioner's recorded statement with the Respondent reference the pain in her left chest area near her shoulder. (Pet. Ex. 5, pg. 11; Resp. Ex. 3, pg. 11). Petitioner's witness also noted that it was his understanding that Petitioner's initial complaints were on the left side of her chest. (Trans. pg. 76). The initial Concentra visits all note Petitioner complaining of left hip, left groin, low back, and left knee injuries. (Pet. Ex. 6, Pg. 132). Her physical therapy notes reflect her treatment for those body parts, both at Northwest Physical Therapy and Quest Physical Therapy. Petitioner's treatment with Dr. Salehi and Dr. Murtza reflect that she had injections recommended into her lower back, which she did not undergo for personal reasons, which the Arbitrator found to be compelling and credible.

Additionally, Dr. Kathleen Weber examined the Petitioner and she believed that her examination was most consistent with an aggravation of left hip osteoarthritis. (Pet. Ex. 8, Pg. 313). Dr. Weber also recommended treatment in the form of an injection, which was not performed. Petitioner testified about her fears of injections and needles, so the only treatment available continued to be physical therapy. Petitioner may have pre-existing osteoarthritis or degenerative conditions, but that does not negate the fact that she, per her credible testimony, never complained or treated for any hip, groin or knee related issues prior to the work injury. While there is a record of Petitioner complaining of low back issues in 2020 included as part of Dr. Weber's medical notes, Petitioner credibly testified that she sought no treatment for those back complaints. She was able to work at Amazon in a physical position prior to working for Respondent and then worked for the Respondent for 3 ½ months without missing time from work for physical issues or being written up for being unable to perform her

duties as required. Since the work injury, the Petitioner is now unable to perform her job duties for Respondent based on the opinion of Respondent's Section 12 examiner, Dr. Neal. He opined that Petitioner is unable to perform work beyond the sedentary level or work that allows her only intermittent ambulation, with a 20lbs weight limit. (Resp. Ex. 4, Pgs. 73, 74).

Dr. Neal testified that Petitioner had right hip and left hip osteoarthritis, right knee and left knee osteoarthritis, obesity and lumbar spondylosis, which he found to all pre-exist Petitioner's January 2, 2022 injury. However, when asked whether she could return to work in her full-duty position with Respondent, Dr. Neal stated that he believed that she would not be able to do so because of her pre-existing, degenerative arthritic conditions in multiple joints and her morbid obesity. (Resp. Ex. 4, Pg. 42). This was in spite of the fact that the Petitioner had worked up until January 2, 2022 with no issues and no need for treatment to any of the body parts he opined were stopping her from working as a domestic sorter. Petitioner had worked for three one-half (3½) months for Respondent prior to this injury without any complaints or physical limitations. When Dr. Neal was asked whether Petitioner could have aggravated any of her pre-existing conditions, he responded with a simple, "No." (Resp. Ex. 4, pg. 76). Prior to the January 2, 2022, she was able to work her domestic sorter position for Respondent and had no restrictions from any doctors. Following injury, Respondent's own Section 12 examiner opined that she would be unable to work as a domestic sorter for Respondent. Petitioner testified credibly that she continues to have pain in her left hip, left groin, lower back and knees. Treatment continues with Dr. Grochowski, including a visit on November 8, 2022, where she continued to complain of low back pain. (Pet. Ex. 11, Pg. 527).

The Arbitrator finds that, following a careful review of the medical evidence and Petitioner's testimony, Petitioner has proven by the preponderance of the evidence that her current condition of ill-being in her left shoulder is causally related to the January 2, 2022 work injury. Petitioner complained about the left side of her chest on the day of the injury. Petitioner's initial treatment at Gottlieb Memorial reflects that she had complaints on the left side of her chest. It is apparent that the Gottlieb Memorial emergency room only performed an EKG, concerned about her heart, and did not consider a muscle or tendon issue as being a cause of her pain. As a result, Petitioner did not obtain treatment for her left shoulder until finally seeing Dr. Grochowski in April of 2022. Petitioner also complained of left-sided chest pain on her recorded statement with the Respondent. (Resp. Ex. 1, pg. 11). Respondent's witness, Mr. Brown, also testified that it was his understanding that Petitioner's complaint was left-sided chest pain. It is clear that the initial physicians may have confused Petitioner's complaint on the left side of her chest for heart issues when it was actually shoulder issues that was causing pain. Petitioner credibly testified that the pain in her left chest was just underneath her clavicle and that it traveled to her left shoulder. During her treatment with Dr. Grochowski, he noted that she had complained of the pain in her left shoulder since the work injury. Dr. Grochowski ordered an MRI of her left shoulder and the MRI showed a torn rotator cuff involving the supraspinatus tendon. (Pet. Ex. 10, Pg. 475). Petitioner testified that following the MRI, she was sent to Dr. Poepping who provided her with physical therapy for her left shoulder. Petitioner testified that while therapy has helped some, her left shoulder still remains severely limited with regard to motion and is painful to move and weak.

Petitioner was able to perform her job as a domestic sorter for three and one-half (3 ½) months prior to January 2, 2022. The physical demands of her job included using her arms and shoulders to remove packages from a mail cart, placing them in mail bags, and then moving said mail bags once they were filled. Since that injury, Petitioner has been unable to use her left shoulder in the same manner. Petitioner testified that because of pain and weakness in her hip and low area she had to use her arms more in order to pick herself up from a seated position, which could make her left shoulder symptoms more painful due to increased use. Dr. Neal reviewed the left shoulder MRI report and opined that Petitioner had degenerative conditions in her left shoulder. He opined that they were pre-existing and he found that the injury on January 2, 2022 did not cause or aggravate her current

complaints in her left shoulder. However, Petitioner was able to perform her job duties as a domestic sorter, which included repetitive lifting of packages, sorting them into mail bags and moving the mail bags from one area to another area, before her work injury. Respondent's witness, Mr. Brown, also testified that he had, on occasion, seen the Petitioner on the floor and saw her performing her job, with no known issues with her job performance.

The Arbitrator finds that Petitioner has proven by the preponderance of evidence that her current condition of ill-being in her left shoulder was causally related to the January 2, 2022 work accident. Petitioner complained of left-sided upper chest pain near her left shoulder on the date of the injury, reflected in the ER notes and in the recorded work injury statement, and has objective findings on an MRI. Petitioner also testified credibly that her left shoulder continues to be severely limited, which was noted by Dr. Neal during his examination; he testified that Petitioner had left shoulder pain with significant diminished active and passive range of motion. (Resp. Ex. 4, Pg. 40). Finally, she continues to seek treatment with Dr. Grochowski and Dr. Poepping and is undergoing physical therapy to help with the pain complaints, strength and range of motion.

The Arbitrator, upon review of Petitioner's testimony and the medical evidence, concludes that Petitioner has proven by the preponderance of the evidence that her current condition of ill-being in her right knee is causally related to her January 2, 2022 work injury. Petitioner credibly testified, that due to her pain caused by the work injury in her left groin, left hip, left knee and lower back, she had to alter the way she was walking to take some pressure off the left side of her body, which resulted in putting more pressure and overcompensating on the right side of her lower body, which resulted in gradual increasing right knee pain. As a result of the change in the way she was walking and carrying her weight, she increased the strain in her right knee to the point where she began to have more pain in her right knee than her left knee, as noted in her treatment with Dr. Poepping in June of 2022. (Pet. Ex. 10, Pg. 481). Dr. Poepping found the Petitioner had bilateral knee ansering bursitis. He recommended physical therapy for her right knee which Petitioner began in the summer of 2022 and continued to attend at the time of trial.

Petitioner credibly testified that her right knee causes her a lot of pain and while her left knee pain is tolerable, her right knee is very painful and limits her ability to walk as she used to. Petitioner credibly testified that she never had any issues with either knee prior to January 2, 2022. Dr. Neal found that the Petitioner had osteoarthritis in her right and left knee and did not find her complaints to be related to the work injury. However, if the Petitioner has pre-existing degenerative condition which makes her more vulnerable to injury, recovery for the accident or injury cannot be denied as long it can show that his employment was a causative factor. *Sisbro vs. Industrial Commission*, 207 Ill. App. 2d 193, 205 (2003). In this case, Petitioner's work injuries resulted in her having to alter the way in which she walked to take pressure off all of her left-sided body complaints, which resulted in increased strain of her of right knee to the point where she developed a great deal pain in her right knee, which continues to cause her pain and limit her ability to ambulate.

Based on all of the above, the Arbitrator finds that Petitioner has proven by the preponderance of evidence that her current condition of ill-being in her left groin, left hip, lower back, left shoulder, left knee, and right knee are causally related to the January 2, 2022 work injury. This Arbitrator finds that Petitioner and the opinions of the Petitioner's treating physicians are more persuasive than that of Respondent's Section 12 examiner. The Arbitrator notes that Dr. Neal provided contradictory opinions regarding that Petitioner would not be able to work in her domestic sorter position because of pre-existing conditions and also that they were not aggravated or caused by her work injury, in spite of her uncontradicted testimony that she had been doing her job for Respondent without any physical restrictions for three and one-half (3½) months before the date of injury. He was not able to provide any reasoning why she was able to perform these duties without any issues prior to January 2, 2022, but

could not just four months later. Based on the totality of the evidence, the Arbitrator finds that Petitioner's current conditions of ill-being are causally related to the January 2, 2022 work accident.

With respect to Paragraph (J), whether the medical services provided were reasonable and necessary? And has Respondent paid all appropriate charges for all reasonable and necessary medical services? The Arbitrator finds as follows:

Petitioner currently has numerous medical bills included in Petitioner's Exhibits 12, 13, 14, 15, and 16. These bills remain unpaid by Respondent since Respondent disputed their causal connection to the January 2, 2022 work injury. Petitioner has relied on Medicare to make payments for some of her medical bills. The Arbitrator has already determined liability in the form of causal connection between Petitioner's January 2, 2022 work injury and her current conditions of ill-being in her left groin, left hip, lower back, left shoulder, left knee, and right knee. The Arbitrator reviewed Petitioner's medical records and bills and finds that these bills are unpaid by the workers' compensation carrier. The Arbitrator finds that the medical expenses are consistent with medical treatment reflected in the medical records for such services. The Arbitrator specifically notes that the medical treatment received by Petitioner was reasonable and necessary to treat her January 2, 2022 work injuries. Based upon the medical records admitted into evidence, along with Petitioner's testimony, the Arbitrator orders Respondent to pay Petitioner's reasonable and necessary medical expenses as noted in Petitioner's Exhibits 12, 13, 14, 15, and 16, incurred in the care and treatment of her January 2, 2022 work injury, with medical bills totaling $16,235.00. Respondent is not entitled to an 8(j) credit because any of Petitioner's work injury related medical bills that have been paid were not paid by Respondent's group insurance, but by Petitioner's Medicare coverage.

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

The Arbitrator finds that the Petitioner has not returned to work since the injury occurred on January 2, 2022. Petitioner did receive Temporary Total Disability (TTD) benefits from January 3, 2022 through May 8, 2022. Since May 9, 2022 Petitioner has not received TTD benefits and she continues to remain off work, per Dr. Grochowski. As a result, the Arbitrator finds that, based on the medical records submitted into evidence, Petitioner's testimony, and the Arbitrator's finding of causal connection of the January 2, 2022 work injury, Petitioner is entitled to TTD benefits from May 9, 2022 through present and ongoing. The Arbitrator finds that the Respondent is entitled to a credit for the $5,000.00 advance issued to Petitioner in October of 2022.

With respect to Paragraph (L), whether Petitioner is entitled to prospective medical care, the Arbitrator finds as follows:

Dr. Poepping and Dr. Grochowski continue to recommend physical therapy to address Petitioner's left shoulder, right knee, left knee, left hip, left groin and lower back injuries. Having found Petitioner's current condition of ill-being as causally related to the January 2, 2022 work injury, and that her conditions have not stabilized or reached MMI, the Arbitrator finds that Petitioner is entitled to prospective medical care for her left shoulder, right knee, left knee, left groin, left hip and lower back as recommended by Dr. Poepping and Dr. Grochowski. Respondent is ordered to approve and pay for the treatment recommendations made by Dr. Poepping and Dr. Grochowski as they relate to Petitioner's January 2, 2022 work injuries.

With respect to Paragraph (N), is Respondent due any credit?

The Arbitrator finds that the Respondent is entitled to a future credit of $5,000.00 towards PPD benefits for the permanency advanced to the Petitioner.

With respect to the nature and extent of the Petitioner's condition, the Arbitrator finds the Petitioner has not reached MMI and makes no decision regarding the permanent partial disability of the Petitioner.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC013138
Case Name	Jetson Mitchell v. American Coal Company
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0084
Number of Pages of Decision	23
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Roman Kuppart, Steven Hanagan
Respondent Attorney	Julie Webb, Kenneth Werts

DATE FILED: 2/14/2024

/s/Marc Parker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JETSON MITCHELL,

Petitioner,

vs. NO: 17 WC 13138

AMERICAN COAL 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 occupational disease, §1(e) and §1(f) of the Workers' Occupational Diseases Act, and permanent disability, and being advised of the facts and law, changes the Corrected 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.

FINDINGS OF FACT

The Commission adopts the Findings of Fact in the Corrected Decision of the Arbitrator and incorporates such facts herein.

CONCLUSIONS OF LAW

The Arbitrator found that Petitioner sustained permanent disability to the extent of a 4% loss of use of his person as a whole. However, in so finding, the Arbitrator omitted the requisite analysis of the five factors enumerated in §8.1b(b) of the Act from the analysis. While we ultimately agree with the Arbitrator's award, we write additionally to analyze said factors herein.

Pursuant to §8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability for accidental injuries occurring on or after September 1, 2011:

a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.

b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors:

(i) the reported level of impairment pursuant to subsection (a);
(ii) the occupation of the injured employee;
(iii) the age of the employee at the time of the injury;
(iv) the employee's future earning capacity; and
(v) evidence of disability corroborated by the treating medical records.

No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order.

With regard to subsection (i) of §8.1b(b), the Commission notes that Dr. David M. Rosenberg testified in his deposition that under the AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition, Petitioner would be a Class 0. However, we also note that Dr. Rosenberg did not provide a written impairment report, and thus did not satisfy the statutory requirements. Petitioner's pulmonary function testing did not show objective measures of impairment. The impairment described by Dr. Istanbouly is not subject to the objective measures of pulmonary function testing. Accordingly, the Commission gives minimal weight to this factor.

With regard to subsection (ii), the occupation of the employee, Petitioner worked at Galatia Mine as a Laborer on the date of accident. He was laid off on that date. He testified had he not been laid off on that date, he would have continued working. Petitioner then took a year off before being hired by Toyota on April 15, 2018. The Commission gives some weight to this factor in favor of a decreased permanency award.

With regard to subsection (iii), Petitioner was 54 years old on the date of last exposure. Potentially, he has approximately a decade left in his work life to deal with his chronic condition, of which there is no cure. Moderate weight is given to this factor.

With regard to subsection (iv), future earning capacity, although Petitioner testified he would have kept working but for being laid off, Dr. Istanbouly opined that any further exposure to coal dust may worsen Petitioner's disease. After taking one year off work, Petitioner was hired by Toyota, where he earned less than he did while working for Respondent. However, no credible vocational assessment was entered into evidence in order to determine a more accurate earning capacity for Petitioner. Minimal weight is given to this factor.

With regard to subsection (v), evidence of disability, based on medical records and testimony, Petitioner experienced increased respiratory difficulty with work and activities of daily living. Dr. Istanbouly opined the inhalation of dust causes irritation and inflammation, and will ultimately form tiny scars which will replace normal lung tissue. He added there is no cure for coal workers' pneumoconiosis, which is a chronic condition. Dr. Rosenberg, who testified at Respondent's request, agreed that coal workers pneumoconiosis adversely affects lung function, that any scars are permanent, and that there is no cure for the disease. Dr. Meyer, who also testified at Respondent's request, agreed with Dr. Istanbouly that simple coal workers' pneumoconiosis was generally asymptomatic.

Petitioner testified his breathing has worsened since being laid off by Respondent. If sleeping, his chest wheezes when he breathes out. He does not take breathing medications, but his breathing does affect his daily activities. He works the Toyota assembly line and is constantly moving, so he begins to labor. He can walk about one mile above ground before experiencing labored breathing. If he walks up a 100-foot incline, he has labored breathing upon reaching 75 feet. When walking stairs, he has labored breathing by the 10th step.

Petitioner exercises by walking laps around his subdivision or riding a bike outside three times a week. When biking, he rides 4 laps before he starts laboring. Then he'll catch his breath for five minutes, then ride two more laps. Moderate weight is given to this factor.

Based on the foregoing, the Commission affirms the Arbitrator's award of $775.18 (Max rate) per week, for a period of 20 weeks as provided in §8(d)(2) of the Act, as the injuries sustained caused a 4% loss of use of Petitioner's person as a whole.

All else is affirmed.

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

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner has proven he has coal workers' pneumoconiosis and is disabled because of his occupationally induced lung disease, which was caused by his occupational exposure with Respondent.

IT IS FURTHER FOUND BY THE COMMISSION that 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 §1(f) of the Workers' Occupational Diseases Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $775.18 per week for a period of 20 weeks, as provided in §8(d)(2) of the Act, for the reasons that the injuries sustained caused a 4% loss of use of Petitioner's person as a whole.

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $15,600.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

February 14, 2024

MP/wde
O: 1/10/24
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/s/ *Marc Parker*

/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC013138
Case Name	Jetson Mitchell v. American Coal Company
Consolidated Cases	
Proceeding Type	
Decision Type	Corrected Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	18
Decision Issued By	Edward Lee, Arbitrator

Petitioner Attorney	Roman Kuppart, Steven Hanagan
Respondent Attorney	Julie Webb, Kenneth Werts

DATE FILED: 10/13/2022

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

/s/Edward Lee, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION

JETSON MITCHELL
Employee/Petitioner
v.
AMERICAN COAL COMPANY,
Employer/Respondent

Case # **17** WC **013138**

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 4, 2022**. After reviewing all the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **April 13, 2017,** Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**79,356.16**; the average weekly wage was $**1,526.08**.

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

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

Respondent 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**.

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

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 $ 775.18 /WEEK FOR A PERIOD OF 20 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 4 % MAW.

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 13, 2022

Edward Lee
Signature of Arbitrator

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FINDINGS OF FACT

Testimony at Arbitration

On August 3, 2022, Petitioner testified at arbitration. The issues in disputes were accident, disease, causal causation, nature and extent and Sections 1(d), 1(e) and 1(f) of the Occupational Disease Act.

Petitioner testified that his current home address is 5335 Bojangles Ln, Evansville, IN. Petitioner testified that his date of birth is December 1, 1962. Petitioner testified he is currently 59 years old and is single. Petitioner testified he was divorced a year ago. Petitioner testified he went to school until the 12th grade and he graduated high school.

Petitioner testified he worked in the coal mines for 21 years all underground. Petitioner testified he was regularly exposed to coal and rock dust during his employment at the coal mine. Petitioner testified he was also exposed to chloride, calcium chloride, and diesel fuel.

Petitioner testified he was last employed with in the mines in April 2017 with American Coal in Galatia. Petitioner testified on the date of his last employment with the mine he was 54 years old.

Petitioner testified his classification on his last day was a laborer. Petitioner testified that on the last date he worked he breathed in coal dust.

Petitioner testified while recovering the mine the miners heard Respondent was going to shut the mine down. Petitioner testified he received a letter to go to the mine office and that he was being laid off. Petitioner testified after he was laid off from American Coal, he took off a year. Petitioner testified he had his savings and unemployment for six months. Petitioner testified he did not attempt to go back and look for work in the mines. Petitioner testified he could not because his black lung would not allow him to do it. Petitioner testified he had seen Dr. Istanbouly while working in the mines. Petitioner testified he went to the unemployment office to sign up for work. Petitioner testified he saw a sign that said Toyota was hiring and he took advantage of that and got the job. Petitioner testified he started working at Toyota on April 15, 2018.

Petitioner testified the W2 forms were his correct ones from Toyota. Petitioner testified that the job that he got at Toyota was the best and highest paying job he could get at that time.

Petitioner testified he graduated from high school in 1980. Petitioner testified from 1980 through 1981 he worked in construction with his uncle. Petitioner testified that was heavy work. Petitioner testified from 1981 through 1984 he was with the US Army. From 1984 to 1987 he

worked for Thomas Steel Corporation. Petitioner testified from 1987 through 1992 he worked for Thena Industries making display racks of some type. From 1992 through 1993 he worked with Manpower doing temporary jobs. Petitioner testified from 1993 through 1996 he worked for Caterpillar Logistics picking parts. Petitioner testified these jobs that he had through that point were heavy jobs.

Petitioner testified in April of 2016 he started working with Kerr-McGee that later became American Coal. Petitioner testified during the work that he had with Kerr-McGee and American Coal he was regularly exposed to coal dust. Petitioner testified of his job classifications with Kerr-McGee and American Coal. Petitioner testified he started out shoveling for about six months, he then went to running the scoop on a section. Petitioner testified he then ran an end loader and then a road grader. Petitioner testified his road grader job he did for seven years. Petitioner testified that job was dusty and when you dropped the blade you were plowing up coal in there and throwing it. Petitioner testified the grader that he operated was an open cab grader, so all the dust comes up on you. Petitioner testified when he finished a shift as a road grader he was covered in dust. Petitioner testified after the road grader he tried to bid for an easier job because he was having trouble breathing. Petitioner testified he bid for a mine examiner, which he received and performed for several years. Petitioner testified he then went to outby bossing. Petitioner testified doing those jobs you are still walking, and it is a laboring job but you are not in the dust as much. Petitioner testified he would walk seven miles during his examining shift. Petitioner testified as an outby boss he would check the books to see what needed to be addressed. Petitioner testified that he may be shoveling, build a stop, blow out something, or build a stopping. Petitioner testified they would also hang curtains to redirect air whatever needed done to clear the books. Petitioner testified the work he did as a mine examiner he would have to walk in water sometimes chest deep but most of the time above the ankles. Petitioner testified it was a wet mine, but you had dry areas too. Petitioner testified he has fungus on his right foot bad from the water and stuff.

Petitioner testified he had difficulties breathing when he was performing work as a mine examiner. Petitioner testified he would have to walk the belt lines, which are long, so you are laboring when you are walking but when you take your readings you are in dust. Petitioner testified he would take breaks every 20 minutes. Petitioner testified that all the jobs he did for American coal were heavy in nature. Petitioner testified that the lighter jobs you still labored because he was walking the belt lines and returns mine examining, there is also a lot of lifting. Petitioner testified he would have to stop and take a break then he would continue on his path. Petitioner testified he would have to bend, stoop and squat in order to do some of these job duties. Petitioner testified doing those things would also cause breathing problems.

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Petitioner testified he first noticed breathing problems five years into the mine. Petitioner testified he first noticed while he was building cribs and shoveling. Petitioner testified that was a lot of manual labor. Petitioner testified they had to carry timbers to a location and there are certain areas you can't get a scoop to carry certain things. Petitioner testified he would have to go in there and set timbers and they packed a lot of that. Petitioner testified he was able to walk on normal level ground about a mile before his breathing is labored. Petitioner testified he is able to go up inclines but by the time he gets up to the top he is laboring. Petitioner testified the hill could be about 100 foot depending on the steep of it at about 75 feet to 100 feet he would start laboring. Petitioner testified he can start stairs but by the time he gets to the 10th step that is when he starts laboring because he is climbing.

Petitioner testified from the onset of breathing problems they have gotten worse. Petitioner testified that since his last date of exposure at American Coal he feels like he has gotten worse. Petitioner testified when he is sleeping at night, he can just be laying there asleep and his chest wheezes and it's like a double breath coming out of me. Petitioner testified he is not taking any medications for breathing at this time. Petitioner testified his breathing problems effect his daily activities. Petitioner testified he works for Toyota and it is an assembly line. Petitioner testified he is on the line so constantly moving and walking he begins to labor, and the reputation of that job causes him to labor. Petitioner testified that his job now is mainly using his arms and walking to keep up with the vehicle because it is moving on a track. Petitioner testified he works in the paint department, and he works doing the sealer. Petitioner testified they have guns that they apply the sealer, and they have stives like little rubber stives that we use to wipe the sealer. Petitioner testified after they apply it then they wipe it. Petitioner testified he is able to complete his work on a daily basis but by the time he completes it he is laboring and worn out. Petitioner testified that his legs and feet are aching, and his legs are burning because it is a standing job. Petitioner testified he has never had a desk job before. Petitioner testified he has never done any work that is not manual labor.

Petitioner testified he does not smoke and he has never smoked. Petitioner testified it would be fair to say that when he is working at the mines he was able to complete his job but it was more difficult toward the end of his employment period. Petitioner testified he would not be able to do the last job he had at the mine today. Petitioner testified he would be labored too much to do that job. Petitioner testified he is now 59 years old so he is much older and can't take the dust. Petitioner testified that the work he now does for Toyota is less physical than the coal mine but it is repetitious. Petitioner testified his arms and legs would be wore out.

Petitioner testified his employment by Kerr-McGee began April 8th, 1996. Petitioner testified he was laid off by Kerr-McGee on May 9, 2008, and he was recalled on May 18, 2008. Petitioner

testified they made an accident by laying him off. Petitioner testified he was then laid off August 29th, 2015, by American Coal. Petitioner testified he then applied for unemployment and filed a black lung claim against them. Petitioner testified he then was recalled to the mine on August 7, 2016, and dismissed his claim. Petitioner testified he was then laid off for a final time on April 13, 2017, and if it wasn't for the layoff he would have reported for his next shift. Petitioner testified he then filed for unemployment and collected that for about six months. Petitioner testified after a year he went back to work.

Petitioner testified he was first employed by a temp agency called Aerotek and that is Toyota in Princeton, IN. Petitioner testified he was living in Carrier Mills when he first started working there and it was a two-hour drive almost every day and he did that for two years. Petitioner testified he needed to get an apartment closer as he tore up two cars driving there. Petitioner testified he ended up getting an apartment in Evansville at Richmond Park Apartments for 55 and older and that put him 30 minutes away and that is his permanent residence now. Petitioner testified he was hired by Toyota in 2018. Petitioner testified the period of time with Aerotek was through a temp agency and now he has been there for four years. Petitioner testified it is not a UAW plant. Petitioner testified he works an 8 hour day job on the assembly line but they never let you go on time. Petitioner testified he works from 7 p.m. to 4 a.m. but they keep him until 6:30 a.m. and that is 5 days a week.

Petitioner testified he is working on a catwalk, and it is about 25 feet long. Petitioner testified it raises up and down so he is back and forth 25 feet all day. Petitioner testified that it is pitched at that time they you switch after two hours and go to your next pitch, and it is a two pitch rotation. Petitioner testified it is like a 40 feet space. Petitioner testified he has no idea how far he walks in a day. Petitioner testified he is worn out by the end of the day, and he has nerve problems down his legs and his feet are aching and burning. Petitioner testified he is having problems with it right now and the sciatic is tearing his legs up.

Petitioner testified he goes to the VA as a primary care provider. Petitioner testified he has applied for military disability for his knee that he injured in 84 and his back in 83. Petitioner testified he gets a VA compensation once a month for that. Petitioner testified he is 60% disability. Petitioner testified he stays in an apartment complex, so he doesn't get the benefit of not paying property tax because of the disability.

Petitioner testified he is a sealer at Toyota, and he works on the line. Petitioner testified he uses a sealer gun. Petitioner testified it is like a caulk gun. Petitioner testified the sealer doesn't have an odor. Petitioner testified that they were wearing a mask but every Friday they do what they call a check for COVID. Petitioner testified that is the only mask they wear. Petitioner

testified on Friday's they do an update status on COVID to see if you have to wear a mask or not.

Petitioner testified that his work on Toyota is all on one level. Petitioner testified he does not have to walk stairs there. Petitioner testified that Mr. Kuppart had him examined by Dr. Istanbouly for his black lung claim. Petitioner testified that he last saw Dr. Istanbouly in March of 2016. Petitioner testified from time to time over the years he underwent NIOSH chest x-ray screening for black lung. Petitioner testified after NIOSH took the x-ray of him, they would then write to him and tell him what the film revealed. He did not bring any of those letters with him.

Petitioner testified that in his spare time he watches a lot of ministries and he will then exercise. Petitioner testified he walks about two laps around his subdivision. Petitioner testified two laps is one mile and he does those 3 times a day. Petitioner testified he rides a bicycle and about six laps or four laps depending on if he gets labored. He will then ride again after he catches his breath. Petitioner testified it doesn't have gears and has two front brakes. Petitioner testified his hobbies is riding his Harley, which is a Road King Classic and it is 110 cc's. Petitioner testified that it is a dresser and it is a big bike. Petitioner testified he gets 10 days' vacation, and they do a 7 day shut down and 12 PTO days now. Petitioner testified he now does staycations. Petitioner testified he had cancer and a lot going on but is now cancer free. Petitioner testified he had prostate cancer, and he was diagnosed November 29th and December 7 the doctor read the results to me and said he had no cancer. Petitioner testified he was to go to a 6-month appointment in June and to schedule to have his prostate removed but when the MRI came back the results was the cancer was gone.

Petitioner testified that the result of the NIOSH examination was why he went to see Dr. Istanbouly. Petitioner testified that he exercised three times a day, but he meant three times a week. Petitioner testified that he rides bikes, but he has breathing issues when he is riding his bike. Petitioner testified when riding his bike, he will ride two to four laps around and then he is laboring, and he has to let the bike coast. Petitioner testified it will be about 5 minutes into the bike ride. Petitioner testified he could not tell you the last date of the NIOSH x-ray taken.

Medical Evidence

On January 29, 2016, Dr. Henry K. Smith reviewed a chest x-ray taken on January 20, 2016. (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 film. Dr. Smith's impression was of simple coal workers' pneumoconiosis with small opacities, primary p, secondary p, in all lung zones bilaterally, of a profusion 1/1.

On February 23, 2016, Petitioner filed an Application For Adjustment of Claim with the Illinois Workers' Compensation Commission. Petitioner listed his date of accident as April 13, 2017, and 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 20 years.

On July 20, 2018, 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. 3). 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 chest x-rays of Petitioner from Harrisburg Medical Center dated January 15, 2013; a February 25, 2014, film from Harrisburg Medical Center; a January 20, 2016, x-ray from Ferrell Hospital; and a chest CT from Methodist Hospital dated May 10, 2016. (RX1, P. 40). Dr. Meyer testified all films that he reviewed did not show any coal worker's pneumoconiosis. (RX1, p. 40-45). Dr. Meyer testified that the chest CT that Mr. Werts ordered, and Dr. Meyer read was not high resolution. He goes on to testify that when looking for coal worker's pneumoconiosis on CT scan, the scan that should be ordered is a volumetric CT, instead of the old fashion high resolution CT's. (RX1, p. 64-65).

Dr. Meyer testified that experts with similar credentials, knowledge and training may disagree on the reading of chest films, especially those in Category 1 of pneumoconiosis. (RX1, P. 62). 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. 51). Dr. Meyer testified that an intelligent physician with extensive knowledge and training in occupational diseases could fail the B-reading test easily. (RX1, p. 62).

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. 51). 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. (RX1, P. 51). 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. 57). Dr. Meyers explained that "[m]ost of the nodules that we see on chest x-rays are actually what are known as summation shadows, which means that multiple coal macules superimposed on one another form a shadow that's big enough for us to see." (RX1, P. 57). Dr. Meyer could not cite any studies to refute the Laney and Petsonk study. (RX1, p. 59).

Dr. Meyer testified that the B-reading program came about around 1969, which was primarily used for epidemiologic data, it was not developed for medicolegal work. (RX1, p. 65). He went on to testify that a doctor does not have to be a B-reader to diagnose someone with coal worker's pneumoconiosis, nor do they have to use the ILO system to make that diagnosis. (RX1, p. 67).

On October 26, 2018, Dr. 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. 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. (PX1, p. 5-7).

Dr. Istanbouly testified that he evaluated Petitioner on March 29, 2016. (PX1, p. 7). Dr. Istanbouly testified that he took a detailed history from Petitioner, performed a physical examination, and reviewed the pulmonary function testing and the chest x-ray. (PX1, p. 7).

Dr. Istanbouly testified that prior to being sent to Dr. Istanbouly for a Section 12 examination, he previously saw Petitioner in October of 2012 and was diagnosed with coal worker's pneumoconiosis at that time. (PX1, p. 8).

Dr. Istanbouly testified that the pertinent aspects of Petitioner's history were that Petitioner was a retired coal miner working underground in the mines for 20 years. Petitioner was a nonsmoker. He testified that Petitioner mentioned daily cough for years which was mild in intensity and having mild sputum production. Dr. Istanbouly documented no significant exertional dyspnea, as he could walk for a mile without breathing problems, although he noticed that his physical capacity was declining a little bit. (PX1, p. 8-9).

Dr. Istanbouly testified that it is not unusual for miners with simple coal worker's pneumoconiosis to be asymptomatic. (PX1, p. 9). He went on to testify that a coal miner can have coal worker's pneumoconiosis and not know they have it. (PX-1, p. 10). Dr. Istanbouly testified that Petitioner's physical examination of his chest was normal, which was not unusual for someone with early stages of coal workers' pneumoconiosis to have a normal physical examination of the chest. (PX1, p. 9-10).

Dr. Istanbouly testified that Petitioner's pulmonary function studies were within normal limits. 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. 10). He went on to testify that a miner does not have to have either an obstruction or restriction in order to have coal workers' pneumoconiosis. (PX1, p. 10). 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. (PX1, p. 12). He testified that just because pulmonary function is within normal limits does not mean that the lungs have not been damaged. He testified that a person could have a certain amount of their lung with focal impairment, yet the global overall function be normal. (PX-1, p 11). Dr. Istanbouly testified that a person could

even have shortness of breath and, 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. (PX-1, p. 11).

Dr. Istanbouly testified that he personally reviewed Petitioner's chest x-ray which was taken on January 20, 2016. (PX1. p. 12). Dr. Istanbouly testified that the chest x-ray was of diagnostic quality, and that it revealed mild bilateral interstitial changes consistent with coal worker's pneumoconiosis with a profusion 1/1 by B-reader, Dr. Henry Smith. (PX1, p 12). involving upward, mid and lower lung zones. 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. 12). Dr. Istanbouly testified that he does not use B-reader's report to diagnose black lung medically. It is mainly used for legal purposes. (PX1, p. 13).

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. 13-15)

Dr. Istanbouly testified that, based upon a reasonable degree of medical certainty, Petitioner's coal workers' pneumoconiosis was caused by his long-term coal dust inhalation. (PX1, p. 16). Dr. Istanbouly testified that based on Petitioner's x-ray and breathing tests it is not advisable for Petitioner to ever return to work in the coal mines. (PX1, p. 16). Dr. Istanbouly testified that any additional exposure to coal dust could cause the damage to his lungs to worsen. (PX1, p. 16).

Dr. Istanbouly testified that a person with chronic lung disease such as coal workers' pneumoconiosis are more susceptible to pulmonary infections and pneumonias and these diseases will make it more difficult to recover from those pulmonary infections and pneumonias. (PX1, p. 17).

On August 13, 2018, 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). He is licensed in Ohio, Kentucky, Tennessee and Florida. (RX2, p. 7). Dr.

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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 of his report. (RX2, p. 11-18). The chest films that Dr. Rosenberg reviewed of Petitioner were dated January 15, 2013, and January 20, 2016, he would both films to be Quality 1 but neither film had abnormalities consistent with coal workers' pneumoconiosis. (RX2, p. 20-21).

Dr. Rosenberg concluded that Petitioner worked in the coal mines until April 22, 2017, and that he was a non- smoker. There are a few mentions of intermittent coughing in the records but the records do no outline chronic respiratory complaints. (RX2, p. 23). He does not have chest x-ray evidence of a pneumoconiosis. (RX2, p. 24).

Dr. Rosenberg testified that he does 5 or 6 records reviews a week for coal worker's litigation. (RX2, p. 26). He testified that he had approximately 10 to 20 patients that he is treating for black lung. (RX2, p. 26). 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. 26). 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. 26-27). He testified that he still does a couple of hundred examinations per year for occupational disease claims. (RX2, p. 27).

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. 27-28).

Dr. Rosenberg agreed that scarring and fibrosis occurs with coal workers' pneumoconiosis. Dr. Rosenberg went on to state that 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. 30). 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. (RX2, p. 31). He agreed that a person could have a certain amount of their lungs with focal areas of impairment, yet there 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. 32). 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. 33). 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. 35-36). 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. 37).

The doctor agreed that he stated under "Discussion" in his report "There is no evidence in the file of any association of chronic respiratory issues and past coal dust exposure." He then goes on to say that Dr. Istanbouly is the only one that outlines that; however we know that is not true as Petitioner's treating physician referred Petitioner to Dr. Istanbouly. (RX2, p. 42).

On February 27, 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. 15-16).

Dr. Smith reviewed a chest film of Petitioner dated January 20, 2016. His report was dated January 29, 2016. (PX2, p. 36). He rated the film a quality 1 and noted the presence of interstitial fibrosis classification p primary, secondary p, in all lung zones bilaterally of a profusion of 1/1. (PX2, p. 37).

Dr. Smith reviewed a chest film of Petitioner dated February 25, 2014. His report was dated April 19, 2016. He rated the film a quality 1 and noted the presence of interstitial fibrosis classification p primary, secondary p, bilaterally in the mid and lower zones of a profusion of 1/0. (PX2, p. 37).

Dr. Smith reviewed a chest CT dated May 10, 2016, with his report being dated May 26, 2016. He found diffuse interstitial fibrosis and small opacities throughout the bilateral upper, mid and lower lung zones of p-type. Profusion 1/1. (PX2, p. 38).

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Petitioner entered Petitioner's treatment records from Southern Illinois Respiratory disease clinic as PX3. On 10/18/12 Petitioner was seen for cough. Under Assessment it states that Petitioner had intermittent cough with sputum production for more than six months in this 49 year old non smoking male. Could be related to allergic rhinitis with bronchospasm or asthma. (PX3, p. 3-6). On 01/15/13 Petitioner was seen for asthma. The assessment was 1) persistent cough secondary to uncontrolled allergic rhinitis with subsequent bronchospasm, Resolved. 2). Mutiple tiny nodules on the chest x-ray, most likely consistent with early coal worker's pneumoconiosis. (PX3, 10). Petitioner was again seen on 02/25/14. It states that he still has micronodules bilaterally consistent with coal worker's pneumoconiosis. His PFT's were within normal limits. Under Assessment it was noted coal worker's pneumoconiosis, mild and stable. (PX3, p. 11-13). On 05/12/15 he was again diagnosed with coal worker's pneumoconiosis. (PX3, p. 16).

On November 7, 2017, Dr. Glen R. Baker, Jr., authored a B-reading report of a chest film dated April 14, 2011. (PX4). Dr. Baker is Board certified in Internal Medicine, Pulmonary diseases and has been a NIOSH B-reader since November 1988. He is currently a medical examiner for the U.S. Department of Labor, Determinations of Pulmonary Disorder. (PX6). Dr. Baker's findings on the 04/14/11 chest film were of interstitial fibrosis of classification p/t, with opacities present in all 3 zones of the right lung and mid and lower zones of the left lung of a profusion 1/0. He classified the film as Quality 1. (PX4).

On November 7, 2017, Dr. Glen R. Baker, Jr., authored a B-reading report of a chest film dated August 5, 2015. (PX5). Dr. Baker's findings on the 08/05/15 chest film were of interstitial fibrosis of classification t/t, bilaterally mid and lower lung zones, of a profusion 1/0. He classified the film as Quality 2 due to over exposure. (PX5).

On August 20, 2018, Dr. Michael S. Alexander, prepared a B-reading report of a chest film dated 01/15/13. (PX7). Dr. Michael S. Alexander is Board Certified in Diagnostic Radiology as well as being Board certified in Special Competence in Nuclear Radiology, and Nuclear Medicine. He has been a NIOSH certified B-reader since 1992 and holds medical licensure in California, North Carolina and Maryland. (PX9). Dr. Alexander found that the 01/15/13 chest film has small primarily round opacities present bilaterally, consistent with pneumoconiosis category p/p, 1/0. He found the film to be Quality 1.

On August 20, 2018, Dr. Michael S. Alexander, prepared a B-reading report of a chest film dated 02/25/14. (PX8). Dr. Alexander found that the 00/25/14 chest film to have small primarily round opacities present bilaterally, consistent with pneumoconiosis category p/p, 1/0. He found the film to be Quality 1. (PX8).

Respondent entered Petitioner's medical records from Harrisburg Medical Center into evidence as RX3. These records contain several chest films; however, none of them were done for the purpose of looking for an occupational lung disease, nor were any of them B-readings. There were also several pulmonary function tests performed that were within normal limits;

however, both Drs. Istanbouly and Rosenberg agree that a person could be asymptomatic and have normal pulmonary function and still have coal worker's pneumoconiosis.

Respondent entered Petitioner's medical records from Primary Care Group as RX4. These records contain ailments of ordinary life; however, on 09/25/12 Petitioner was referred to Dr. Istanbouly for a pulmonary workup. (RX4, p.25). There are no chest x-rays or pulmonary function testing in these records. Nor is there an examination for the presence or absence of an occupational disease.

Respondent entered Petitioner's medical records from the VA Medical Center as RX5. Petitioner was seen at the VA for many ailments; however, his breathing was not one of them. There are no chest films or pulmonary function studies contained in these records. I give them little weight even though there are entries denying cough, shortness of breath and dyspnea. All experts in the records agree that these entries are not necessary to prove coal worker's pneumoconiosis and go on to state the most miners with simple coal workers' pneumoconiosis are asymptomatic.

At Respondent's request, Petitioner underwent a diffusing capacity test performed by Dr. Jeff Selby on May 10, 2016. No spirometry or lung volumes were performed. The report indicates that Dr. Selby found Petitioner's diffusing capacity was normal. (RX6). Dr. Selby also reviewed a CT report of Petitioner dated 05/10/16, which he found was negative for coal worker's pneumoconiosis.

Respondent entered records from NIOSH regarding Petitioner at (RX7). These records consist of the reading of x-rays dated 7/17/06, 04/14/11and 08/05/15. All films were found negative by the readers, which consisted of A-readers and B-readers. Unfortunately we do not know the qualification of these readers. Petitioner also has an additional 2 years of dust exposure after the last NIOSH film was taken. I give these records little weight for these reasons.

CONCLUSIONS OF LAW

WITH RESPECT TO ISSUE (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT BY THE RESPONDENT, and WITH RESPECT TO ISSUE (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

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 January 20, 2016, Petitioner underwent an x-ray of the chest for pneumoconiosis at Ferrell Hospital. On January 29, 2016, Dr. Henry Smith, a board-certified B-Reader for over 32 years, performed a chest film interpretation and B-Reading. Dr. Smith's impression was of simple coal workers' pneumoconiosis with small opacities, primary p, secondary p, bilateral all lung zones involved, of a profusion 1/1.

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, Smith, Baker, and Alexander'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.

Although Respondent's experts, Drs. Meyer and Rosenberg, disagree with the findings and diagnosis of Drs. Istanbouly, Smith, Baker and Alexander, 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. Meyer also stated that the chest CT that was read was not high resolution, which it should have been to be looking for pneumoconiosis.

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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, Smith, and Alexander 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 20 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.

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

I find Petitioner has sustained a permanent partial disability of 4% 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.

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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 walking or climbing stairs. 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 the scarring and fibrosis is an alteration of the lung tissue and is also an alteration of the function of the involved lung tissue. Petitioner was diagnosed by Dr. Itanbouly, his treating pulmonologist as having coal worker's pneumoconiosis as far back as 2013, prior to Petitioner leaving the mines.

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 April 13, 2017. Petitioner has not worked in the coal mines and has not had any other exposure to coal mine dust since that date. On January 20, 2016, 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/p, 1/1. 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.

I give little weight to Petitioner's treatment records from Harrisburg Medical Center, Primary Care Group, and the VA Medical Center. Although they do not list many complaints of shortness of breath, dyspnea or abnormal physical examination of the chest, all experts agree that these complaints/findings are usually not found in a coal miner with simple coal worker's pneumoconiosis. I also do not give much weight to the NIOSH file as Petitioner had additional coal dust exposure after the 05/27/16 chest film and do not find the other films relevant and Petitioner had many years of coal dust exposure after they were taken. I do give great weight to the records of Southern Illinois Respiratory Disease Clinic as Petitioner's treating physician sent him there for evaluation of his breathing problems.

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	20WC019974
Case Name	Richard Hayes v. Kienstra
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0085
Number of Pages of Decision	18
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Mary Massa, Nathan Becker
Respondent Attorney	Michelle Symank

DATE FILED: 2/20/2024

/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

RICHARD HAYES,

Petitioner,

vs. NO: 20 WC 019974

KIENSTRA,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein, and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, temporary total disability, causal connection, and prospective medical care, and being advised of the facts and law, expands upon 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 having fully reviewed the facts and law expands upon the analysis of the Arbitrator in sustaining the *Ghere* objection raised by Respondent and striking the causation opinion testimony of Dr. David Robson. Dr. Robson first treated Petitioner while assisting Dr. Kennedy intraoperatively on January 7, 2000. Dr. Robson placed instrumentation in Petitioner's lumbar spine at the time of his initial multi-level (L4-S1) spinal fusion. Petitioner had not consulted or treated with Dr. Robson during the intervening 20 years.

Petitioner regularly treated with Dr .Rajneesh Jain, his primary care physician for general health care and also for chronic low back pain. Dr. Jain prescribed hydrocodone for the chronic back pain and counseled petitioner on weight loss and exercise.

Petitioner presented to Dr. Robson on referral from Dr. Jain, following his alleged work accident of June 11, 2020. Dr. Robson examined Petitioner on one occasion only on October 14, 2020. Petitioner was scheduled to return to Dr. Robson for follow-up in November 2020 but failed to do so. The records of Dr. Robson were entered into evidence as PX5. The records of Dr. Robson contain no opinions concerning the cause of Petitioner's symptoms. He recommended that Petitioner lose 75 lbs. in order to be considered a candidate for further spinal surgery and referred him to aquatherapy.

The history of present illness recorded by Dr. Robson states in summary that Petitioner had a history of a laminectomy and multi-level fusion 20 years earlier and he had "done well until June 11th when he was at work and felt a pop in his back and developed severe pain". Dr. Robson testified via evidence deposition and acknowledged on cross-examination that he had not reviewed either the medical records of Dr. Jain or Petitioner's treating chiropractor, Dr. Roller.

As such, Dr. Robson was unaware that Dr. Jain's records of treatment document ongoing complaints of low back pain going back to November 2017 with regular prescription refills for hydrocodone, a narcotic pain medication. As recently prior to the work accident as May 20, 2020, Petitioner complained to Dr. Jain of low back pain and leg cramps.

Dr. Robson was further not aware that on June 10, 2020, Petitioner had been unable to attend work due to low back pain and was seen by his chiropractor, Dr. Roller, for urgent treatment. The alleged work accident occurred the following morning of June 11, 2020.

The evidence deposition of Dr. Robson was taken on October 7, 2021. Petitioner's counsel on direct examination posed a complex and carefully constructed hypothetical question that elicited Dr. Robson's opinion, previously undisclosed, giving an opinion that Petitioner's current condition of ill-being was causally related to his June 11, 2020, work incident.

On cross-examination Dr. Robson conceded that he had not reviewed the medical records of Dr. Jain or Dr. Roller. Dr. Robson further testified that if the evidence showed that Petitioner's low back pain had been severe enough to require chronic use of narcotic pain medication that his opinion on causal connection could change.

The ruling of the Arbitrator striking the causal connection opinion testimony of Dr. Robson is not outcome determinative. The Commission finds the paucity of facts underlying Dr. Robson's opinion that Petitioner's injury was the result of his work activities renders his causation opinion unpersuasive. The causation opinion was elicited via a complex hypothetical that was incomplete and failed to include critical facts that Dr. Robson himself admitted under cross examination could change his causation opinion e.g. chronic use of narcotic medication for

treatment of low back pain since 2017. It was clear that Dr. Robson's causation opinion was premised in large part on the incorrect understanding that Petitioner had not undergone prolonged medical treatment for low back pain in the several years preceding the June 11, 2020, incident.

In light of the forgoing analysis the Commission finds that Petitioner failed to meet the burden of proof on the issue of causal connection even if the *Ghere* objection were overruled and the causation opinion of Dr. Robson admitted. The Commission finds that the opinion is lacking in foundation and therefore not persuasive. Petitioner failed to meet his burden of proof that his current condition of ill-being is causally connected to the alleged work- related accident of June 11, 2020.

IT IS THERFORE ORDERED BY THE COMMISSION that no benefits are awarded.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall 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) of the Act is only applicable when the Commission has entered an award for the payment of money. Therefore, no bond is set by the Commission. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to file for Review in the Circuit Court.

February 20, 2024
SJM/msb

o-1/10/2024
44

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

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

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC019974
Case Name	Richard Hayes v. Kienstra
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	14
Decision Issued By	Jeanne AuBuchon, Arbitrator

Petitioner Attorney	Nathan Becker
Respondent Attorney	Michelle Symank

DATE FILED: 10/31/2022

THE INTEREST RATE FOR THE WEEK OF OCTOBER 25, 2022 4.39%

/s/ Jeanne AuBuchon, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

RICHARD HAYES
Employee/Petitioner

v.

KIENSTRA
Employer/Respondent

Case # **20** WC **19974**

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 **5/25/22**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

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FINDINGS

On the date of accident, **6/11/20**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**48,100.00**; the average weekly wage was $**925.00**.

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

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

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**3,024.31** for other benefits under Section 8(j) of the Act.

ORDER

No benefits awarded,

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

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

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

OCTOBER 31, 2022

Jeanne L. AuBuchon
Signature of Arbitrator

PROCEDURAL HISTORY

This matter proceeded to trial on April 28, 2020, 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 low back conditions; 3) payment of medical bills; 4) entitlement to TTD from June 12, 2020, through May 24, 2022; and 5) entitlement to prospective medical care to the Petitioner's low back.

FINDINGS OF FACT

At the time of the accident, the Petitioner was 54 years old and had been employed by the Respondent as a concrete truck driver. (T. 9) On June 11, 2020, he went into work and performed his pre-trip, which included filling up one or two three-gallon jugs, putting them on the back of the truck and strapping them down. (T. 10) He said that while getting back up in the truck, he felt a pop in the middle of his back about four inches above the belt line, stepped down off the truck and moved around to see if everything felt okay. (T. 10-11, 47) He said he didn't feel anything, so he got back into the truck, got the truck loaded, washed his truck and proceeded to the job, where he unloaded his truck. (T. 11) He said that when he went to wash the truck, he could hardly move and had excruciating pain shooting down the center of his back and down his legs. (Id.) He then informed his dispatcher of the incident, took his truck back and washed it out. (T. 12)

The Petitioner acknowledged that he had prior two-level fusion surgery at L4-5 and L5-S1 approximately 22 years ago in relation to a workers' compensation claim with a different employer. (T. 19) He said that claim was denied. (T. 30) The Petitioner stated that he was released to go back to work without restrictions. (T. 19) He said he did have occasional low back pain and a bit of numbness in his left leg. (T. 19-20) He rated the pain at 1-3/10 and the numbness,

which he rated at 2-3/10 came and went. (T. 20) He said he had no issues with his right leg and not seen another surgeon regarding his low back since. (Id.) He did see his primary care doctor for low back pain from 2017 through 2020, during which time he was prescribed medication. (T. 21, PX1) The Petitioner said the medication helped manage his pain. (T. 22) The Petitioner also sought chiropractic treatment for neck, mid-back and low-back pain from August 2017 through the day before the accident. (T. 22, PX7) He said the treatment was mostly for maintenance to get feeling a little better "here and there" when physical activity would cause flare-ups. That he would rate as 4-5/10 (T. 22-23)

Records from chiropractor Dr. Jeffrey Roller at Staunton Chiropractic Clinic reflect visits in 2017 and 2020 when the Petitioner reported low back pain ranging from 4/10 to 8/10. (PX7) He also was suffering lumbar spasms and swelling. (Id.) On November 11, 2019, Dr. Roller evaluated him for neck and back pain that was characterized as sharp and a dull ache of a severity of 5/10 but with no radiating symptoms. (Id.) The Petitioner was re-evaluated on April 13, 2020, at which time he complained of a dull ache of a severity of 4/10 without radiating symptoms. (Id.) From then until June 10, 2020, the Petitioner rated his pain at 3-6/10 and had lumbar spasms and swelling. (Id.) On June 10, 2020, he rated his pain at 4/10. (Id.) The Petitioner acknowledged calling off work that day because of low back pain. (T. 40-41) He said his symptoms had not worsened after that treatment, and he drove himself to work the next day. (T. 42-43)

The Petitioner treated for low back pain with Dr. Rajneesh Jain, the Petitioner's primary care physician at Staunton Clinic, from since at least 2017. (PX1) Dr. Jain noted that the Petitioner had a laminectomy at L5-S1 and posterior fusion on January 7, 2000. (Id.) Throughout this time, Dr. Jain prescribed hydrocodone. (Id.) From November 15, 2017, through May 20, 2020, the Petitioner's symptoms were stable. (Id.) On November 28, 2018, Dr. Jain reported that

interventional procedures had not resulted in any benefit and surgery was not an option. (Id.) This notation was made again on June 12, 2019, November 20, 2019, and May 20, 2019. (Id.) The Petitioner did not recall discussing surgery with Dr. Jain or consulting with a surgeon for his back in November 2019. (T. 38) He denied attempting any interventional procedures for his low back before the work accident. (T. 39) On May 20, 2020 – his last visit to Dr. Jain before the accident – the Petitioner reported no change in his low back. (Id.)

Regarding his other medical conditions, the Petitioner said he was currently being treated with medication for blood pressure, diabetes and heartburn. (T. 31) He said he had been taking hydrocodone on an as-needed basis since 2017. (T. 31-32) He said he and his doctors would consider his diabetes under control, although it had its ups and downs. (T. 32) He did not recall his doctors discussing weight loss to help with his back until recently. (Id.)

The Petitioner testified that the symptoms he experienced until the date of the accident did not affect his ability to perform day-to-day activities and were intermittent. (T. 23, 35) However, flare-ups did cause him to miss work, which he estimated at six to seven times in the past 13 years. (T. 24) He said there were periods of time where he had no pain. (T. 35) He said that after the work accident, his pain got a lot worse, and he rated it at a 10+/10 in the first three to four weeks after the accident. (T. 25) Since then his pain had been at 7-8/10, and his legs and feet were numb and tingling. (T. 25-26) He rated his left leg symptoms at 7-8/10 and his right leg at 8-9/10. (T. 26)

On the same day as the accident, the Petitioner saw Dr. Roller, and reported pain of 10/10 that was sharp, a dull ache and shooting that radiated into his right hip. (PX7) He reported that he was having trouble walking. (Id.) The Petitioner testified that he provided the off-work slips to his employer. (T. 12-13) There were no off-work slips or notations included in Dr. Roller's

records. (PX7) The Petitioner completed 15 sessions of treatment from June 11, 2020, through July 6, 2020, with Dr. Roller. (T. 12, PX7) He testified that he received very little relief from the treatment, and his symptoms did not go back to his baseline pain level. (T. 13, 27) Dr. Roller's records showed that during treatment, the Petitioner's pain reports decreased to 6/10 by June 26, 2020, but increased to 7/10 on July 3, 2020, and July 6, 2020. (PX7)

The Petitioner then sought treatment from Dr. Jain on July 9, 2020. (PX1) He described the work incident consistently with his testimony and told Dr. Jain that his lower back was hurting worse and that he had pain radiating to his right lower extremity. (Id.) He was using a cane to ambulate. (Id.) Dr. Jain diagnosed the Petitioner with low back pain and ordered X-rays and an MRI. (Id.) The X-rays showed severe degenerative disc disease. (PX3) On July 21, 2020, Dr. Jain referred the Petitioner to physical therapy at Alton Physical therapy. (PX1) On August 17, 2020, the Petitioner reported to Dr. Jain that his symptoms were worse – he was having more pain, and his right leg was going numb within a few minutes of standing and then gave way. (Id.) Dr. Jain added a diagnosis of radiculopathy of the lumbar region. (Id.) The lumbar MRI was performed on August 25, 2020, at Staunton Clinic and showed severe lumbar spondylosis (osteoarthritis), including disc bulging and foraminal stenosis (narrowing of the disc space) at all levels and central canal stenosis (narrowing of the spinal cord canal) at all levels except L5-S1 – with the most severe at L2-3 and L3-4. (PX8)

The Petitioner underwent physical therapy for five sessions from July 27, 2020, through October 26, 2020, that he said provided no benefit. (PX2, T. 14) Dr. Jain issued off-work orders for July 20, 2020, through October 12, 2020, and from November 24, 2020, through February 24, 2021. (PX10) The Petitioner testified that he provided off-work slips from Dr. Jain to his supervisor. (T. 13-14)

On October 14, 2020, the Petitioner saw Dr. David Robson, an orthopedic surgeon at Advanced Spine Institute, to whom the Petitioner complained of low back pain and right greater than left leg pain, numbness and tingling. (PX5) Dr. Robson read the MRI as showing severe spinal stenosis at L2-3 and L3-4 partly on a congenital basis and new X-rays as showing a severe level collapse at L3-4 adjacent to the prior L4-S1 fusion. (Id.) Dr. Robson diagnosed low back pain and spinal stenosis of the lumber region with neurogenic claudication (compression of the spinal nerves) and recommended aquatic physical therapy and ordered the Petitioner off work until November 25, 2020. (Id.)

On November 3, 2020, the Petitioner reported to Dr. Jain that his symptoms were worse despite several weeks of physical therapy and that he needed lumbar surgery but could not have it because of his obesity. (PX1) He said he was trying to watch his diet and lose weight. (Id.) In addition to prescribing hydrocodone, Dr. Jain prescribed Gabapentin. (Id.) On November 24, 2020, Dr. Jain recommended a 1,400-calorie-per-day diet. (Id.)

The Petitioner testified that he did not undergo the aquatic therapy prescribed by Dr. Robson nor follow up with Dr. Robson on November 25, 2020, because he had no insurance. (T. 16, 51) He said that although he was not formally terminated, his group health insurance was terminated because he was not working. (T. 28-29) The Petitioner testified that he continued to see Dr. Jain, who prescribed pain medications. (T. 16)

On August 16, 2021, the Petitioner underwent a Section 12 examination by Dr. Daniel Kitchens, a neurosurgeon at Cardinal Neurosurgery & Spine. (RX1, Deposition Exhibit B) The Petitioner described the work incident consistently with his testimony. (Id.) He informed Dr. Kitchens of his prior fusion surgery and reported that he had no back pain in the interim from his surgery until the work incident. (Id.) He said he would occasionally need his pelvis realigned.

(Id.) Dr. Kitchens performed an examination and reviewed the Petitioner's medical records (except for Dr. Roller's records) and the lumbar MRI. (Id.) He opined that the work incident did not cause, exacerbate or aggravate the pre-existing, degenerative condition of the Petitioner's lumbar spine as there was no evidence of a supraphysiologic force being applied to the spine. (Id.) He further opined that as it related to the work incident, the medical treatment provided was not reasonable or necessary, the Petitioner was at maximum medical improvement and the Petitioner did not require further treatment. (Id.)

Dr. Robson testified consistently with his records at a deposition on October 7, 2021. (PX4) He believed the collapsed disc at L3-4 was the pain-generating area of the Petitioner's spine. (Id.) He said the Petitioner needed to lose weight because he had a firm rule about not operating on someone with a body mass index (BMI) of more than 35, and the Petitioner's BMI was 44. (Id.) He agreed that a collapsed disc, the Petitioner's symptoms and his weight factored together would prevent the Petitioner from having a substantial weight loss in a fast fashion. (Id.) He said that if the Petitioner achieved a BMI of 35, he would recommend surgery to take out the Petitioner's existing hardware from the prior fusion, decompress the discs at L2-3 and L3-4 and re-instrument (re-fuse) levels from L2 to the sacrum. (Id.)

During his testimony, Dr. Robson was given a hypothetical situation mirroring the Petitioner's medical history, description of the work incident and subsequent symptoms and was asked for an opinion as to the cause of the Petitioner's low back condition. (Id.) The Respondent's counsel objected to this testimony based on *Ghere v. Industrial Comm'n*, 278 Ill.App.3d 840, 633 N.E.2d 1046, 215 Ill.Dec. 530 (4th Dist. 1996). Dr. Robson testified that while the work incident didn't cause the Petitioner's spinal stenosis, it aggravated the condition to the point where the Petitioner became extremely symptomatic and needed further treatment and surgery. (PX4)

On cross-examination, Dr. Robson acknowledged that he had not reviewed any previous medical records of the Petitioner. (Id.) He said his opinion could change depending on what the records showed – such as a series of treatments, imaging, injections and chronic use of narcotic pain medication. (Id.) He explained that the congenital spinal stenosis was a condition the Petitioner was born with whereby his spinal canal was of less diameter than most and put the Petitioner in a riskier category to develop symptoms. (Id.)

On January 18, 2022, Dr. Roller testified consistently with his records. (PX9) He opined that the work incident was a cause or an aggravative cause for the worsening of the Petitioner's lumbar condition. (Id.) No *Ghere* objection was made to this testimony. On cross-examination, Dr. Roller acknowledged that the Petitioner did not provide any specific mechanism of injury other than saying he was injured at work. (Id.)

Dr. Kitchens issued a supplemental report on February 21, 2022, after reviewing Dr. Roller's records and the depositions of Drs. Roller and Robson. (RX2, Deposition Exhibit C) His opinions did not change. Dr. Kitchens testified consistently with his reports at a deposition on March 2, 2022. (RX2) He explained that the condition of the Petitioner's lumbar spine that he saw was degenerative and took many years to develop. (Id.) He said that such a condition worsens over time and eventually gets to the point where it causes severe complaints – sometimes numbness, tingling and difficulty walking. (Id.) When discussing his opinion that there was no evidence of a supraphysiologic force being applied to the Petitioner's spine by the work incident, Dr. Kitchens defined the term as anything that would be more than everyday living or everyday activity. (Id.) On cross-examination, Dr. Kitchens acknowledged that in reviewing Dr. Jain's records, there was a change in the Petitioner's reported low back symptoms from his visit on May 20, 2020, to his visit on July 9, 2020. (Id.) Similarly, he acknowledged the change in symptoms

reported to Dr. Roller from June 10, 2020, to June 11, 2020. (Id.) But Dr. Kitchens did not find this significant because the complaints were subjective reports, and there was no objective basis for the pain reports – specifically some acute injury to the Petitioner's lumbar spine that could be seen on the MRI. (Id.) Dr. Kitchens declined to speculate as to whether it was possible that something happened between the June 10, 2020, and June 11, 2020, visits to Dr. Roller that caused the Petitioner's spinal stenosis and degenerative disc disease to become dramatically more symptomatic. (Id.)

The Petitioner testified that he wanted to have the surgery recommended by Dr. Robson. (T. 15, 17) He said he was trying to lose weight per Dr. Robson's orders. (T. 17-18) He acknowledged that Dr. Robson had since retired, but he had not sought out another spine surgeon for treatment. (T. 52, 53) The Petitioner stated that he did not think he could safely perform the functions of a concrete truck driver, given his condition. (T. 27) He said he was approved for Social Security disability benefits in July 2021. (T. 53)

CONCLUSIONS OF LAW

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

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

In order to obtain compensation under the Act, a claimant bears the burden of proving by a preponderance of the evidence two elements: (1) that the injury occurred in the course of the claimant's employment and (2) that the injury arose out of the claimant's employment. *McAllister v. Ill. Workers' Comp. Com'n,* 2020 IL 12484, ¶ 32.

The phrase "in the course of employment" refers to the time, place and circumstances of the injury. *Id.* at ¶34. A compensable injury occurs in the course of employment when it is sustained while a clamant is at work or while he or she performs reasonable activities in conjunction with his or her employment. *Id.* In this case, the Petitioner consistently reported that his back popped while getting into his cement truck, and he began experiencing pain shortly thereafter. This evidence was unrebutted. Therefore, the Arbitrator finds that the Petitioner's injury occurred in the course of his employment.

The "arising out of" component is primarily concerned with causal connection. *McAllister*, 2020 IL 12484, ¶ 36. To satisfy this requirement, it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. *Id.* The three categories of risk are: (1) risks distinctly associated with the employment; (2) risks personal to the employee; and (3) neutral risks which have no particular employment or personal characteristics. *Id*. at ¶38.

A risk is distinctly associated with an employee's employment if, at the time of the occurrence, the employee was performing: (1) acts he or she was instructed to perform by the employer; (2) acts that he or she had a common-law or statutory duty to perform; or (3) acts that the employee might reasonably be expected to perform incident to his or her assigned duties. *Id.* at ¶46. The Arbitrator finds that the Petitioner's climbing into his concrete truck was an act that he might reasonably be expected to perform incident to his assigned duties.

Next is the requirement that the risk created a causal connection between the employment and the accidental injuries. Dr. Robson opined that while the incident the Petitioner described did not cause his spinal stenosis, it aggravated the condition to the point where the Petitioner became extremely symptomatic and needed further treatment and surgery. Counsel for the Respondent

raised a *Ghere* objection to this testimony. In *Ghere*, the Court determined that exclusion of testimony was appropriate when the decedent's doctor expressed an opinion that the decedent's work could have precipitated his fatal heart attack without having disclosed this opinion at least 48 hours before the doctor's deposition. *Ghere*, 278 Ill.App.3d at 846. The Court noted that the opinion went well beyond the doctor's records that were produced. Similarly, Dr. Robson's opinion went beyond his records. There was no proof that Dr. Robson's opinion was disclosed to the Respondent at least 48 hours before the deposition. Therefore, the objection is sustained, and Dr. Robson's causation opinion testimony is stricken.

Dr. Roller testified that he believed the work incident was a cause or an aggravative cause for the worsening of the Petitioner's lumbar condition from June 10, 2020, to June 11, 2020. However, his opinion deserves very little weight because Dr. Roller is a chiropractor and is not qualified to render an opinion as to a specific orthopedic or neurologic condition. In addition, Dr. Roller did not know a specific mechanism of injury to make a valid determination that a specific action caused an injury. On the other hand, Dr. Kitchens did have a detailed description of the work incident and read the MRI. He found no evidence of a supraphysiologic force being applied to the spine that would cause, exacerbate or aggravate the pre-existing, degenerative condition of the Petitioner's lumbar spine.

Because there is no orthopedic or neurologic opinion that the Petitioner's condition 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 condition, the Arbitrator finds that the Petitioner has failed to prove by a preponderance of the evidence that the Petitioner's injuries arose out of his employment.

Due to the findings above, the Arbitrator does not address the other disputed issues of medical bills, TTD and prospective medical treatment.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC006143
Case Name	Tia Smith v. State of Illinois - Illinois Department of Transportation
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0086
Number of Pages of Decision	15
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Thomas C Rich
Respondent Attorney	Nicole Werner

DATE FILED: 2/20/2024

/s/ Deborah Simpson, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Tia Smith,
Petitioner,

vs. NO: 21 WC 6143

SOI/Dept. of Transportation,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses and notice and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. 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 20, 2022, is hereby affirmed and adopted.

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

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.

February 20, 2024

o1/10/24
DLS/rm
046

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

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

/s/*Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC006143
Case Name	Tia Smith v. State of Illinois – Illinois Department of Transportation
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	Jeanne AuBuchon, Arbitrator

Petitioner Attorney	Thomas Rich
Respondent Attorney	Nicole Werner

DATE FILED: 10/20/2022

THE INTEREST RATE FOR THE WEEK OF OCTOBER 18, 2022 4.24%

/s/ Jeanne AuBuchon, Arbitrator

Signature

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

October 20, 2022

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

TIA SMITH
Employee/Petitioner

v.

SOI/ DEPT. OF TRANSPORTATION
Employer/Respondent

Case # **21** WC **006143**

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 **May 25, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **July 9, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**77,088.00**; the average weekly wage was $**1,482.46**.

On the date of accident, Petitioner was **46** years of age, ***married*** with **3** 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 the reasonable and necessary medical services outlined in Petitioner's Exhibit 1, as provided in § 8(a) and § 8.2 of the Act. Respondent shall have credit for any amounts previously paid and shall indemnify and hold Petitioner harmless from claims made by any health providers arising from the expenses for which it claims credit.

Respondent shall authorize and pay for the treatment recommended by Dr. Bradley.

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

October 20, 2022

ICArbDec19(b)

PROCEDURAL HISTORY

This matter proceeded to trial on May 25, 2022, pursuant to Sections 19(b) and 8(a) if the Illinois Workers' Compensation Act (hereinafter "the Act"). The issues in dispute are: 1) whether the Petitioner sustained accidental injuries that arose out of and in the course of her employment; 2) whether the Petitioner gave the Respondent notice within the time limits stated in the Act; 3) the causal connection between the accident and the Petitioner's right carpal tunnel condition; 4) liability for medical bills and 5) entitlement to prospective medical care.

FINDINGS OF FACT

The Petitioner had been employed with Respondent for six years, during which time she held different positions – assistant southern region outreach manager, traffic coordinator and grants administrator. (T. 10-11) As an outreach manager, she drove to locations in St. Clair and Madison Counties to meet with stakeholders and promote the Department at local colleges. (T. 11-12) She said she drove an old Chevrolet Cavalier that did not have power steering. (T. 13-14) She took notes on a clipboard for two to three hours then went back to her office and type up the information for up to another three hours. (T. 14-17) She said she provided materials for vendor events – carrying promotional materials, putting them on a dolly, rolling the dolly downstairs, loading them into the car, unloading them at the event and putting the materials on a vendor table. (T. 18-19) She estimated that a box of pamphlets that she gripped with her hands weighed 15-20 pounds. (T. 19-29)

As traffic coordinator, the Petitioner traveled to events – driving the same vehicle 2½ hours from her office – and setting up promotional materials at events. (T. 21-22) She said that sometimes she did not have a dolly and had to carry the boxes of materials. (T. 24-25) She said she also typed press releases and grant requests. (T. 25-26)

As grants administrator, the Petitioner partnered with police to provide grants to assist with traffic safety enforcement. (T. 27-28) She said she traveled to locations to ensure that police officers were complying with their responsibilities, at which time she again wrote information on a clipboard, return to the office and write a report. (T. 28) She also had to proofread reports from the officers and traveled to Springfield. (T. 29-30) She said she drove the same vehicle until mid-2019, when she got a vehicle with power steering. (T. 30) When she went to Springfield, she would file her reports – 50-60 at a time – in filing cabinets, pinching and pulling files. (T. 32-33) She also assisted other divisions with preparing spreadsheets and working in their storerooms moving boxes. (T. 34-35) While testifying about the various activities, the Petitioner demonstrated how she used her hands.

The Petitioner submitted a job description representing her work activities as grants administrator. (T. 35, PX9) This was similar to her testimony and included carrying large boxes (10-15 pounds) and pushing and pulling a rolling cart three to four days a week and typing timesheets, subordinate performance valuations, press releases, spreadsheets and grant agreements five days per week. (PX9) The Respondent submitted a position description for southern region outreach manager that gave an overview of the nature and scope of the job. (RX6) The document did not describe specific physical activities. (Id.)

The Petitioner testified that while working for the Respondent in late 2015 or early 2016, she started noticing sharp pains in her hands while typing or writing, and her hands would get numb or cramped. (T. 35-36, 38) She said she couldn't sleep because her hands were tingling or constantly falling asleep. (T. 36) She said the symptoms got progressively worse, especially when lifting boxes. (T. 38)

On June 19, 2018, the Petitioner went to the office of her primary care physician, Dr. David Rawdon at BJC HealthCare, and complained of bilateral hand and wrist pain and weakness. (PX3) After an examination by Physician Assistant Pamela VanBevern, she was diagnosed with pain and paresthesias of the hands. (Id.) PA VanBevern recommended electromyography (EMG) and a nerve conduction study (NCS) and encouraged the Petitioner to use night splints and take an over-the-counter anti-inflammatory. (Id.) The tests were conducted on July 9, 2018, at Memorial Hospital Belleville and showed mild bilateral median motor-sensory focal distal neuropathy at the wrist that could have represented bilateral carpal tunnel syndrome. (PX4)

The Petitioner reported her injury to the Respondent on July 12, 2018. (T. 42, PX8, RX1) At that time, she was 46 years old. (AX1) On July 17, 2018, she completed an accident report describing her symptoms and stating that the injury was due to lifting boxes and typing. (PX8, RX2)

On December 6, 2018, the Petitioner saw orthopedic hand surgeon Dr. Harvey Mirly at BJC HealthCare, who diagnosed bilateral hand numbness consistent with carpal tunnel syndrome and performed steroid injections. (PX5) The Petitioner testified that Dr. Mirly gave her therapeutic exercises to do at home, wrist guards and a pen support. (T. 40) In 2020, the Petitioner was laid off from her job but testified that she continued to have symptoms, although they were not as strong as when she was working. (T. 44-45) The Petitioner returned to Dr. Mirly on August 13, 2020, and reported that the injections gave her good relief but at that time she was having recurring and more severe symptoms. (PX5) She told Dr. Mirly that her work duties for the Respondent included keyboarding, field work visiting police departments, driving and hand writing. (Id.) Dr. Mirly performed another injection to the right carpal tunnel. (Id.) The Petitioner

saw Dr. Mirly again on January 21, 2021, and reported worsening symptoms. (Id.) Dr. Mirly gave her treatment options including surgery, which the Petitioner wanted to consider. (Id.)

The Petitioner next sought treatment on August 26, 2021, from Dr. Matthew Bradley, an orthopedic surgeon at Metro-East Orthopedics, who also diagnosed bilateral carpal tunnel syndrome after reviewing the Petitioner's medical records and performing an examination. (PX6) The Petitioner told Dr. Bradley that prior to working for the Respondent, she had no signs or symptoms consistent with those she was reporting at that time. (Id.) She described her job duties as: pushing and pulling a dolly, picking up boxes, passing out pamphlets and typing and computer work. (Id.) She said she produced more than 3,000 agreement-type documents that she had to type and process over the past three to four years. (Id.) Dr. Mirly recommended carpal tunnel release surgery. He opined that the repetitive microtrauma the Petitioner described as suffering over the past three to four years while working for the Respondent contributed to the development of bilateral carpal tunnel syndrome. (Id.)

On November 2, 2021, the Petitioner underwent a Section 12 examination by Dr. Ryan Calfee, an orthopedic hand surgeon at Washington University in St. Louis School of Medicine. (RX4) She reported that her hand and arm symptoms started five or six years before and were greater in her right hand. (Id.) She described her jobs for the state as involving office work, lifting boxes of materials, pulling a dolly and transferring materials from one area to another. (Id.) Dr. Calfee reviewed the Petitioner's accident report and Dr. Bradley's office note from August 26, 2021. (Id.) He performed a physical examination and diagnosed the Petitioner with bilateral carpal tunnel syndrome. (Id.)

Dr. Calfee opined that there was not a causal relationship between the Petitioner's condition and her work for the state in that she did not have employment that would be categorized

as manual labor that he would believe could tighten and thicken the transverse carpal ligament and cause carpal tunnel syndrome. (Id.) He said that just as the Petitioner's work activities cause symptoms, so would her sleeping posture, as she experienced her worse symptoms at night. (Id.) He said that whether doing relatively low-force work with intermittent lifting or sleeping, it was not surprising to see symptoms from median nerve compression, but he would not expect either activity to cause or accelerate permanent changes in the carpal tunnel. (Id.) He stated that as a female in her 40s, the Petitioner was at higher risk for developing iatrogenic (look up in book) carpal tunnel syndrome regardless of her activity. (Id.) He acknowledged that the Petitioner did not have many other medical comorbidities associated with developing carpal tunnel syndrome. (Id.) Dr. Calfee stated that the medical treatment to date was reasonable and necessary and additional medical treatment in the form of carpal tunnel release would be beneficial. (Id.)

Dr. Bradley testified consistently with his records at a deposition on December 1, 2021. (PX7) Prior to the deposition, he had reviewed the hand-written job description from the Petitioner and Dr. Calfee's report. (Id.) Dr. Bradley testified that carpal tunnel syndrome is a multifactorial condition with contributing factors of being a female, obesity, hyperthyroid, uncontrolled diabetes and neuropathy. (Id.) He agreed that the Petitioner's two greatest risk factors were being female and her age. (Id.) After being asked about the job description provided by the Petitioner, Dr. Bradley stated that any kind of repetitive activity that gives repetitive trauma or impact to the wrist, like pushing and pulling dollies, would contribute to carpal tunnel syndrome. (Id.) He added that the Petitioner's gender and age "kind of" makes her more susceptible, meaning that it does not take as much trauma to develop carpal tunnel syndrome. (Id.)

Dr. Bradley saw the Petitioner again on March 14, 2022, at which time the Petitioner reported worsening symptoms. (PX6) Dr. Bradley continued to recommend surgery. (Id.)

Dr. Calfee testified consistently with his report at a deposition on April 1, 2022. (RX5) On cross-examination, he acknowledged that he had not reviewed the records of Drs. Rawdon and Mirly nor the Petitioner's job description (PX9). (Id.) When portions of the Petitioner's job description were read to him, Dr. Calfee stated that if a person's job and days are spent with the majority of it picking up tables and moving heavy boxes, that could contribute to carpal tunnel syndrome. (Id.) He said that knowing the weight of those boxes, which he did not know, would be relevant to how much force was involved in lifting them. (Id.) He said rolling carts of materials three to four days a week would be less likely to contribute to the condition. (Id.) He did not believe the Petitioner's typing activities would contribute to producing compressive neuropathy even when combined with the other activities. (Id.) He said he was not positive that a non-ergonomic workstation would be a contributing factor. (Id.)

The Petitioner testified that at the time of arbitration, she was employed by the Federal Reserve Bank of St. Louis for approximately eight months. (T. 10) For a year before that, she was working for Centene Corporation as a providers relations recruiter. (T. 11)

CONCLUSIONS OF LAW

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

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

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) Even though an employee may have a pre-existing condition, which may make him or her more vulnerable to injury, recovery will not be denied as long as it can be shown that the employment was also a causative factor. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill.2d 193, 205, 797 N.E.2d 665, 278 Ill.Dec. 70 (2003).

The doctors agreed the Petitioner had bilateral carpal tunnel syndrome but disagreed on whether her work was a contributing factor. Dr. Bradley explained that the Petitioner's gender and age made her more susceptible to developing carpal tunnel syndrome and that it would take less trauma to develop the condition. He reviewed the Petitioner's medical records and her hand-written job description. Dr. Calfee had not reviewed these documents before rendering his opinion. After hearing excerpts from the Petitioner's job description, he acknowledged that the Petitioner's lifting activities could have contributed to her carpal tunnel syndrome, although he disputed that her other activities could have contributed. Because Dr. Bradley had more information in forming his opinion than Dr. Calfee and because of his explanation of how the Petitioner's condition would have developed, the Arbitrator gives greater weight to the opinions of Dr. Bradley.

Therefore, the Arbitrator finds that the Petitioner has proved by a preponderance of the evidence that her injury arose out of and in the course of her employment.

Issue (E): Was timely notice of the accident given to Respondent?

An employee is clearly prejudiced in the giving of notice to the employer if he is required to inform the employer within 45 days of a definite diagnosis of the repetitive-traumatic condition and its connection to his job since it cannot be presumed the initial condition will necessarily degenerate to a point at which it impairs the employee's ability to perform the duties to which he is assigned. Requiring notice of only a potential disability is a useless act since it is not until the employee actually becomes disabled that the employer is adversely affected in the absence of notice of the accident. *Oscar Mayer & Co.*, 176 Ill. App. 3d at 611.

The Petitioner reported her injury three days after the positive EMG/NCS tests. Therefore, the Arbitrator finds that timely notice was given to the Respondent.

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

Based on the causation findings above regarding whether the injury was in the course of and arose out of employment, the Arbitrator finds that the Petitioner has proved by a preponderance of the evidence that her bilateral carpal tunnel syndrome is causally related to her work activities.

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 he disputed causation, Dr. Calfee agreed that the medical services the Petitioner received were reasonable and unnecessary. The Arbitrator finds that these services 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): 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).

Although Dr. Calfee disagreed as to causation, he agreed that the surgery recommended by Dr. Bradley was needed. Therefore, the Arbitrator finds that the Petitioner is entitled to prospective medical care, including surgery, as recommended by Dr. Bradley, and the Respondent shall authorize and pay for such 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.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	13WC020136
Case Name	Jacob Soto v. City of Chicago
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0087
Number of Pages of Decision	23
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Jason M. Whiteside
Respondent Attorney	Joseph Zwick

DATE FILED: 2/22/2024

/s/Carolyn Doherty, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JACOB SOTO,

Petitioner,

vs. NO: 13 WC 20136

CITY OF CHICAGO

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 26, 2023, is hereby affirmed and adopted.

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

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

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.

February 22, 2024
o: 2/15/24
CMD/kcb
045

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

/s/ *Marc Parker*
Marc Parker

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	13WC020136
Case Name	Jacob Soto v. City of Chicago
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	20
Decision Issued By	Jacqueline Hickey, Arbitrator

Petitioner Attorney	Jason M. Whiteside
Respondent Attorney	Joseph Zwick

DATE FILED: 6/26/2023

THE INTEREST RATE FOR THE WEEK OF JUNE 21, 2023 5.17%

/s/ Jacqueline Hickey, Arbitrator

Signature

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

24IWCC0087

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

Jacob Soto
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **13 WC 20136**

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 **Jacqueline Hickey**, Arbitrator of the Commission, in the city of **Chicago** , on **7/22/2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☒ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Respondent claims TTD overpayment 12/30/15 to 7/22/22**

FINDINGS 24IWCC0087

On **6/11/2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**64,428.00**; the average weekly wage was **$1,239.00**.

On the date of accident, Petitioner was **32** 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 $**317,684.59** for TTD and maintenance paid, $**0** for TPD, and $**0** for other benefits, for a total credit of $**317,684.59.**

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

ORDER

Respondent shall pay reasonable and necessary medical services pursuant to the Medical Fee Schedule, as provided in Section 8(a) of the Act, for the unpaid balances to the following medical providers: Mercy Works Occupational Medicine, Northwestern Medical Imaging, Orthopaedic Specialists of the Northshore, ATI Physical Therapy, Midwest Orthopedics at Rush, University Pathologists, P.C., Rush University Medical Center, IWP, Chicago Ridge Radiology, Elmwood Park Same Day Surgery, Pain and Spine Institute, Neurological Surgery and Spine Center, RX Development Associates, Elite Care RX LLC, Pain Treatment Centers or Illinois, Preferred Open MRI and Improved Functions. The parties stipulated that medical providers would be paid directly by Respondent and that Petitioner recognizes any credit for bills already paid by Respondent.

Respondent shall pay Petitioner maintenance benefits of $826.00/week for 342 2/7 weeks, commencing 12/30/2015 through 7/22/2022, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits, commencing 7/22/2022, of $399.33/ week until Petitioner reaches age 67 or five years from the date of the final award, whichever is later, because the injuries sustained caused a loss of earnings, as provided in Section 8(d)1 of the Act.

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

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

Jacqueline C. Hickey

Signature of Arbitrator

JUNE 26, 2023

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Jacob Soto,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Case No. **13WC20136**
City of Chicago,	)	
	)	
	)	
Respondent.	)	

FINDINGS OF FACT

This matter proceeded to hearing on July 22, 2022 in Chicago, Illinois before Arbitrator Jacqueline Hickey on the Parties' Request for Hearing. Issues in dispute include causation, medical bills, maintenance, nature and extent and TTD/maintenance overpayment or credit owed. See Arbitrator's Exhibit 1"Ax1"

Stipulations by the Parties

1. The parties agreed that if bills were to be awarded that providers would be paid directly by the Respondent and that Petitioner recognizes any credit for bills already paid by Respondent.
2. The parties agreed that Petitioner was entitled to TTD from 6/12/13 through 12/30/15 and was in fact paid TTD during said period.
3. There was a prior agreement by the parties to have Petitioner undergo an additional FCE and 2nd evaluation by Dr. Goldberg. However, for reasons unknown to the parties, Dr. Goldberg did not see Petitioner but did a records review instead.

Background

Petitioner testified that he is married with two children and lives at 11425 South Maplewood, Chicago, Illinois. (T.16). At the time of his injury, he was 32 years old. (T.17). At the time of his injury on June 11, 2013, he worked as an asphalt laborer for the City of Chicago. (T.17-18). His job duties were laborer, running or shoveling asphalt, using a jackhammer or sledgehammer, using a pick to break up concrete and asphalt, basic labor. (T.18). His average weekly wage was $1,239.00. (AX1). Before this job he worked as a laborer in a warehouse and in construction. (T.20). The extent of his education is high school diploma. (T.20).

Prior to his injury his general health was very good. (T.21). Petitioner testified that he worked out and ran six miles every night. He once injured his left shoulder in football in the seventh grade; he never injured his neck. (T.21). Prior to his injury he was not actively on any kind of prescription medication. (T.22). He would lift weights and work on cars as side work. (T.23). Petitioner testified that he was righ-hand dominant, but he swung a pick, sledgehammer and shoveled with his left. (T.93).

Accident

On June 11, 2013, Petitioner's shift started at 8:00 a.m. (T.23). He reported to the "west side," off of Madison. At the job site, the paver was going up and down the block and he shoveled asphalt in the holes the paver leaves. (T.24). The operator accidentally left too much material on the ground, so Petitioner had to shovel it. (T.24-25). Petitioner was injured when he was shoveling it out. (T.25). Petitioner felt pain in his left shoulder, and could not let go of the shovel. It had to be removed from his hand. Petitioner also couldn't move his neck at the time and was told his bicep looked strange. (T.25).

Summary of Medical Treatment

Petitioner went to 35th and Ashland emergency care, or occupational clinic, where a drug and alcohol test was administered, which Petitioner passed. (T.26-27). There, he was diagnosed with a shoulder strain and was referred for an MRI for his shoulder. (PX1). Petitioner recalled having an x-ray and MRI, and then being referred to Dr. Silver with Orthopedic Specialists. (T.28). The MRI done at Northwest Medical Imaging showed a detached left shoulder labrum. (PX2). Dr. Diadula referred Petitioner to Dr. Silver. (PX1). After a review of the findings with Dr. Silver, Petitioner understood he had a labrum and bicep tear. (T.29). Dr. Silver diagnosed him with rotator cuff impingement with SLAP tear labrum and recommended surgery. (PX3). He eventually underwent surgery on his shoulder on December 19, 2013. (T.29; PX3). After that, he performed physical therapy with Northshore Specialists. (T.30).

Petitioner submitted as Exhibit 1 records from Mercy Works revealing treatment on date of accident, which then Petitioner reported pain in the left shoulder from shoveling asphalt. Petitioner was initially diagnosed with a shoulder strain. Petitioner returned on June 14th, which time an MRI was recommended.

Petitioner 's Exhibit 2 is an MRI report from Northwestern Medical from an MRI on July 9, 2013, demonstrating detachment of the labrum with involvement of the biceps labral anchor. There was also reported to be mild to moderate supraspinatus tendinitis without a tear.

Petitioner 's Exhibit 3 consists of medical records from NorthShore Orthopaedics, where Petitioner saw Dr. Ronald Silver beginning on July 10, 2013. Dr. Silver reviewed the MRI and diagnosed rotator cuff impingement with damage to the labrum/SLAP tear. Dr. Silver recommended arthroscopic surgery. Petitioner eventually underwent surgery on December 19, 2013, in the form of arthroscopic subacromial decompression (partial anterior acromioplasty coracoacromial ligament transection), Arthroscopic debridement of torn labrum, arthroscopic lysis of adhesions, arthroscopic removal of loose body, arthroscopic distal clavicle resection and

arthroscopic synovectomy of the glenohumeral joint in subacromial space. Petitioner continued to follow up with Dr. Silver postoperatively. On April 16, 2014, Dr. Silver noted that Petitioner was reporting episodes of paresthesia in the left hand and arm "since his injury." Dr. Silver recommended follow-up with a cervical spine specialist. On July 30, 2014, Dr. Silver noted that Petitioner's internal rotation on the left side was almost full. Dr. Silver indicated a 25-pound lifting restriction and noted that he was awaiting results from a cervical MRI.

In 2014, Petitioner was undergoing physical therapy with ATI and having issues; his left hand was going numb, so a cervical MRI was ordered. (T.31; PX7; PX3). His MRI at Chicago Ridge Radiology showed a compression of the cervical cord from C3-C7 with disc protrusions, disc bulges, disc desiccations, stenosis, and hypotrophy of facet joints. (PX5). He was referred to Dr. Sharma with Pain and Spine, where he started treating around January 23, 2015. (T.31; PX6).

Dr. Cole- Section 12 Examiner

Petitioner was sent for an IME with Dr. Cole for his shoulder condition in December of 2014. (T.32; PX5). Dr. Cole opined that he no longer needed treatment for the shoulder, that his shoulder condition was related to his work injury, and that further work-up from a cervical standpoint was warranted. (RX1). Respondent submitted as its Exhibit 1 the report of December 1, 2014, by Dr. Brian Cole, who noted that the principal complaint at that time with pain radiating from the left side of the neck down the left arm. Dr. Cole diagnosed left upper extremity complaints that were likely radicular in nature. Dr. Cole stated that the evaluation of the left shoulder was normal and stated that the treatment to the left shoulder was appropriately managed. Dr. Cole stated that Petitioner was at maximum medical improvement with regard to left shoulder and no longer had any disability in connection with the shoulder. Dr. Cole confirmed that Petitioner would be able to return to regular employment with regard to the left shoulder.

Dr. Goldberg Treatment

Petitioner was then sent to Dr. Goldberg with Midwest Orthopedics at Rush for an IME on February 27, 2015. (PX8). Based on the meeting with Dr. Goldberg, Petitioner understood he needed surgery on his neck. (T.32). Dr. Goldberg started as an IME physician, but then Petitioner consented to be treated as a patient. (T.32-33). Petitioner underwent anterior cervical discectomy and fusion C3-C6 on August 13, 2015. (T.33; PX8). He then started physical therapy with ATI. (T33). In December of 2015, he did a functional capacity evaluation at ATI, and later, the results were reviewed with Dr. Goldberg. (T.34; PX7; PX8). At that point, Petitioner understood he was limited to 20 to 30 pounds lifting for two hours a day. (T.35). On February 29, 2016, Dr. Goldberg wrote Petitioner was permanently restricted to light duty work. (PX8).

On January 20, 2016, Petitioner began receiving treatment from Pain Treatment Centers of Illinois. Those records were submitted as Petitioner 's Exhibit 10. Petitioner continues to receive treatment from Pain Treatment Centers of Illinois. A note from February 24, 2016, notes that Petitioner expressed prior difficulty weaning himself from OxyContin.

Dr. Kornblatt- Section 12 Examiner

About seven to ten days later, he went to another IME with Dr. Kornblatt. (T.36). Dr. Kornblatt indicated that at that point all treatment was related to the work injury, including the shoulder and neck surgery. (PX17). It was his opinion that Petitioner suffered from a delayed union, and recommended a MRI (PX17). Dr. Kornblatt felt that Petitioner should increase his work tolerance and stated that Petitioner was not at MMI. As noted above, Dr. Kornblatt subsequently retired. Petitioner did undergo an MRI on May 11, 2016 (PX11), which reported the fusion from C3 to C6 with resolution of previously seen central protrusion at C3 – 4 and resolution of spinal stenosis.

After that IME, Petitioner's understanding of his condition was post laminectomy syndrome. (T.36-37). He continued with his pain management at Pain Centers of Illinois with Dr. Najera and Dr. Abusharif. (T38). There, Petitioner was prescribed medicine through Elite Care, formerly Rx Development. (PX10; PX13; PX14). Noted problems were anxiety, depression, cervical post-laminectomy syndrome, lumbar pain, and was provided Zanaflex, Cyclobenzaprine, Wellbutrin, Norco, and Morphine. (PX10).

On September 21, 2016, Petitioner had another consultation with Ms. Kari Stafseth where she did a full analysis of his education, background, and work history. (T.39-40). After the consultation, it was Petitioner's understanding that there was no job market out there for him. (T.40). After that, he was sent for his fourth IME, on November 3, 2016 with Dr. Konowitz. (T.40). After that consultation, Petitioner's understanding of his condition remained unchanged as post laminectomy syndrome. (T.41).

Around the summer of July 27, 2017, Petitioner testified that he was told to start looking for work. (T.41). He started filling out applications. His wife helped with online applications and showed him how to do a job search. (T.41-42). Between August 2017 through March of 2019, he did this every week, listing out hundreds of jobs. (PX20). He testified that he did receive one call for a labor position at a car wash. (T.43;45). He would not be able to carry a 60-pound bucket all day which would have exceeded his restrictions. (T.45). On October 26, 2017, Petitioner was invited to City Hall by the Committee on Finance to attend a seminar where he was shown how to fill out an application and find employment. (T.46). When he applied for the positions listed in his job logs, he did not tell anyone he was limited to a two-hour work day. (T.83).

Dr. Graf – Section 12 Examiner

Around October 2018, he went to see Dr. Graf for another IME, his fifth. (T.46). Dr. Graf called into question the FCE done at ATI, criticizing that it was not done by a licensed and certified physical therapist, but rather an athletic trainer. (RX2, p. 12-13). After that examination, Petitioner's TTD benefits were terminated, but he continued his job search. Because of Dr. Graf's critique of the FCE at ATI, Petitioner testified that on June 29, 2019, he underwent another Functional Capacity Evaluation was done with Improved Functions, which continued his previous limitations of light duty with a two-hour workday. (T.48-49; PX12).

Petitioner attempted a return to work with the City of Chicago in October 2019, around Columbus Day. (T.50). Petitioner described his experience as standard labor work, sledgehammer, hammer drill, and putting in speed bumps. (T.50). He had to drill concrete to put in rebar, and lift and carry his drill and sledgehammer. (T.51). The rebar was 50 pounds, and he recalled dropping it. (T.51). He finished two eight-hour days. (T.51). Afterward, he needed a ride home where he took his pain medication. (T.51). He was also on medication, morphine release 30 mil., during the work. (T.52). After the first day, Petitioner was told he could find someone else drive him to the job sites because the big trucks bounced too much. (T.52). After those two days, Petitioner put in for medical leave with Dr. Abusharif. (T.53; PX10).

Toward the end of 2019, Petitioner testified that he recalled getting ready for a hearing, but was instead sent for a new FCE in January of 2020. (T.53-54). This time the FCE was done at NovaCare on January 7, 2020. (PX15). The NovaCare professional opined that Petitioner could not return to his previous line of work as a laborer. (PX15). The results were noted as valid and indicated Petitioner was restricted to a medium demand level that allowed: occasional lifting 30 pounds from the floor to waist; 35 pounds from floor to shoulder and 20 pounds waist to shoulder; carry up to 35 pounds bilaterally, push 26.5 pounds of force and pull 24 pounds of force; abilities to stand, walk and reach on a constant basis; sit, stoop and kneel on a frequent basis; climb stairs, climb ladders and crawl on an occasional basis and an inability to crouch, all with an eight hour work day. (PX15).

Petitioner recalled the NovaCare FCE being very difficult for him, where afterward he was in a lot of pain and took pain medication. (T.56). At the time he was taking Morphine ER, Morphine IR, Cyclobenzaprine, Xanax, and medical cannabis. (T.57). Petitioner testified his medical marijuana allowed him to not ingest as much morphine. (T.71). Dr. Goldberg declined to personally evaluate Petitioner after the FCE, but agreed to a record review based on the new FCE findings. (T.55).

Respondent then sent Petitioner to Dr. Graf for another IME, his sixth. (T.55; RX4). Dr. Graf's opinions were unchanged from his previous report. (RX2 & 4).

On June 10, 2021, Dr. Goldberg agreed with the restrictions set forth by NovaCare, noted that Petitioner could not return to his old job, and recommended that Petitioner go to a detox program with Shirley Ryan Ability Labs. (PX8).

Petitioner Current Condition

After the last FCE, Petitioner testified that he understood that his lifting requirements were essentially the same but he could work for an eight-hour day. At this point, Petitioner recalled being very depressed. (T.58). Through the year 2020, he continued his pain management treatment, and after Dr. Goldberg weighed in on the FCE opinion, Petitioner had another vocational assessment with Kari Stafseth. (T.58). As of the date of the hearing, Petitioner testified that he was still receiving medical treatment in the form of facet and Botox injections for which he paid out of pocket. (T.61-62; 63). Petitioner said he felt a lot better and was getting sleep, was eating, and doing light exercises. (T.62). He said he didn't need to use a cane after his surgery in 2016 anymore. (T83). As of the time of the hearing, Petitioner testified that it was his understanding that his disks underneath the hardware in his neck are deteriorating. (T.64).

Petitioner testified that he has three fake disks; a plate in the front and a plate in the back of his neck with screws. (T.64-65).

Between his attempted return to work and the last FCE with NovaCare, Petitioner testified regarding his daily life activities of taking care of his children. (T.65). He recalled dropping milk while pouring it, so they had to move milk into different containers or the kids would have to do it. (T.65). He also testified that he did not drive much because of how his arms felt while driving. (T.66). He also doesn't do lawn work. (T.66). At the time of the hearing, Petitioner testified he was walking better and was doing light 5-pound exercises, with swimming to stay in shape. (T.67). He testified that had he not been injured he would have preferred to continue working with the City and work into the operator's union or get a superintendent job. (T.67). At the time of the hearing, Petitioner testified that he was receiving social security disability from the government. (T.73).

On cross-examination, Petitioner testified that in the year 2016 he at times used assistive devices to aid in walking, and had balance issues. (T.75). He indicated that he would not drive unless he had to drive, for the most part, after his surgery in 2016. (T.79-80). At the time of the hearing, he drives as little as possible with his wife driving most places. (T.80). He also testified that in 2016 he told Dr. Najera that he could not play catch with his son because he could not close the glove with his hand. (T.81; 88). As for his cane use, Petitioner testified that in 2019 he was on a lot of medication, and would use his cane maybe once a day or once a day for a week. (T.86). Petitioner also testified to participating in his children's sporting activities by going to the park where he would blow a whistle. He recalled needing a cane for this activity occasionally, but most of the time he would be sitting. (T.89). He testified to helping coach during his son's football practice, and to having watched his son's boxing match at St. Cajetan. (T.90-91).

PhotoFax Investigators & Respondent Witnesse, Mark Jacob & Nic Molchan

Respondent called Mark Jacob to testify regarding surveillance taken of Petitioner. (T.100). Mr. Jacob is an investigator with PhotoFax. (T.100). He testified with regard to the remote or "unmanned" surveillance taken from June 29, 2018 through July 2, 2018. (T.101). Additional surveillance of Petitioner was taken by agents of PhotoFax on November 3, 2019, October 19, 2019, September 8, 2019, and August 17 through 18 of 2018. (T.103). Mr. Jacob and Mr. Molchan state that there was no time they observed Petitioner where the video was not taken.

Respondent also called Nic Molchan, who is also an investigator for PhotoFax. (T.133). Mr. Molchan conducted surveillance on September 8, 2019 and November 3, 2019. (T.133). Mr. Jacob and Mr. Molchan provided report and video surveillance submitted as Respondent Exhibits 7 through 10. Several reports and surveillance videos were submitted by Respondent. (RX7; RX8; RX9; RX10). The report identified as RX7 indicates Petitioner was seen walking, sitting, standing, and carrying items considered to be light, and driving. (RX7). The report identified as RX8 shows surveillance done at Petitioner's son's championship football game at Marist High School. (RX8). Later, Petitioner is also seen entering and exiting stores and his home. (RX8).

On rebuttal, Petitioner testified that during the periods shown on the video, he was conducting himself within the restrictions provided by his physicians and was also heavily medicated on Morphine. (T.137-138).

A review of all reports and video surveillance do not appear to show Petitioner conducting himself outside of the restrictions placed by his physicians. The Arbitrator notes there are no reports nor footage that indicate or show Petitioner any sort of activity that he testified he did not do or could not do. Some footage shows him sitting and standing at his son's boxing match. There does not appear to being any footage that showing him standing or sitting for a period of 20 minutes or more. Frequently, Petitioner sits or stands at five-ten minute intervals. At some points he is seen helping children get ready for football practice where Petitioner is carrying a jersey or pads. Petitioner is also seen driving his vehicle from time to time. (RX7-10; Transcript). Petitioner is seen without a cane in the surveillance. Petitioner is also seen driving his vehicle from time to time. Petitioner did not testify that he never drove, only that his wife would drive for the most part. The surveillance evidence does not tend to prove or disprove any of the assertions made by Petitioner while testifying and so it is offered little weight by the Arbitrator.

Testimony of Dr. Edward Goldberg – Treater

Petitioner called Dr. Edward Goldberg, M.D., who is a licensed, board certified orthopedic spine surgeon with Rush Orthopedics. (PX19, pp.6-7). He first saw Petitioner on February 27, 2015 to do an independent medical examination for the Respondent. (Id.). He took a history from Petitioner, which included a background on shoveling asphalt with the City of Chicago on June 11, 2013, when he developed severe left shoulder and neck pain. (Id. at 12). He already had shoulder surgery with Dr. Silver. (Id.). His cervical range of motion was limited and he tested positive for nerve compression. (Id. at 13). Dr. Goldberg diagnosed him with a herniated disk at C3-4 with cervical stenosis at C4-5 and C5-6. (Id.). He believed the history given was a competent cause of his neck and left arm symptoms. (Id. at 14). Dr. Goldberg recommended physical therapy and if that did not work a three-level anterior cervical discectomy and fusion. (Id.). He testified that Petitioner completed four weeks of therapy in May of 2015, but reported his left arm was getting weaker relative to the right and he had ongoing neck pain and paresthesia in the left arm. (Id. at 18). On August 13, 2015, Dr. Goldberg performed a three-level anterior cervical discectomy and fusion at C3-4, C4-5, and C5-6 with allograft – meaning bank bone – and anterior instrumentation – a plate and screws. (Id. at 21). Two weeks after surgery, Petitioner reported he was "walking funny" since surgery with some numbness in his lower extremities. (Id. at 22).

On September 25, 2015, Petitioner reported left sided arm pain and shoulder pain that went into his fingers. (Id. at 23). He ordered Petitioner to continue with therapy. (Id. at 24). After the FCE taken December 17, 2015, he returned to Dr. Goldberg who found him to be neurologically intact. Dr. Goldberg read that the therapist who performed the FCE felt Petitioner gave a valid effort. (Id. at 28). Based on the findings, Dr. Goldberg believed he could not return to work as a heavy laborer, but could work in the light demand category, occasionally lifting 14 pounds overhead, 6 pounds frequently; lift 28 pounds floor to waist occasionally, 8 pounds frequently, and push and pull 54 pounds occasionally, 17 pounds frequently, with minimal crawling, and to kneel and squat occasionally, for a two hour work day. (Id. at 28-29). On February 29, 2016, Dr. Goldberg opined that Petitioner had permanent restrictions of no sitting for more than 25 minutes, to not stand five

minutes at a time or walk more than a short distance. (Id. at 30). He disagreed with IME Dr. Kornblatt's opinion that there was a failed cervical spine surgery with delayed union. (Id. at 32).

Dr. Goldberg testified within a reasonable degree of medical and surgical certainty that Petitioner's work accident was the producing cause of Petitioner's cervical condition and that the treatment provided was reasonable and necessary. (Id. at 33). At the time of his testimony, the last time he saw Petitioner was May 22, 2016, when he recommended pain management treatment. (Id. at 33-35). At the time of his testimony, he anticipated Petitioner's work restrictions would potentially be for an eight-hour day at light duty. (Id. at 45). He also said that as it pertained to the driving restriction, that he disagreed with the driving restriction and noted that restriction was due to his medications that made him drowsy, but that it had nothing to do with his range of motion of the neck that would impede him from driving. (Id. at 60).

Testimony of Dr. Carl Graf - Section 12 Examiner

Respondent called Dr. Carl Graf, M.D. to testify as an independent medical examiner. (RX2). Dr. Graf is a licensed, board certified physician with a specialty in spine surgery. (Id. at 4-5). He evaluated Petitioner on December 10, 2018. (Id. at 6). Dr. Graf noted that at the time of his review, Petitioner had surgery on his neck and drew a diagram indicating he felt pain all over his body. (Id. at 14). He offered opinions on the neck, but not the shoulder. (Id. at 17). After his review of previous records, Dr. Graf testified that he could not find a work restriction that he could objectively substantiate, and that Petitioner could return to work full duty. (Id. at 20; 23). According to Dr. Graf, based on the physical exam, Petitioner produced non-anatomic signs of pain for which there was no objective correlation. (Id. at 9). He reported that he had patients who worked heavy labor that took heavy narcotics, like morphine. (Id. at 22). Dr. Graf was also asked about the opinions of Dr. Kornblatt. Dr. Graf noted that he would disagree with the opinions of Dr. Kornblatt, noting that Dr. Kornblatt did not have the benefit of imaging studies. (Id. at 24). On redirect examination, Dr. Graf noted that it was his understanding Dr. Kornblatt had retired. (Id. at 39).

Testimony of Kari Stafseth- Vocational Rehabilitation Counselor, Petitioner Witness

Kari Stafseth is a licensed vocational counselor for the company Vocamotive. (PX18, pp. 8-10). She testified that the first step in counseling an injured worker is to evaluate and interview the worker, obtain medical status information, a work history, learn the educational background and review records, then outline her findings in a report. (Id. at 10). She provided an assessment on September 23, 2016, August 16, 2019, and October 8, 2021. (Id. at 13). It is her custom and practice to rely on limitations set forth in functional capacity evaluations. (Id. at 15). During her first interview with Petitioner, Petitioner told her he was earning $38.25 per hour for a 60-hour work week. (Id. at 22). After her first interview, a review of his education background, work history, daily life activities, medical records, IME reports, and the FCE taken at ATI, she found Petitioner did not have any transferrable skills and could not return to his line of employment as a laborer. (Id. 16-24). She believed he did not have access to a viable stable labor market. (Id. at 25).

After her second evaluation of Petitioner on August 16, 2019, her opinions were left unchained and Petitioner still did not have a viable labor market. (Id. at 26). For her most recent evaluation of Petitioner on October 8, 2021, she did her evaluation virtually. (Id. at 26). Petitioner informed her of his trial return to work for Respondent, that lasted two days. (Id. at 28). She reviewed the updated medical opinions, including Dr. Graf's IME reports and the FCE done at NovaCare where Petitioner was restricted to a medium demand level that allowed: occasional lifting 30 pounds from the floor to waist; 35 pounds from floor to shoulder and 20 pounds waist to shoulder; carry up to 35 pounds bilaterally, push 26.5 pounds of force and pull 24 pounds of force; abilities to stand, walk and reach on a constant basis; sit, stoop and kneel on a frequent basis; climb stairs, climb ladders and crawl on an occasional basis and an inability to crouch, all with an eight hour work day. (Id. at 30-31). However, during the interview, Petitioner's own self-perceived limitations did not allow him to sit or stand for even 20 minutes, where he would then try to get comfortable. (Id. at 31).

Kari testified that if the medical opinion of Dr. Graf were accepted, it would be her opinion that Petitioner would not sustain any vocational impairment or wage loss exposure. If Dr. Goldberg's opinion and FCE at NovaCare were accepted, then Petitioner lost access to his most recent line of employment as a laborer. (Id. at 31). Kari believed he would have access to a few potential job targets, such as an assembly worker, machine operator, production worker, parts clerk, cleaner or porter. (Id. at 32). The most reasonable wages for these positions were between 13 and 16 dollars per hour. (Id at 32). She also noted that participating in a detox program could increase Petitioner's ability to reenter the labor market. (Id. at 37).

In response to Ms. Julie Bose's vocational opinion, Ms. Stafseth reviewed Ms. Bose's assessment and noted that at the time of Ms. Bose's report in May 2019, Petitioner had restrictions on his ability to sit, stand or walk, and could not perform work as a driver, packer, assembly worker or machine operator. (PX18, p. 37). She also noted there was no indication she ever met with Petitioner. (Id. at 38).

Testimony of Julie Bose- Vocational Rehabilitation Counselor, Respondent Witness

Respondent called Julie Bose to testify about Petitioner's vocational opportunities. (RX5). Julie Bose is a vocational rehabilitation counselor. (Id. at 4). In preparing to produce her opinion, she reviewed three reports from Vocamotive, functional capacity evaluations, and records from Dr. Goldberg. (Id. at 6-7). She believed Petitioner could perform a range of medium work and she agreed with the types of job identified by Vocamotive that Petitioner would be suited for. (Id. at 8-9). She however disagreed that Petitioner's potential wages were between $13-$16 per hour, as the City of Chicago's minimum wage is $15.40. (Id. at 9). She testified that Petitioner's limitations could not be assessed because in her opinion, Dr. Goldberg's opinion was based on conditions not related to Petitioner's work injury. (Id. at 11-12).

On cross examination, she testified that in forming her conclusions from a vocational counseling position, if Petitioner had any pre-existing conditions, that she would consider those as part of her total analysis. (Id. at 13). In forming her opinions, she did not review Dr. Kornblatt's IME report. (Id. at 14). She also did not personally interview Petitioner before making her conclusions but testified that she still evaluated Petitioner and was not required to be in person or face to face; she

instead evaluated the important vocational factors based on the file reviewed. (Id. at 15-16). She did admit that Petitioner would have to ween off of his medications before doing certain jobs she opined that he could obtain, such as operating heavy machinery or driving a truck. (Id. at 17). She was aware that Diamond Warren, who used to work for Ms. Bose, did an interview of Petitioner on April 13, 2016, but admitted she instructed Ms. Warren to not generate a report because Mr. Soto was not medically stable at that time. (Id. at 19). When asked whether Petitioner could be employed in the heavy labor market, she could not give a definitive answer. (Id. at 19-20).

CONCLUSIONS OF LAW

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

Decisions of an arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). The Arbitrator, as the trier of fact in this case, has the responsibility to observe the witnesses testify, judge their credibility, and determine how much weight to afford their testimony and the other evidence presented. *Walker v. Chicago Housing Authority*, 2015 IL App (1st) 133788, ¶ 47. Credibility is the quality of a witness which renders his evidence worthy of belief. The Arbitrator, whose province it is to evaluate witness credibility, evaluates the demeanor of the witness and any external inconsistencies with his/her testimony. Where a claimant's testimony is inconsistent with his/her actual behavior and conduct, the Commission has held that an award cannot stand. *McDonald v. Industrial Commission,* 39 Ill. 2d 396 (1968); *Swift v. Industrial Commission,* 52 Ill. 2d 490 (1972).

In the case at hand, the Arbitrator observed Petitioner during the hearing and finds him to be a credible witness. The Arbitrator compared Petitioner's testimony with the totality of the evidence submitted and did not find any material contradictions that would deem the witness unreliable. Petitioner came across as a hard-working individual who made an attempt to go back to his laborer job for Respondent for two days, but was unsuccessful. None of the physicians who treated him noted any symptom magnification.

The Arbitrator finds Petitioner's testimony to be straight forward, truthful, and consistent with the records as a whole. He does not appear to be a sophisticated individual and any inconsistencies in his testimony are not attributed to an attempt to deceive the finder of fact. The Arbitrator finds Dr. Goldberg to be more credible than IME Dr. Graf regarding Petitioner's permanent restrictions and work capabilities. The Arbitrator also finds Ms. Stafseth to be more credible in her vocational opinion that Ms. Bose. The Arbitrator gives little to no weight to the opinions of Ms. Bose. Overall, Respondent witnesses' testimony and exhibits, for reasons stated below, did not persuade the Arbitrator.

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, ¶ 1, 11 N.E.3d 453. It is axiomatic that when the injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment. *Caterpillar, Inc. v. Industrial Comm'n*., 228 Ill. App. 3d 288 (3d Dist. 1992). A work-related injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. Even if the claimant had a preexisting degenerative condition which made him more vulnerable to injury, recovery for an accidental injury will not be denied as long as he can show that his employment was also a causative factor. Thus, a claimant may establish a causal connection in such cases if he can show that a work-related injury played a role in aggravating his preexisting condition. *Sisbro, Inc. v. Industrial Comm'n,* 207 Ill. 2d 193, 205, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003). "A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." *International Harvester v. Industrial Com.*, 93 Ill. 2d 59, 63 442 N.E.2d 908 (1982).

Petitioner testified credibly and with conviction regarding the mechanism of injuries and presented a consistent sequence of events corroborated by contemporaneous medical records and testimony from Dr. Goldberg, reflecting that he sustained left shoulder and neck injuries which necessitated medical treatment. Petitioner testified that he injured his left shoulder and neck during the occurrence at work on June 11, 2013. Causal connection was established by a majority of the physicians who treated Petitioner, including the IME examiners Dr. Cole, Dr. Goldberg, Dr. Kornblatt, and based on what Petitioner testified to, Dr. Konowitz. Dr. Graf's opinions are directed more at Petitioner's then current condition of ill-being, which he rejects as being causally related to the work occurrence.

The Arbitrator takes note that Dr. Graf was the fifth IME physician who reviewed Petitioner's case. Respondent argues that Petitioner's current complaints and restrictions are due to an unrelated lumbar spine condition, in large part due to a few comments from Petitioner to his pain doctor. This position is also relied upon by Dr. Graf, who before his Section 12 exam asked Petitioner to identify where his pain was located, at which point Petitioner circled his entire body. At the time of his IME with Dr. Graf, Petitioner had already had four IMEs, had been on heavy pain medication, and had been treating with pain management for several years. There is no evidence in the record that any of Petitioner's treaters recognized Petitioner's comments on pain in his lumbar spine as being the producer of the pain that Petitioner has felt since his surgeries, specifically his last cervical spine surgery. The overwhelming majority of physicians involved in Petitioner's treatment appear to opine in the records and testify in support of Petitioner's pain as being derived from his post cervical surgery and the significant neck injury he sustained.

The Arbitrator finds is reasonable that if any of his medical treaters believed any complaints in the lumbar spine were the true producer of Petitioner's current medical condition, then it is likely that the treating doctors would have ordered testing done on Petitioner's lumbar spine. There has been no evidence submitted in that regard nor has there been any evidence submitted that the Arbitrator has seen that reflects that Petitioner suffers from a pre-existing lumbar condition. Therefore, the only competent producer of Petitioner's pain is that which resulted from his work-related incident to his left shoulder and neck.

Overall, Dr. Goldberg's testimony was persuasive to the Arbitrator and is found to be more credible than Dr. Graf. Dr. Goldberg diagnosed Petitioner with a herniated disk at C3-4 with cervical stenosis at C4-5 and C5-6 after treatment began post IME (PX19 at 13.). He believed the history given by Petitioner was a competent cause of his neck and left arm symptoms. (Id. at 14). Dr. Goldberg recommended physical therapy and if that did not work a three-level anterior cervical discectomy and fusion. (Id.). On August 13, 2015, Dr. Goldberg performed a three-level anterior cervical discectomy and fusion at C3-4, C4-5, and C5-6 with allograft – meaning bank bone – and anterior instrumentation – a plate and screws. (Id. at 21). Two weeks after surgery, Petitioner reported he was "walking funny" since surgery with some numbness in his lower extremities. (Id. at 22) Based on the December 2015 FCE findings, Dr. Goldberg believed Petitioner could not return to work as a heavy laborer, but could work in the light demand category, occasionally lifting 14 pounds overhead, 6 pounds frequently; lift 28 pounds floor to waist occasionally, 8 pounds frequently, and push and pull 54 pounds occasionally, 17 pounds frequently, with minimal crawling, and to kneel and squat occasionally, for a two hour work day. (Id. at 28-29). Later in February of 2016, Dr. Goldberg opined in a note that Petitioner had permanent restrictions of no sitting for more than 25 minutes, to not stand five minutes at a time or walk more than a short distance. (Id. at 30). Dr. Goldberg testified within a reasonable degree of medical and surgical certainty that Petitioner's work accident was the producing cause of Petitioner's cervical condition and that the treatment provided was reasonable and necessary. (Id. at 33). At the time of his testimony, the last time he saw Petitioner was May 22, 2016, when he recommended pain management treatment. (Id. at 33-35). Petitioner underwent pain management for years after that referral. At the time of his testimony, he anticipated Petitioner's work restrictions would potentially be for an eight-hour day at light duty. (Id. at 45). He also said that as it pertained to the driving restriction, that he disagreed with the driving restriction and noted that restriction was due to his medications that made him drowsy, but that it had nothing to do with his range of motion of the neck that would impede him from driving. (Id. at 60).

The Arbitrator gives little weight to Dr. Graf's opinions and is persuaded by Dr. Goldberg who was an IME turned treater in this matter and appears to have a better understanding of Petitioner's history, treatment, conditions, restrictions and capabilities. The Arbitrator hereby finds that the Petitioner's condition of ill-being regarding his left shoulder and neck are causally connected to the work accident of June 11, 2013.

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 (820 ILCS 305/8(a) (West 2006)), a claimant is entitled to recover reasonable medical expenses, the incurrence of which are causally related to an accident arising out of and in the scope of his employment and which are necessary to diagnose, relieve, or cure the effects of the claimant's injury. *Absolute Cleaning/SVMBL v. Ill. Workers' Compensation Comm'n*, 409 Ill. App. 3d 463, 470 (4th Dist. 2011)(citing: *University of Illinois v. Industrial Comm'n*, 232 Ill. App. 3d 154, 164 (1st Dist. 1992). Medical care under Section 8(a) is continuous as long as such care is required to relieve the effects of the injury. *Freeman United Coal Mining Co. v. Industrial Commission*, 81 Ill.2d 335 (1980). Whether a medical expense is either reasonable or necessary is a question of fact to be resolved by the Commission, and its determination will not be overturned on review unless it is against the manifest weight of the evidence. *F&B Manufacturing Co. v. Industrial Comm'n*, 325 Ill. App. 3d 527, 532 (1st Dist. 2001).

Overall, the Arbitrator finds Petitioner's treatment to be reasonable and necessary and finds that Respondent has not paid for all of said treatment. As such, the Arbitrator orders Respondent to pay the medical providers directly for the following outstanding medical services, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act as shown in Petitioner's Exhibit 22, which are supported by the record and bill exhibits contained in Petitioner's exhibit submissions 1-15. The Arbitrator finds however that charges for medical marijuana are not awarded. Further, Dr. Goldberg has no opinion as to whether medical marijuana was reasonable and necessary and therefore any and all medical charges for the same are not awarded.

Overall, the Arbitrator finds that Petitioner satisfied his burden by proving his left shoulder and neck injuries were caused by the work accident, as is supported by testimony from the providers. Dr. Goldberg opined that his ongoing treatment would consist of pain management treatment and a detox program. Petitioner testified that he recently started receiving injection treatment from his pain management physicians. There has been no evidence offered to the contrary that any of the past treatments were unnecessary, rather the Dr. Graf opined it was related to the lumbar spine. Having found causation already and incorporating the findings of fact and conclusions of law above, the Arbitrator awards the reasonable and necessary medical services pursuant to the Medical Fee Schedule, as provided in Section 8(a) of the Act, for the unpaid balances to the following medical providers: Mercy Works Occupational Medicine, Northwestern Medical Imaging, Orthopaedic Specialists of the Northshore, ATI Physical Therapy, Midwest Orthopedics at Rush, University Pathologists, P.C., Rush University Medical Center, IWP, Chicago Ridge Radiology, Elmwood Park Same Day Surgery, Pain and Spine Institute, Neurological Surgery and Spine Center, RX Development Associates, Elite Care RX LLC, Pain Treatment Centers or Illinois, Preferred Open MRI and Improved Functions.

The parties previously stipulated that medical providers would be paid directly by Respondent and that Petitioner recognizes any credit for bills already paid by Respondent.

Issue K, whether Petitioner is entitled to Maintenance 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). Employers are responsible for paying not only TTD, but also maintenance for the time period during which they are disputing the need for vocational rehabilitation pursuant to section 8(a). 820 ILCS 305/8(a). The claimant need not request vocational rehabilitation before maintenance may be awarded. *Roper v. Contracting v. Industrial Comm'n*., 349 Ill. App. 3d 500, 506 (5th Dist. 2004). The employer may be responsible for paying maintenance while the employer is either disputing the need for vocational rehabilitation or determining whether an alternative option is viable, even if maintenance has not been requested. *Id*. A claimant is generally entitled to vocational rehabilitation when he sustains a work-related injury which causes a reduction in his earning power and there is evidence that rehabilitation will increase his earning capacity. *Euclid Bev. v. Ill. Workers' Comp. Comm'n*, 2019 IL App (2d) 180090WC ¶ 29. The Act permits maintenance benefits if the claimant is engaged in some type of "rehabilitation" such as physical rehabilitation. *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1019 (2005).

For the case at hand, the first FCE done at ATI was on December 30, 2015. This FCE indicated Petitioner was unable to return to his former line of employment as a laborer. Those findings were affirmed by Dr. Goldberg with his note dated February 29, 2016, when he wrote that Petitioner was permanently restricted to light duty work. Petitioner continued to physically rehabilitate himself up to the date of the hearing and continues to treat. Respondent paid TTD or maintenance until Dr. Graf's first IME opinion. Specifically, Respondent paid maintenance from 12/31/15 through 7/22/22 (hearing date) and ongoing. After the Dr. Graf IME, Petitioner was reexamined by vocational counselor Kari Stafseth, who laid out the possibility for alternative work for the Petitioner. Petitioner continues to rehabilitate himself and look for work.

The most recent FCE took place at NovaCare on January 7, 2020. (PX15). The NovaCare professional opined that Petitioner could not return to his previous line of work as a laborer. (PX15). The results were noted as valid and indicated Petitioner was restricted to a medium demand level that allowed. In addition, Ms. Stafseth's second evaluation of Petitioner on August 16, 2019, her opinions remained unchanged that Petitioner still did not have a viable labor market. For her most recent evaluation of Petitioner on October 8, 2021, she did her evaluation virtually. Petitioner at that time informed her of his trial return to the City that lasted two days. She reviewed the updated medical opinions, including Dr. Graf's IME reports and the FCE done at NovaCare, where Petitioner was restricted to a medium demand level that allowed: occasional lifting 30 pounds from the floor to waist; 35 pounds from floor to shoulder and 20 pounds waist to shoulder; carry up to 35 pounds bilaterally, push 26.5 pounds of force and pull 24 pounds of force; abilities to stand, walk and reach on a constant basis; sit, stoop and kneel on a frequent basis; climb stairs, climb ladders and crawl on an occasional basis and an inability to crouch, all with an eight hour work day. Ms. Stafseth testified that if the opinion of Dr. Graf were accepted, it would be her opinion that Petitioner would not sustain any vocational impairment or wage loss exposure. If Dr. Goldberg's opinion and FCE at NovaCare were accepted, then he lost access to his most recent line of employment as a laborer.

The Arbitrator has already found the opinions of Dr. Goldberg to be more credible and persuasive and further finds that Ms. Stafseth's opinion more persuasive that Petitioner has lost access to his most recent line of employment as a laborer. It is clear to the Arbitrator that Petitioner could not return to the same full duty job as a laborer for Respondent due to his work related injuries. Further, the Arbitrator finds that Petitioner has not been and could not be accommodated with his permanent work restrictions.

For these reasons, and based upon the greater weight of evidence, specifically the opinions of Dr. Goldberg, the most recent FCE and Ms. Stafseth, the Arbitrator finds Petitioner is entitled to maintenance benefits from December 30, 2015 through the date of the hearing, July 22, 2022, representing 342 2/7 weeks at $826.00/week, subject to a Respondent credit for TTD/maintenance payments made during that time-frame. Specifically, Respondent shall be given a credit of $317,684.59 for TTD and maintenance paid.

Issue L, the nature and extent of the injury, the Arbitrator finds as follows:

To qualify for a wage differential under section 8(d)(1) of the Illinois Workers' Compensation Act, 820 ILCS 305/8(d)(1) (2012), a claimant must prove: (1) partial incapacity which prevents him from pursuing his usual and customary line of employment; and (2) an impairment of earnings. *Crittenden v. Ill. Workers' Comp. Comm'n, 2017 IL App (1st) 160002WC* ¶ 20. To prove an impairment of earnings, a claimant must prove his actual earnings for a substantial period before the accident and after he returns to work, or in the event that he has not returned to work, he must prove what he is able to earn in some suitable employment. *Id*. Once the claimant provides evidence of these amounts, it is the Illinois Workers' Compensation Commission's function to use the formula provided in 820 ILCS 305/8(d)(1) to calculate the amount of the wage differential. *Id*. In making the calculation of a wage differential under 820 ILCS 305/8(d)(1), the Illinois Workers' Compensation Commission must determine the average amount which the claimant is able to earn in some suitable employment or business after the accident. *Crittenden,* at ¶ 23. If the claimant is not working at the time of the calculation, the Commission must rely on functional and vocational expert evidence. *Id*. To calculate a wage differential award, the Illinois Workers' Compensation Commission must identify, based on the evidence in the record, an occupation that the claimant is able and qualified to perform, and apply the average wage for that occupation to the wage differential calculation. *Id*. at ¶ 24. The claimant is required to introduce evidence sufficient for the Commission to identify an occupation that the claimant is able and qualified to perform, and the average wage for that occupation. *Id*. In any case where the Commission identifies an occupation that the claimant is able and qualified to perform, as well as the average wage for that occupation, and applies that average wage to the appropriate part of the formula, the Commission's determination becomes a factual determination, and thus will not be disturbed unless it is against the manifest weight of the evidence. *Id*.

In *Critten*, the Commission used a dollar figure on average that Petitioner's vocational expert deemed Petitioner would likely earn at a new place of employment. *Id*. at ¶ 25. Where *Critten* failed, was that his vocational expert did not identify any suitable occupation where Petitioner might earn $13.78. *Id*. In this case, the vocational expert Ms. Stafseth, identified a few potential jobs, such as an assembly worker, machine operator, production worker, parts clerk, cleaner or

porter. The most reasonable wages for these positions were between $13 and $16 dollars per hour.

As of the December 2015 FCE findings, Dr. Goldberg believed Petitioner could not return to work as a heavy laborer, but could work in the light demand category, occasionally lifting 14 pounds overhead, 6 pounds frequently; lift 28 pounds floor to waist occasionally, 8 pounds frequently, and push and pull 54 pounds occasionally, 17 pounds frequently, with minimal crawling, and to kneel and squat occasionally, for a two hour work day. Later in February of 2016, Dr. Goldberg opined in a note that Petitioner had permanent restrictions of no sitting for more than 25 minutes, to not stand five minutes at a time or walk more than a short distance. Dr. Goldberg testified within a reasonable degree of medical and surgical certainty that Petitioner's work accident was the producing cause of Petitioner's cervical condition and that the treatment provided was reasonable and necessary. At the time of his testimony, the last time he saw Petitioner was May 22, 2016, when he recommended pain management treatment. Petitioner underwent pain management for years after that referral. At the time of his testimony, he anticipated Petitioner's work restrictions would potentially be for an eight-hour day at light duty.

The permanent restrictions remain in place and Petitioner is clearly precluded from working as a Laborer for Respondent. He has not been accommodated and has been off receiving temporary total disability benefits and later maintenance benefits since June 12, 2013, outside of the sole two days Petitioner attempted a return to his old position in 2019, which was unsuccessful. In addition to the multiple FCEs, petitioner underwent vocational rehabilitation assessments and did a self directed job search conducted from August 2017 through March 2019, identifying and applying to hundreds of jobs. See Petitioner Exhibit 20. The Arbitrator is persuaded that Petitioner has not and cannot return to accommodated work for Respondent and cannot gain the same weekly pay as he did for Respondent. Petitioner still continues to treat and has not found new employment. The arbitrator overall finds that Petitioner has proven that the work related injuries he sustained caused a loss of earnings, based upon the testimony of Dr. Goldberg, Ms. Stafseth and Petitioner, the treating medical records and the record as a whole.

The Arbitrator finds that at the time of his injury, Petitioner earned an average weekly wage of $1,239.00. Ms. Stafseth opined and the Arbitrator is persuaded that Petitioner would have access to a few potential job targets, such as an assembly worker, machine operator, production worker, parts clerk, cleaner or porter. The most reasonable wages for these positions were between $13 and $16 dollars per hour. The Arbitrator finds that it is reasonable that Petitioner could earn $16.00 per hour for an average 40-hour work week. Petitioner's new earnings would be $640.00 per week. This gives Petitioner a differential of payment in the amount of $599.00. Two thirds of $599.00 equals $399.33, which would be Petitioner's weekly differential payment.

The Arbitrator therefore finds that Petitioner has proved a wage differential is owed and orders Respondent to pay Petitioner permanent partial disability benefits, commencing 7/22/22 of $399.33/week until Petitioner reaches age 67 or five years from the date of the final award, whichever is later, because the injuries sustained caused a loss of earnings, as provided in Section 8(d)1 of the Act.

Issue N, whether Respondent is due any credit for maintenance/TTD overpayment, the Arbitrator finds as follows:

As explained above, maintenance is owed and awarded from 12/30/15 through the date of the trial, July 22, 2022 Therefore because the Arbitrator finds that the Respondent's payment of maintenance was appropriate and supported by the evidence, no overpayment was made., Respondent shall be given a credit of $**317,684.59** for TTD and maintenance paid, $**0** for TPD, and $**0** for other benefits, for a total credit of $**317,684.59.**

For the reasons stated above, Petitioner is entitled to an award of benefits under The Illinois Workers' Compensation Act consistent with the findings herein.

It is so ordered:

Jacqueline C. Hickey
Arbitrator

June 24, 2023
Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC038033
Case Name	Anthony Jordan v. State of Illinois – Illinois Department of Transportation
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0088
Number of Pages of Decision	20
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Michael Casey
Respondent Attorney	Charlene Copeland

DATE FILED: 2/22/2024

/s/Christopher Harris, Commissioner

Signature

24IWCC0088

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

ANTHONY JORDAN,

Petitioner,

vs. NO: 18 WC 38033

STATE OF ILLINOIS,
ILLINOIS DEPARTMENT OF
TRANSPORTATION ,

Respondent.

DECISION AND OPINION ON REVIEW

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

While the Commission agrees with the Arbitrator's analysis of Section 8.1(b), the Commission assigns lesser weight to subsection (v) with respect to Petitioner's right hip injury. As a result of the injury to his right hip, Petitioner underwent physical therapy and received 2 documented injections. He was then returned to work full duty. He testified to experiencing some hip stiffness and pain when he sits in his work truck for a longer period of time. He then has to stretch his hip to alleviate the pain. Based upon the evidence, the Commission finds that the Petitioner is entitled to 7.5% loss of use of the right leg pursuant to Section 8(e) of the Act. All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed June 16, 2023, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $837.18 per week for a period of 16.125 weeks, as provided in §8(e) of the Act, for the reason that the injury sustained caused 7.5% loss of use of the right leg.

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

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

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.

February 22, 2024

d: 2-15-24
CAH/tdm
052

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

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

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC038033
Case Name	Anthony Jordan v. Illinois Department of Transportation
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	17
Decision Issued By	Raychel Wesley, Arbitrator

Petitioner Attorney	Michael Casey
Respondent Attorney	Charlene Copeland

DATE FILED: 6/16/2023

THE INTEREST RATE FOR THE WEEK OF JUNE 13, 2023 5.15%

/s/ Raychel Wesley, Arbitrator
Signature

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

June 16, 2023

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation

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

Anthony Jordan
Employee/Petitioner

Case # 18 WC 038033

v.

Illinois Department of Transportation
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Raychel Wesley, Arbitrator of the Commission, in the city of Chicago, on 4/11/2023. 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 8/24/2018, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $75,660.00; the average weekly wage was $1,455.00.

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

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

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

Respondent shall be given a credit of $79,426.31 for TTD, $0 for TPD, $0 for maintenance, and $0 for other benefits, for a total credit of $79,426.31.

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

ORDER SEE ATTACHED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner Exhibit 6 and as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $837.18/week for 28 weeks, because the injuries sustained caused the 13% loss of the right leg, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $837.18/week for 125 weeks, because the injuries sustained caused the 25% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

/s/Raychel A. Wesley **JUNE 16, 2023**

Anthony Jordan v Illinois Department of Transportation 18 WC 038033
Findings of Fact

Petitioner testified before the Arbitrator who had opportunity to view his demeanor under direct examination and under cross-examination. The Arbitrator considered the testimony of Petitioner with all other evidence in the record. The Arbitrator finds that Petitioner was a credible witness.

On August 24, 2018, Petitioner was an employee of the Illinois Department of Transportation. His job title was heavy construction equipment operator. Job duties include operating heavy equipment, duties as highway maintainer which includes basic highway maintenance, cutting grass, trimming trees, weed whacking, paper picking, snowplowing in the winter, loading trucks with salt in the winter, and basic heavy equipment when needed. He has been a heavy equipment operator since 2014. Before that he worked in highway maintenance for respondent. He started that job in 2010. The difference between his current job and the highway maintenance job he had before 2014, is that in the current job he operates heavy equipment. Heavy equipment consists of front loaders, bobcats, skid steer attachments for milling and jack hammering, and backhoes. T11. He operates tractor lawnmowers in his current job. His job requires him to lift up to 75 pounds. T 12. Before the accident of August 24, 2012, he had surgery on his right shoulder in March 2008. After that surgery, Petitioner returned to work full duty with no restrictions. Between that surgery in 2008 and the accident of August 24, 2018, he had not injured his right shoulder in any other accidents. T 13. Before the accident of August 24, 2018, Petitioner was able to perform all his job duties without any problem. Petitioner had no surgeries on his right hip prior to August 24, 2018. He did have some physical therapy in February 2018 as a result of getting salt out of the salt truck at work. He was not off work as a result of the February 2018 accident. T 15. The only treatment he had was physical therapy and he returned to work full duty, no restrictions, and was able to perform his full job duties without any problem or limitation up to the date of the August 24, 2018, accident.

At hearing, Petitioner testified he was 5'8" tall and weighed 250 pounds. T 16. Petitioner testified that on August 24, 2018, he was cutting grass on Interstate 80 using a tractor. A tire blew on the tractor causing the tractor to hit the guard rail. Petitioner's right arm was on the wheel well of the tractor and his left arm was on the steering wheel. He had his seatbelt on. When he hit the guardrail, his body shifted and bounced him, twisting the right side of his body. Petitioner hurt his right shoulder and right hip as a result of the accident. He had immediate pain and stopped working T 17-18. Petitioner's supervisor took him to Advocate Occupational Health Hazel Crest. T 19.

On cross-examination Petitioner testified that when the accident occurred, he was operating a tractor, his supervisor was in a pickup truck behind him and there was a dump truck behind the supervisor. The trucks help protect the tractors, especially on the highway because of the cars going 70, 80, 90 miles an hour. T 38. The left rear tire blew. Petitioner thought something hit him because he bounced. The supervisor told him the tire on the tractor blew and that's when Petitioner hit the guardrail. The tractor hit hard because the rim was bent. It bounced

over into the lane of traffic. The mower deck behind the tractor also swung. The weight from the mower deck made the tractor swing out to the lane of traffic. T 39-40. The tractor did not tip over, but it did tilt on its side. Petitioner did not know how the tractor ended up because he was shaken up. He just remembers bouncing off. Petitioner's supervisor took him to Occupational Health at the hospital. T 41.

Medical records of Advocate Medical Group Occupational Health-Hazel Crest were admitted in evidence as Petitioner Exhibit 1.

On 8/24/18 Advocate Occupational Health-Hazel Crest records document the following. Subjective: right shoulder upper back pain; diagnosis thoracic and right shoulder strain. Treatment plan: ice to the right shoulder today for 20 minutes. Epsom salts soaks at night. Rest. Tylenol as needed. Flexeril at night. RX work restrictions, limited duty, no driving large trucks no carrying no pushing no climbing ladders no reaching no more operation no operation of air hammer. PX 1, p7-8.

Petitioner testified as result of the work restrictions, he remained off work. T 21. He followed up at Work Right through September and October 2018 where he received physical therapy.

Medical records of Work Right Occupational Health Alsip were admitted in evidence as Petitioner Exhibit 2.

On 8/27/18 Work Right Occupational Health Alsip records document: initial clinical visit. Patient states while driving a mowing tractor went to turn left tire blew, causing him to hit the guardrail and bounce off of it several times. Pain located the right shoulder, right hip. Throbbing pain shooting pain, stabbing pain. Sharp pain localized. Constant. Examination. Diagnosis: 1. Strain of muscles and tendons of the rotator cuff of right shoulder, 2. Strain of muscles, fascia and tendon of right hip, 3. Pain and right shoulder; 4. Pain and right hip. RX meloxicam Cyclobenzoprine. Apply heat, recheck. RX Restricted work. PX 2, p 89-93.

On 8/31/18 Work Right Occupational Health Alsip records document: no use of the right arm, no squatting or kneeling, no stairclimbing, no driving. PX 2, p 93-96.

On 9/10/18 Work Right Occupational Health Alsip records document: no use of the right arm RX off work, RX no driving operation of hazardous equipment or other work requiring good depth perception. RX meloxicam, Flexeril. PX 2, p 99-102.

On 9/12/18 9/14/18, 9/17/18, 9/19/18, 9/24/18, Work Right Occupational Health Alsip records document ongoing physical therapy. PX 2, p 102-119.

On 9/26/18 Work Right Occupational Health Alsip records document: RX off work. physical therapy. PX 2, p 119-122.

On 9/28/18, 10/1/18, 10/3/18, 10/5/18, 10/10/18, 10/12/18, 10/15/18, through 11/28/18 Work Right Occupational Health Alsip records document physical therapy administered. PX 2, p 122-195.

On 10/24/18 Work Right Occupational Health Alsip records document: RX off work. RX MRI. RX 2, p 156.

Petitioner testified he had MRI performed at South Suburban Open MRI of Orland. T 22.

The records of South Suburban Open MRI of Orland. Were admitted in evidence as Petitioner Exhibit 3.

On 11/12/18 South Suburban Open MRI of Orland, LLC, records document the following. Referred by PA-C A. Golden. Right shoulder arthrogram. Findings: no evidence of fracture or subluxation. Moderate fibers hypertrophy and articular irregularity of the acromioclavicular joint. Small inferior spur formation from the distal end of the clavicle and acromion process. These degenerative changes deface the fat over the musculotendenous junction of supraspinatus, which may produce positional impingement. There is evidence of hyperintense STIR signal in the distal end of the clavicle, suggestive of bone marrow edema. This may be reactionary to the degenerative changes. The contrast is injected into the glenohumeral articulation. The contrast extends into the chondrolabral interface involving the anterior superior glenoid labrum. The long head of the biceps tendon is fixated to the proximal humoral shaft and is not visualized in the bicipital groove on given images. These features are suggestive of SLAP II tear. Confirmation with surgical findings is suggested. PX 3, p 4-7.

On 11/16/18 Work Right Occupational Health Alsip RX off work. RX referral to Dr. Atluri upper extremity specialist. PX 2, p 187.

On 11/19/18 through 3/13/20 Work Right Occupational Health/Alsip records document ongoing physical therapy. RX 2, p 188-420.

Petitioner testified after the MR arthrogram of his right shoulder he was referred to Dr. Atluri by Work Right. T 22.

The medical records of Hand to Surgery Associates/Prasant Atluri, MD, were admitted in evidence as Petitioner Exhibit 4.

On 11/26/18 Hand to Shoulder Associates/Prasant Atluri MD. records document the following. Initial encounter. Patient reports injury to his right shoulder a few months ago. He was driving a tractor on the expressway. He was steering the vehicle with his left hand. The tractor hit a bump of some kind and jammed against his forearm and elbow which was resting on the wheel well. He rapidly developed pain in his right shoulder. The pain progressively worsened. He has been treated with therapy without significant relief. He doesn't feel as if the shoulder is improving. Currently he reports pain at the anterior and superior aspect of his shoulder. The pain is aggravated by activity. He has difficulty sleeping due to the pain. He has a history of prior right shoulder injury which was treated by surgery for his labrum 10 years ago. He states that his shoulder was doing well following that injury until this new incident. He has a history of left shoulder injury which I treated. He states his left shoulder is doing well. Patient is being seen at the request of an occupational health clinic (Work Right Alsip Anthony Golden PA). Shoulder injury is described as the following: shoulder injuries described as being located in the right shoulder. The injury occurred 3 months ago. Associated features include pain, decreased ROM

and weakness. The onset was sudden following an incident at work. Examination. The patient has right shoulder pain. The exam and MRI are suggestive of a persistent or recurrent labral tear along with a partial subscapularis tendon rupture. He does have some clicking and snapping in his shoulder due to subacromial pathology as well, although this is not the dominant pain source. Has not progressed in supervised therapy. I recommend steroid injection along with another course of therapy. If symptoms persist, then surgical intervention would be considered. He has elected to proceed with the injection. This was done without difficulty. RX physical therapy 2 times for week for 6 weeks. PX 4, p 41-43. Right shoulder. Diagnoses: 1. Shoulder, right joint derangement; 2. Acute pain right shoulder; 3. Avulsion of right scapularis. RX restricted no lifting, pushing, pulling 10 pounds; no overhead use. PX 4, p 68.

On 1/7/19 Hand to Shoulder Associates/Prasant Atluri MD. records document: patient reports partial, temporary relief following the steroid injection. States that since then, the pain has recurred. He has right shoulder pain that bothers him at night. Is aggravated by activity. He states that his left shoulder, which was treated previously, is not bothering him. The onset of symptoms has been months. The course has been unchanged. The symptoms are relieved by therapy. Current plans: right shoulder arthroscopy, labral repair or debridement, mini open biceps tenodesis, possible subacromial decompression. He states his symptoms are too severe to tolerate. He wants to proceed with surgical treatment. The surgery will be scheduled pending medical clearance. PX 4, p 38-39.

On 2/4/19 Hand to Shoulder Associates/Prasant Atluri MD. records document: patient states that his symptoms haven't changed. He was contacted by his Worker's Compensation carrier and they told him to be patient while they are reviewing things. Presenting for follow-up visit. PX 4, p 36-37.

On 3/18/19 Hand to Shoulder Associates/Prasant Atluri MD. no change in overall symptoms. Reports pain that fluctuates in intensity. It is aggravated by activity. He still cannot sleep well on his right side. He has noticed occasional numbness and tingling in the small and ring fingers of his right hand. Work restrictions ordered no change in overall clinical picture. Still awaiting authorization for the proposed surgery. Patient advised to continue with home exercise program and restrictions. PX 4, p 34-35.

Petitioner testified while he was waiting for authorization for the surgery ordered by Dr. Atluri, he was examined by respondent IME Dr. Charles Bush Joseph.

The IME report of Charles a Bush Joseph MD dated 4/24/19 was admitted in evidence as Respondent Exhibit 1

On 4/24/19 respondent Section 12 examining physician, IME Charles A Bush Joseph MD. examined petitioner and authored IME report. Dr. Bush Joseph report documents the following. Patient claims he suffered injury while performing mowing activities on August 24, 2018. He claims a tire blew and the mower tilted. He suffered a jam injuries to his right shoulder hand and wrist. He also claims soreness in his hip. He claims a supervisor was present and he immediately reported the injury and began treatment. Seen at Work Right Occupational Health on August 27, 2018. Primary complaints at that point were right shoulder and right hip. 5'8" tall 250 pounds.

Initial physical exam findings were consistent with a right hip strain and right shoulder strain. Impression: 1. Right shoulder strain with rotator cuff impingement AC joint arthritis. 2. Osteoarthritis right hip. Plan: patients prior condition of diabetes malleolus and multiple prior shoulder surgery certainly makes him a significant increased risk for recurrent occupational work related injury. I do believe the patient's current work-related injury to his right shoulder, necessitating surgical management is indeed due to a work-related injury, which occurred on August 24, 2018. I believe the symptoms of his right hip are pre-existing in nature and are due to underlying osteoarthritis. I do not believe there is any specific work related injury or event that aggravated or accelerated the current condition. Medical treatment has been reasonable and appropriate. No specific medications are used at this time for the hip or shoulder. I do believe that shoulder arthroscopy as detailed above is reasonable and appropriate. This would require between 4 to 6 months postoperative rehabilitation program before 75-80% expected return to work on full duty basis. Given the patient's history of prior surgical interventions and diabetes he currently has a 25-30% risk residual permanent impairment. I believe the patient's current conditions in the right hip are osteoarthritis. There is no evidence of specific traumatic mechanical event as result of a work related injury, current conditions of underlying osteoarthritis. The patient is capable of working unrestricted duty basis which includes 25 pound lifting below chest level. RX 1.

On 4/29/19 Hand to Shoulder Associates/Prasant Atluri MD. document: follow-up visit for the right shoulder. The onset of the symptoms has been months. The course has been unchanged. Assessment & plan: shoulder right joint derangement; avulsion of right subscapularis, Plan: limited lifting pushing pulling 10 pounds. Follow-up in one month. Work restrictions ordered. PX 4, p 33.

Petitioner testified he was treated by Dr. Daniel Weber at Integrity Orthopedics for complaints of his right hip. T 24.

Records of Integrity Orthopedics/ Daniel Weber, MD, were admitted in evidence as Petitioner Exhibit 5.

On 5/8/19 Dr. Daniel Weber MD/Integrity Orthopedics records document the following. Initial OV. Moderate to severe pain in the anterior aspect of the right hip and posterior aspect of the right hip. Functional impairment is severe-it interferes with most, but not all, daily activities. The pain interferes with his sleep occasionally. Pain is intermittent. Setting in which it first occurred: Patient was driving a tractor for work and crashed into a guard rail. Duration August 2018. Aggravating factors: climbing stairs, simply standing and standing up from a sitting position, simply walking. No relieving factors. Right hip MRI 12/20/18 South Suburban Open MRI. Previous treatment: applying ice packs slightly improved; rest slightly improved; physical therapy improved. Right hip examination: PROM flexion 90°: internal rotation with pain. Groin pain. 15°. External rotation 20°. Left hip exam normal. MRI right hip 8 May 2019 shows arthritic changes about the right hip. There is no evidence of any fracture. Note is made of a paralabral cyst. It is not an MRI arthrogram, so any labral pathology would not be optimally visualized. Assessment: unilateral primary osteoarthritis right hip; unstable, acute exacerbation. I discussed things with Anthony. He has been having pain since his accident last August. He does

have some arthritis on the MRI. I believe that an arthritic exacerbation with possibly some labral pathology is what is going on. I have recommended that we proceed with a hip injection under fluoroscopy and we are going to try to get that approved. PX 5, p 16-18.

On 6/3/19 Hand to Shoulder Associates/Prasant Atluri MD. records document: patient states that he still has pain. He can't sleep due to the symptoms. Follow-up visit for the right shoulder symptoms are relieved by rest. Examination. No change in overall clinical picture awaiting medical clearance. PX 4, p 32.

On 7/24/19 SURGERY Illinois Hand & Upper Extremity Center LLC Prasant Atluri, MD. Procedure performed: 1. Right shoulder arthroscopy with extensive debridement of superior labrum, partial thickness subscapularis tendon tear, synovitis, capsulitis; 2. Arthroscopic anterior capsular release with manipulation of glenohumeral joint; 3. Arthroscopic subacromial decompression with partial acromioplasty; 4. Arthroscopic distal clavicle excision; 5. Arthroscopic removal of hardware glenohumeral joint (superior glenoid cable and anchor). 6. Arthroscopic double row rotator cuff repair (distal supraspinatus). Postoperative diagnosis: 1. Right shoulder derangement (type I SLAP tear); 2. Right shoulder partial thickness rotator cuff tear (superior subscapularis, articular sided distal supraspinatus). 3. Glenohumeral arthrosis; 4. Arthrofibrosis; 5. Subacromial impingement; 6. Acromioclavicular arthritis; 7. Biceps long head tendon rupture. PX 4, p 50-53.

On 7/24/19 Hand to Shoulder Associates/Prasant Atluri MD. records document: surgery performed RX Norco as needed. PX 4, p 31.

On 7/29/19 Hand to Shoulder Associates/Prasant Atluri MD. records document: presents for postoperative visit. Right shoulder surgery. 5 days post surgical procedure. Patient states they have been compliant with postoperative instructions. Sutures to be removed in a week. PX 4, p 30.

On 8/26/19 Hand to Shoulder Associates/Prasant Atluri MD. the patient states that his shoulder is sore. He has some spasms and his right neck. He feels like the therapy is helping. He has been using his sling as directed. Four weeks post surgical procedure. Patient states they have been compliant with postoperative instructions. Examination. Still has pain and weakness. However he is progressing as expected. Continue therapy. Will wean from sling. Precautions discussed. Anticipate return to light duty work at next visit. PX 4, p 28-29.

On 8/30/19 Dr. Daniel Weber MD/Integrity Orthopedics records document the following. Patient presents for right hip injection arthrogram to be performed under fluoroscopy, Worker's Comp. denied injection, he is now doing it under his personal insurance. Injection right hip arthrography performed without anesthesia. Assessment: unilateral primary osteoarthritis, right hip. Plan light activity for 48 hours follow-up in 6 weeks. PX 5, p 14-15.

Petitioner testified that the injection into his hip helped relieve the pain for a few weeks and then it started back, bothering him. T 27.

On 9/16/19 Hand to Shoulder Associates/Prasant Atluri MD. records document: shoulder is still painful. He is not sleeping well. He has been compliant with his restrictions. Therapy is helping.

7 weeks post-surgical procedure. Will discontinue sling. Advanced therapy per protocol. Returned to work issues discussed in detail. The medical rationale for the assignment of temporary restrictions to allow the patient to return to a light duty position safely was explained. PX 4, p 27.

On 9/20/19 Dr. Daniel Weber MD/Integrity Orthopedics records document the following. Follow-up on right hip OA-patient states the hip is about the same. Maybe the injection helped some. Assessment: unilateral primary osteoarthritis right hip; stable, acute exacerbation location right hip. Strain of muscle, fascia and tendon of right hip, initial encounter. Anthony's groin pain is considerably better after the injection so I think that that indicates a good response to the injection. He still has some residual pain that seems more muscular and were going to try a course of therapy and see him in 4 weeks. PX 5, p 11-13.

On 10/14/19 Hand to Shoulder Associates/Prasant Atluri MD. document: patient states that his right shoulder is still painful. He still cannot sleep in bed. He feels as if his shoulder is still more painful than preop. Therapy is helping. No new injuries. Assessment: localized osteoarthritis of right shoulder region; rotator cuff impingement syndrome right shoulder; traumatic incomplete tear of right rotator cuff. Overall the patient exam continues to improve. Motion and strength are on target for nearly 3 months postop. However, he still has more pain than anticipated at this point. Patient was reminded that recovery following revision surgery is commonly more prolonged. We will continue therapy for now. Symptoms do not approve as expected, we will consider a steroid shot at next visit. PX 4, p 25-26.

On 11/25/19 Hand to Shoulder Associates/Prasant Atluri MD. records document: patient states that his pain is improved since last visit. However, he continues to struggle in therapy. He states that strengthening with 2-pound causes pain when he elevates his arm. The pain is superior and posterior. No new injuries. I recommend a steroid injection to help improve his symptoms. He has elected to proceed with the injection which was done without difficulty. Continue therapy. 1% lidocaine ACL injection. PX 4, p 22-23.

On 1/6/20 Hand to Shoulder Associates/Prasant Atluri MD. records document: patient states his shoulder feels better since the injection. He states that therapy is helping. He feels a sharp pain when he elevates his arm above shoulder level. This is more prominent when he is lifting. No new injuries. The pain is primarily along the anterior joint line. The most problematic symptoms are likely due to the osteochondral defect on the humeral head, which was identified arthroscopically. I explained that this may remain symptomatic. We briefly discussed the possibility of a resurfacing procedure in the future if it is too painful. At this point, he is improving. We will continue supervised therapy and advance his restrictions. Return to work issues discussed. PX 4, p 20-21.

On 1/31/20 through 3/13/20 Work Right records document: OV/ physical therapy. PX 2, p 382-420.

On 2/10/20 Hand to Shoulder Associates/Prasant Atluri MD. records document: patient states that his shoulder feels a lot better. He actually feels fine with tasks below shoulder level. He feels pain when he tries to do lifting with his arm elevated. Overall the patient has improved. He still

has mechanical pain associated with overhead lifting. However, this is expected to persist. We discussed options. At this point he agrees that he wants to try to get back to his regular job. He is not interested in any further invasive treatment. Proceed with modified work conditioning program. RX return to work unrestricted 2/10/20. We will proceed with the modified work conditioning program 3 times a week times 4 weeks. Anticipate a return to full duty work at next visit. PX 4, p 18-19.

On 3/4/20 Daniel Weber MD/Integrity Orthopedics. Records document the following. OV, follow-up on right hip osteoarthritis patient states the hip is painful again, the injection helped for a few months. Assessment: sacroiliitis, not elsewhere classified right; unilateral primary osteoarthritis right hip; stable, acute exacerbation. Plan he did get a response to the hip injection we gave him last fall. His symptoms however are certainly somewhat atypical. I recommended to him that we try and SI joint injection and if that's not helpful we may try and intra-articular injection. He's going to get that scheduled. PX 5, p 8-10.

On 3/6/20 Daniel Weber MD/Integrity Orthopedics records document the following. Patient presents for right SI joint injection/arthrogram to be performed under fluoroscopy. Injection hip arthrography without Anastasio. Assessment: sacroiliitis, not elsewhere classified, condition stable, acute exacerbation, location right. PX 5, p6-7.

On 3/9/20 Hand to Shoulder Associates/Prasant Atluri, MD. records document the following. Patient states work conditioning is going well. He still has some pain and weakness, but he feels like he can handle his usual work duties. No change in the past medical history since last visit. 55-year-old male presenting for a follow-up visit. The follow-up visit is for the right shoulder. Patient is 7 months post operative procedure. The course has been improving. Assessment and plan. Localized osteoarthritis arthritis of the right shoulder region; traumatic incomplete tear of right rotator cuff, subsequent encounter. Avulsion of right super scapularis, right rotator cuff impingement syndrome right shoulder; right joint arrangement. Return to work 3/9/20. Unrestricted work. Still has some pain. His strength has improved. He is motivated to resume work and feels like he can tolerate his regular work duties. He will complete final couple of sessions of work conditioning and then resume full duty work. Final check anticipated in 2 months if he is doing well. PX 4, p 16-17.

On 3/13/20 Workright records document: OV/ physical therapy. Chief complaint right shoulder pain, right hand right hip lower back; diagnoses: 1. Strain of muscles, tendon rotator cuff right shoulder; 2. Strain of muscles, fascia tendon right hip; 3. Pain in right shoulder; 4. Pain in right hip. Plan of care: patient to continue with therapy as per attending physician's recommendation to work on range of motion, stretching, strengthening conditioning modalities progressing as tolerated. PX 2, p 418-420.

Petitioner testified that on 3/16/20 he returned to his same job, full duty. He performed all the same activities that were required of the job. T 29.

On 5/6/20 IME Charles A Bush Joseph MD. Prior IME examination on 4/24/19 patient complains of pain following work-related injury to the right shoulder on 8/24/18. Employed as a heavy equipment operator Department of Transportation for approximately 9 years. He injured

his right shoulder and right hip while performing Highway lawn mowing activities. Apparently, he blew a tire on his unit and his unit tipped over producing the injuries as noted. Patient did have a history of prior problems including a right shoulder arthroscopy, labral debridement by Dr. Preston Wolin 2008. He has undergone a 2nd injury to his left shoulder in 2015 which was surgically treated by Dr. Atluri. At the time of my examination, I felt patient did suffer work-related injury to the right shoulder was rotator cuff impingement and AC joint injuries that warranted surgical management. He was eventually taken to surgery on 7/24/19 and underwent a right shoulder arthroscopy with extensive debridement, subacromial decompression, distal clavicle excision, glenohumeral debridement. A full thickness rotator cuff tear was identified and the cuff repair was performed. During the course of his recovery, which seemed to be uncomplicated, he was also treated for unilateral primary osteoarthritis of the right hip. He underwent a hip injection by Dr. Daniel Weber on 9/4/19 with short-term relief. By 11/25/19 his examination with Dr. Atluri revealed that he had significant relief of his shoulder pain and was making appropriate progress in physical therapy and rehabilitation. He did receive a subacromial injection to help alleviate some soreness and improve his physical therapy participation. By 3/6/20 the patient had made appropriate progress during work conditioning and work hardening with increased fitness and tolerances. He was examined by Dr. Atluri on 3/9/20, at which point he made sufficient progress and it was safe for him to return to work on full duty basis unrestricted as a 3/9/20. The patient states in that interval he has continued to work on full duty basis with some level of soreness and discomfort but he is able to work through and tolerated his condition. He currently takes occasional medication over-the-counter Tylenol. He does not smoke cigarettes. He is otherwise in good health. 5'8" 250 pound black male no apparent distress. Physical examination he does have moderate subacromial crepitation on circumduction of the shoulder with overhead motion. Right elbow wrist hand exam are normal. Medical treatment to this point has been reasonable and appropriate. No further medications are required nor necessary at this point. No further care nor treatment is necessary at this point, the patient is at a functional plateau, in my opinion he is able to continue to work full duty unrestricted. Some residual soreness and discomfort can be expected given the fact the patient has undergone 2 prior shoulder interventions of both the left and right shoulder. He has no restrictions to the work activities described in his job description. I do believe that the work related accident of 8/24/18 did aggravate the pre-existing AC joint arthritis and may potentially have caused a partial thickness rotator cuff tear of the right shoulder necessitating treatment. Patient is at maximum medical improvement. No further care or treatment is warranted.

Petitioner testified that on 3/21/20 TTD was terminated based on IME report of Dr. Bush Joseph T 30-31. He has not returned to see Dr. Atluri or any other doctor for his right shoulder after he was released on March 9, 2020. T 31.

Petitioner testified he did return one more time to Dr. Weber. That was in 2021 when he received an injection. He received a total of 3 injections from Dr. Weber into his hip. He has not seen or consulted any other doctor for his right hip. T 31-32.

At hearing petitioner testified that he now performs work activities different from the way he performed them before the accident on August 24, 2018. He does not lift the same weight. He

does not lift anything over 50 pounds. He can't lift that weight over his head. He has to have help at work to do that. He can only now trim trees for a limited amount of time before his shoulder starts bothering him because it requires him to reach up. On the highway the weeds are really thick so in using the weed whacker the motion requires a lot of force with the weed whacker and that bothers his shoulder. He needs help with activities at work now that he didn't need before the accident. He testified he cannot lift out and up. He has to lift in towards his body and use more leverage with his body when lifting anything over his head. T 33. He can lift his right arm with nothing in it over his head but it sometimes causes popping. The problem at work is when he has to lift weight with his right arm. The maximum weight that he can lift away from his body without having a problem is right shoulder is 25 to 30 pounds. T 34. He can lift 50 pounds over his head without having a problem in his right shoulder, but that is the limit. The weight demand of his job is 75 pounds. Sometimes he would have to lift truck tires and throw them in the back of the dump truck. He can no longer do that by himself anymore. He has to get help getting the tractor tire up to the side of the truck, and then pushing it into the truck. The tractor tires weigh over 50 pounds. T 35.

Petitioner testified that home activities like painting overhead and lifting anything to put up in the attic or up in the rafters of the garage, creates a problem so that sometimes he cannot do it. If he does it for an extended period of time that can cause pain in the arm. He takes Tylenol at the end of the day when he is sore. He is not able to do the same things he used to do because of his shoulder; it gets fatigued faster. T 36.

Petitioner testified that sitting for a long time gives him the most problem with his hip. In the wintertime when he is loading trucks, he has to sit in the loader all night and he has problems with his hip. He has to get out of the loader and stretch his hip because it starts bothering him. When he is picking up papers on the inclines on the side of the highways, the incline bothers his hip, so he does not do the incline as much. They tell him to stay low if it bothers him, and that helps. T 37.

Conclusions of Law

With respect to Paragraph F, Is Petitioner's Current Condition of Ill-Being Causally Related to the Injury, the Arbitrator finds as follows:

The weight of credible evidence in this record demonstrates that Petitioner was able to perform his physically demanding job of highway maintenance /heavy equipment operator with respondent for at least four years prior to the date of the August 24, 2018, work accident, without any complaint or problem with his right shoulder and his right hip. His job required him to operate tractor lawnmowers, lift up to 75 pounds, operate heavy equipment consisting of front loaders, bobcats, skid steer attachments for milling and jack hammering and backhoes. T11-12. He was able to trim trees which required overhead activity. He was able to do that without any complaint or problem with his right shoulder. T 36. He could sit in the loader during the wintertime all night loading the salt trucks, without any problem to his right hip. T 37. Petitioner

credibly testified that the large tire on the tractor mower he was operating blew causing the tractor mower to hit the guardrail causing his body to be twisted and bouncing him. He felt immediate onset of pain in his right shoulder and his right hip. The supervisor took him from the scene of the accident to the Advocate Occupational Health Hazel Crest. Medical records document history of the onset of the symptoms with the work accident consistent with the testimony of Petitioner at hearing. Medical records further document ongoing complaints of right shoulder pain and right hip pain. These complaints were initially addressed conservatively with physical therapy and work restrictions. Conservative management did not resolve the complaints of pain in the right shoulder and right hip. Dr. Atluri performed injection into the right shoulder which provided temporary relief but did not resolve complaints of pain. Records document that as a result, Dr. Atluri performed surgery on Petitioner's right shoulder on 7/24/19 described as: Procedure performed: 1. Right shoulder arthroscopy with extensive debridement of superior labrum, partial thickness subscapularis tendon tear, synovitis, capsulitis; 2. Arthroscopic anterior capsular release with manipulation of glenohumeral joint; 3. Arthroscopic subacromial decompression with partial acromioplasty; 4. Arthroscopic distal clavicle excision; 5. Arthroscopic removal of hardware glenohumeral joint (superior glenoid cable and anchor). 6. Arthroscopic double row rotator cuff repair (distal supraspinatus). Postoperative diagnosis: 1. Right shoulder derangement (type I SLAP tear); 2. Right shoulder partial thickness rotator cuff tear (superior subscapularis, articular sided distal supraspinatus). 3. Glenohumeral arthrosis; 4. Arthrofibrosis; 5. Subacromial impingement; 6. Acromioclavicular arthritis; 7. Biceps long head tendon rupture. PX 4, p 50-53. Dr. Atluri noted his diagnosis of Petitioner's condition as "traumatic incomplete tear of right rotator cuff." PX 4, p 25-26. After that surgery Dr. Atluri's records document Petitioner continued to have more pain than anticipated but noted that the recovery following revision surgery is more commonly prolonged. PX 4, p 25-26. As a result, Dr. Atluri performed a post-surgery injection into the right shoulder on 11/25/19. PX 4, p 22-23.

The medical records in evidence also document onset of the right hip symptoms with the work accident consistent with Petitioner's testimony at hearing. Petitioner's treating physician for the right hip, Dr. Daniel Weber, stated in his records that Petitioner had a unilateral primary osteoarthritis of the right hip with an acute exacerbation noting that Petitioner has been having pain since the accident last August. Dr. Weber stated: "I believe that an arthritic exacerbation with possibly some labral pathology is what is going on. I have recommended that we proceed with a hip injection under fluoroscopy and we are going to try to get that approved." PX 5, p 16-18. Dr. Atluri performed a right hip injection on 8/30/19. PX 5, p 14-15.

Consistent with the opinions of Petitioner's treating physicians with regard to the right shoulder injury, Respondent's IME, Charles A. Bush Joseph, MD, in his IME report of 4/24/19 opined that Petitioner's current work related injury to his right shoulder, necessitating surgical management, is indeed due to a work-related injury, which occurred on August 24, 2018. RX 1.

Dr. Bush Joseph in that same IME report dated 4/24/19 opined, "I believe the symptoms of his right hip are pre-existing in nature and are due to underlying osteoarthritis. I do not believe there is any specific work related injury or event that aggravated or accelerated the current condition." RX 1.

The Arbitrator finds that the opinions of Dr. Bush Joseph are not consistent with the weight of other credible evidence in this record. There is no indication in this record that Petitioner had any symptom or problem with his right hip that caused him to seek medical treatment prior to the work accident of August 24, 2018. Petitioner credibly testified he did have one episode of hip pain in February, 2018 prior to the work accident for which he had therapy. He did not miss any time from work and continued to perform all his work activities after that therapy in February 2018 up to the date of the accident on August 18, 2018. There is no evidence in this record to contradict that. Dr. Bush Joseph offers no explanation of the onset of the right hip symptoms with the work accident as testified by Petitioner and as documented in medical records in evidence. Dr. Bush Joseph states, "there is no evidence of a specific traumatic mechanical event as result of a work related injury, current conditions of underlying arthritis." RX 1. Although there is no dispute that Petitioner did have pre-existing underlying arthritis of the right hip, there is no evidence in this record that the pre-existing arthritis in the hip caused any problem that prevented Petitioner from doing all the activities of his physically demanding job. The weight of credible evidence of record demonstrates a traumatic event when the tire on the tractor Petitioner was operating blew, causing the tractor to hit the guardrail causing Petitioner to twist his body and bounce with the immediate onset of symptoms in both the right shoulder on the right hip. The Arbitrator finds the opinions of Dr. Bush Joseph regarding the causation of Petitioner's right hip problems to be less credible than the opinion of Petitioner's treating physician, Dr. Weber, as stated in his medical records.

A work-related injury need not be the sole or principal causative factor, as long as it was a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v Industrial Commission*, 207 Ill. 2nd 193, 205 (2003). Thus, even if the claimant had a pre-existing 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. *Sisbro, Inc. v Industrial Commission,* 207 Ill. 2nd 193, 205 (2003). 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 pre-existing condition. *Mason & Dixon Lines, Inc. v. Industrial Commission,* 99 Ill. 2nd 174, 181 (1983); *Azzarelli Construction Co. v. Industrial Commission,* 84 Ill. 2nd 262, 266 (1981). A claimant may rely on a "chain of events" in his or her case to demonstrate the aggravation or acceleration of a pre-existing condition. See *Schrader v. Illinois Worker's Compensation Commission,* 2017 Ill. App. 4th 160192 WC. PP 25-29.

Based upon the weight of credible evidence in this record the Arbitrator finds under a chain of events analysis and the credible opinions of the treating physicians, that Petitioner's current condition of ill-being of Petitioner's right shoulder and his right hip, are causally related to the work accident of August 24, 2018.

With respect to Paragraph J, Were the Medical Services That Were Provided to Petitioner Reasonable and Necessary? Has Respondent Paid All Appropriate Charges for All Reasonable and Necessary Medical Services? The Arbitrator finds as follows:

The Petitioner claims respondent is responsible to pay the unpaid bill identified in Petitioner Exhibit 6 which documents physical therapy administered Petitioner's right shoulder and right hip provided by Work Right Occupational Health. The Arbitrator has found that the current condition of Petitioner's right shoulder and Petitioner's right hip are causally related to the work accident of August 24, 2018. The Arbitrator finds that the physical therapy provided to Petitioner as identified in the bill of Work Right Occupational Health and the charge for those services is reasonable, necessary and causally related medical treatment of the work injury. Respondent shall pay reasonable and necessary medical services of medical providers as identified in Petitioner Exhibit 6 and as provided in Sections 8(a) and 8.2 of the Act.

With respect to Paragraph L, What Is the Nature and Extent of the Injury, the Arbitrator finds as follows:

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 maintenance heavy equipment operator at the time of the accident. The evidence demonstrates that this is a physically demanding job which required him to lift up to 75 pounds with overhead lifting, trimming trees, working on inclined slopes and extensive sitting operating machinery to load trucks. He was able to return to work in his prior capacity. However the Arbitrator notes that as result of the injury to Petitioner's right shoulder and to his right hip he now has to request assistance when he lifts anything over 50 pounds. He experiences pain performing the same activities he previously performed. He must sit in the loader all night when he is loading salt trucks in the winter and has to now step out of the vehicle to stretch his hip. He performs the job differently from the way he performed prior to the work accident; the Arbitrator therefore gives greater weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 54 years old at the time of the accident. The Arbitrator finds that the impact of the injury on his aged body is more pronounced than would be on a younger person. The Arbitrator therefore gives *greater weight* to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes there is no evidence in the record of an impact on Petitioner's earning capacity. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes the medical records document that Petitioner underwent a right shoulder surgery performed by Dr. Atluri described as: Procedure performed: 1. Right shoulder arthroscopy with extensive debridement of superior labrum, partial thickness subscapularis tendon tear, synovitis, capsulitis; 2. Arthroscopic anterior capsular release with manipulation of glenohumeral joint; 3. Arthroscopic subacromial decompression with partial

acromioplasty; 4. Arthroscopic distal clavicle excision; 5. Arthroscopic removal of hardware glenohumeral joint (superior glenoid cable and anchor). 6. Arthroscopic double row rotator cuff repair (distal supraspinatus). Postoperative diagnosis: 1. Right shoulder derangement (type I SLAP tear); 2. Right shoulder partial thickness rotator cuff tear (superior subscapularis, articular sided distal supraspinatus). 3. Glenohumeral arthrosis; 4. Arthrofibrosis; 5. Subacromial impingement; 6. Acromioclavicular arthritis; 7. Biceps long head tendon rupture. PX 4, p 50-53. Post surgery recovery was complicated by continuing pain in the right shoulder during therapy requiring a post surgery injection into the right shoulder. PX 4, p 22-23. Postsurgery complaints of right shoulder pain continued and Dr. Atluri noted The pain is primarily along the anterior joint line. The most problematic symptoms are likely due to the osteochondral defect on the humeral head, which was identified arthroscopically. I explained that this may remain symptomatic. We briefly discussed the possibility of a resurfacing procedure in the future if it is too painful. PX 4, p 20-21. Dr. Atluri noted on 2/10/20 post surgery, He feels pain when he tries to do lifting with his arm elevated. Overall the patient has improved. He still has mechanical pain associated with overhead lifting. However, this is expected to persist. PX 4, p 18-19. Petitioner credibly testified of the problems he has performing lifting activities of his job with his right arm. He no longer lives anything over 50 pounds because of the pain in the right shoulder. Overhead activities both at work trimming trees and at home moving or lifting anything into the storage spaces in the rafters of the garage, create pain in the right shoulder.

Medical records of Dr. Weber document Petitioner's continuing complaints of pain after the August 24, 2018 work injury to the right hip. Records document that Dr. Weber performed injection into the hip on 8/30/19. That injection helped somewhat Petitioner continued to have pain which required course of physical therapy. A 2nd injection into the right hip by Dr. Weber was performed on 3/6/20. PX 5, p6-7. Petitioner credibly testified that when he has to operate the loader during the wintertime loading the trucks with salt his job requires him to sit in the loader throughout the whole night. That causes pain in his right hip so that he has to step out of the loader to stretch his hip to address the pain.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 25% loss of use of the man as a whole pursuant to section 8(d)2 of the Act as a result of the injury to his right shoulder.

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 13% loss of use of the right leg pursuant to section 8(e) of the Act as result of the injury to his right hip.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC003685
Case Name	Michael Varrero v. Dutch American Foods
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0089
Number of Pages of Decision	16
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Nikitas Fudukos
Respondent Attorney	Ryan M. Regan

DATE FILED: 2/22/2024

/s/Carolyn Doherty, 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 Down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MICHAEL VARRERO,

Petitioner,

vs. NO: 22 WC 3685

DUTCH AMERICAN FOODS,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) of the Act 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, prospective care, and temporary total disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part thereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill. 2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

The Commission modifies the Decision of the Arbitrator regarding the issue of medical expenses. The Arbitrator ordered Respondent to pay for the reasonable and necessary medical services, as provided in Petitioner's Exhibits 2 through 8, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act, awarded Respondent a credit for any payments made towards the awarded outstanding expenses, and ordered Respondent to hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act. The Commission modifies this award only to exclude a $25.00 charge by Midwest Orthopaedics at Rush for failing to appear for treatment on May 18, 2022, which appears in Petitioner's Exhibit 8.

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 September 1, 2023, is modified as stated herein. The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay for Petitioner's reasonable and necessary medical services, as provided in Petitioner's Exhibits 2 through 8, in the amount of $5,547.10 (a figure which excludes the $25.00 "no show" charge) in unpaid charges pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for any awarded medical benefits that have been paid by Respondent, 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, if any.

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

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

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

Bond for the removal of this cause to the Circuit Court is hereby fixed at the sum of $18,300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

February 22, 2024
o: 2/15/24
CMD/kcb
045

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

/s/ *Marc Parker*
Marc Parker

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC003685
Case Name	Michael Varrero v. Dutch American Foods
Consolidated Cases	
Proceeding Type	19(b)/8(a) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Paul Cellini, Arbitrator

Petitioner Attorney	Nikitas Fudukos
Respondent Attorney	Ryan M. Regan

DATE FILED: 9/1/2023

THE INTEREST RATE FOR THE WEEK OF AUGUST 29, 2023 5.35%

/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
19(b)/8(a)

MICHAEL VARRERO Case # **22** WC **03685**
Employee/Petitioner
v.
DUTCH AMERICAN FOODS
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Cellini**, Arbitrator of the Commission, in the city of **Joliet**, on **June 16, 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, **January 3, 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 $**26,041.08**; the average weekly wage was $**500.79**.

On the date of accident, Petitioner was **59** years of age, ***married*** with **0** dependent children.

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

Respondent shall be given a credit of $**11,933.00** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**11,933.00**.

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 cervical, lumbar, right elbow and right knee conditions are causally related to the January 3, 2022 accident. The Arbitrator further finds that the Petitioner reached maximum medical improvement with regard to the lumbar spine, right elbow, and right knee well prior to the hearing in this case.

Respondent shall pay Petitioner temporary total disability benefits of **$333.86 per week** for **73-6/7 weeks**, commencing **January 18, 2022 through June 16, 2023**, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of **$11,933.00** for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical expenses contained in Petitioner's Exhibits 2 through 8, as provided in Sections 8(a) and 8.2 of the Act.

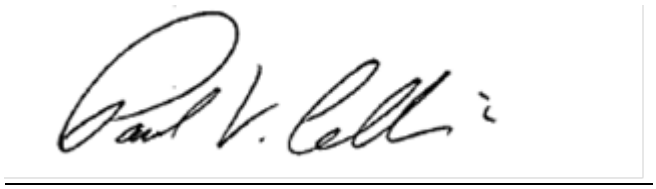
Respondent shall be given a credit for any awarded medical benefits that have been paid by Respondent prior to the hearing, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall authorize the upper extremity EMG testing recommended and prescribed by Dr. Singh, pursuant to 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.



Signature of Arbitrator

SEPTEMBER 1, 2023

STATEMENT OF FACTS

Petitioner testified he began working for Respondent in approximately January 2021 as a temp worker before being hired by Respondent directly. He worked 10 hour days, five days per week as a custodian with occasional utility worker duties such as driving a forklift. Petitioner testified he underwent a C3/4 cervical fusion with hardware approximately 20 years ago. After being released, he testified he worked as a custodian for 24 plus years for a school district and a manufacturer. The Arbitrator notes when Petitioner was asked if he had any prior spinal surgeries and initially indicated he hadn't, he testified he didn't understand the question.

On 1/3/22, Petitioner was walking in an area where the floor was wet, causing him to slip and fall onto his back. He testified this caused excruciating back pain. He indicated there was nothing identifying the floor being wet. He fell backwards with his arms outstretched, testifying: "Yes, because I am anticipating breaking my fall which I am right handed. So when I fell, I injured my hand, my finger which -- that's when I noticed my arm, my hand and my back." His supervisor, Jose, was standing over him at some point while he was on the floor.

Petitioner initially sought treatment at Frankfort/Steger (hereinafter, Steger) Medical Clinic on 1/7/22. He testified he continued working and waited to seek treatment because he didn't want to lose his job. At some point he was unable to get out of bed and went to Steger Medical, located across the street from his home. A 1/6/22 note from Steger noted no appointments were available and he was to see PA Ebony Williams the next day. (Rx4). The 1/7/22 Steger notes indicate Petitioner was there for follow up after a fall at work with aching pain to the low back and sides, and no numbness in the legs. Petitioner was noted to be assisting in caring for his wife at home. Norco and cyclobenzaprine were prescribed. Petitioner was taken off work for 7 days. A generic diagnosis of low back pain was noted. (Px2; Rx4).

On 1/10/22, the Riverside Clinic, which appears to be the company clinic, notes a history of Petitioner falling at work a few days prior with complaints of elbow pain and swelling. Right elbow x-ray showed no abnormalities. A bill from this visit notes that alcohol and drug testing was performed. This exhibit does not contain any notes referencing Petitioner's specific complaints beyond the right elbow, if any, nor any diagnoses or discharge notes. (Px3). It appears that the bill for the x-ray was $645.00, noting a "patient adjustment" of $461.50 and an

amount due of $183.50. (Px4). The radiologist's bill of $60.00 reflects a $24.78 adjustment and a $33.22 balance. (Px5).

A 1/13/22 lumbar x-ray ordered by Steger Clinic showed no fracture or malalignment with moderate to severe degenerative disc disease that was worse versus 2016 films at L5/S1. The history notes low back pain after a fall at work. (Px6; Rx4). On 1/18/22, Petitioner told Dr. Asadullah (Steger Clinic) he returned to work on 1/8/22 despite being advised to stay off work. At this visit he complained of low back and right knee pain, referencing a 1/6/22 fall at work. It was noted he was seen at the Riverside with complaints of the right elbow, right knee, muscle spasm, and inability to move well, and he was limited to no lifting over 15 pounds. Petitioner was held off work for 5 days, with the note referencing back and right knee pain. (Px2; Rx4).

Petitioner testified he last worked for Respondent on 1/18/22, and that he had been terminated due to a failed 1/10/22 drug test. He currently remains unemployed.

1/19/22 right knee x-rays ordered from Steger showed no fracture or dislocation. 1/25/22 follow up at Steger noted the x-ray results and this time noted he fell at work on 1/7/22. Diagnoses were right knee and low back pain. The x-rays were discussed, and Petitioner was to "continue pain management as ordered no refills until after 2/7/22." (Px2; Px6; Rx4).

Petitioner testified his attorney recommended he see orthopedic surgeon Dr. Singh at Midwest Orthopaedics at Rush. Petitioner initially saw Dr. Singh on 2/15/22. The doctor noted a 1/3/22 work injury where he slipped and fell onto his lower back on a concrete floor and developed low back pain. He complained of pain from the low back into the neck along with bilateral buttock and tailbone pain and bilateral shoulder pain. (8 to 9 out of 10, or 8-9/10). He was taking Norco, Tylenol, and a muscle relaxer. He had a history of C3/4 discectomy/fusion 20 years prior with Dr. Chang "of which he states that he also has worsening neck pain and bilateral shoulder pain." Petitioner denied gait or dexterity issues. Past medical history included depression, stress, elevated thyroid, headache, and hepatitis. He was a 30 year, pack a day smoker. Dr. Singh diagnosed him status post C3/4 ACDF with lumbar and thoracic strains. MRIs of the cervical, thoracic, and lumbar spine, cervical CT scan and off work status were prescribed.

On 2/28/22, Petitioner underwent a cervical CT scan, which showed anterior cervical discectomy and fusion hardware at C6/7 with no loosening, fracture, or migration – "intervertebral spacer grafts at this level with no solid osseous consolidation across the disc space." Also noted was multilevel degenerative disc disease and degenerative misalignment, multilevel facet arthropathy, and right asymmetric disc osteophyte complex at C3/4, C4/5 and C5/6 contributing to severe stenosis of the spinal canal. The radiologist also notes the most severe foraminal stenosis was at right C3/4 and left C5/6. A cervical MRI was performed on the same date, and these films also noted the prior C6/7 discectomy and fusion, and the findings otherwise were very similar to the CT findings, including severe spinal stenosis from C3 to C6. (Px8).

The 2/28/22 lumbar MRI showed degenerative disc and facet disease throughout the lumbar spine, and a disc-osteophyte complex at L5/S1 with lateral recess stenosis, right greater than left, marginalizing the right S1 nerve. There also was a left asymmetric L4/5 disc protrusion effacing the left lateral recess with potential compromise of the left L5 nerve, a shallow L3/4 disc protrusion with annular fissure, and moderate right foraminal stenosis at L5/S1. Mild foraminal stenosis was noted at multiple lumbar levels, and there was mild retrolisthesis at L2/3 and L5/S1. Thoracic MRI showed degenerative disc and facet disease throughout the thoracic spine with a small central T7/8 protrusion with slight canal stenosis. (Px8).

Dr. Singh reviewed the film studies on 3/15/22, while Petitioner reported low back and neck pain into the shoulders and buttocks, as well as burning, stabbing, aching, numbness, and tingling, along with subjective

weakness in all extremities. Dr. Singh noted evidence of non-union of the prior cervical fusion, moderate to severe stenosis at C4/5 and C5/6, and degenerative L5/S1 disc disease. He prescribed four weeks of physical therapy for the entire spine as well as Mobic. Nothing was indicated at this visit as to work status. (Px8).

On 4/6/22, Petitioner told Dr. Singh's office he was unaware that therapy had been prescribed, noting he recently had a death in the family and was having difficulty coping. He denied any recent spinal treatment. He reported neck and back pain that was worse than any pain referred into the extremities. Dr. Singh held him off work and again prescribed therapy and Mobic. (Px8).

On 4/19/22, Steger Clinic noted a prior medical history of hypertension and anxiety disorder, and that Petitioner was following up for complaints of chronic low back and neck pain. He had run out of muscle relaxers early and had tested positive for THC in February during a routine drug screen. It was noted he had seen neurosurgeon Dr. Singh, who had prescribed Robaxin and therapy. He was referred to pain management with a diagnosis of chronic pain syndrome. (Px2; Rx4).

It appears that the initial physical therapy evaluation took place at Rush on 4/19/22 or 4/20/22. The note indicates Petitioner reported his wife passed away in May 2021, and that he hadn't worked since 1/3/22 and had been terminated by Respondent. He noted his supervisor was present when he slipped and fell at work and assisted him off the floor. The therapy note indicates that he completed an accident report and was offered hospital care but declined: "He reports he was able to work the next day full duty but reports on 1/5/22 he had difficulty getting out of bed due to back pain", after which he went to his primary provider and called his lawyer due to difficulty obtaining the medication prescribed. Therapy sessions were performed on 4/20/22, 4/25/22 and 4/26/22. (Px8).

Petitioner next followed up with Dr. Singh's assistant on 5/4/22, who noted he'd only had three therapy sessions since his last visit. Petitioner was advised that he would not see benefit without consistent therapy, and while he was agreeable, he indicated he wasn't able to schedule it due to insurance issues and having recently lost his wife. PA McGee again prescribed four weeks of therapy and off work. (Px8).

Therapy resumed on 5/5/22, at which time the therapist notes Petitioner stated that Dr. Singh or PA McGee suggested a cervical fusion or spine reconstruction needed to be done but for now he was to continue therapy and medication. Further therapy sessions were held on 5/5/22, 5/9/22, 5/11/22, 5/13/22, 5/16/22, 5/19/22, and 5/24/22. He was a no-show on 5/18/22, reporting he was in too much back pain for therapy. (Px8).

On 6/1/22, Petitioner returned to Dr. Singh's office and was examined by PA McGee. He reported no significant benefit with 12 sessions of therapy. He was taking Norco as needed. Petitioner reported the neck pain was going into the biceps/triceps area and was significantly debilitating. PA McGee prescribed EMG testing of the bilateral upper extremities and continued Petitioner off work pending follow up. (Px8).

Petitioner was examined by orthopedic surgeon Dr. Ghanayem (Loyola) on 8/18/22 at the request of Respondent pursuant to Section 12 of the Act. He initially notes Petitioner works as a standup forklift driver. He states that he reviewed records, films, and examined Petitioner. Complaints were of left sided low back pain and pain at the base of the cervical spine with referred pain into the bilateral triceps and elbows. His examination was essentially normal with tenderness at the cervical base and normal neurologic findings. His review of cervical MRI showed longstanding multilevel disc degeneration at every level, both above and below the prior fusion, with no spinal cord signal changes. Lumbar MRI also showed longstanding disc degeneration. Dr. Ghanayem opined that Petitioner's neck and back complaints were soft tissue in nature, with normal neurologic findings and longstanding MRI findings. A brief course of physical therapy was reasonable for the lumbar

spine. He believed Petitioner had reached maximum medical improvement (MMI) and was able to return to his full work duties. (Rx4).

Petitioner testified that his TTD benefits were terminated following this examination.

Petitioner returned to Dr. Singh's office on 6/1/22. Tramadol was prescribed, EMG was again ordered, and Petitioner was continued off work. On 10/5/22, Dr. Singh referenced Dr. Ghanayem's opinions. He continued to recommend the EMG and to hold Petitioner off work on 10/5/22 and 11/2/22. (Px9).

On 3/17/23, Petitioner went to the Franciscan Health Olympia Fields ER after falling at home. The report references Petitioner with "chronic neck and lower back pain status post cervical spinal fusion 20 years ago with mechanical slip and fall today." Nothing more detailed is noted other than that he didn't strike his head or lose consciousness. The triage notes indicate he denied being a smoker. Petitioner complained of acute onset of neck, shoulder, and low back pain after this fall. He denied numbness, tingling, or weakness. Prior medical history noted localized osteoarthritis of the ankle and foot. Cervical CT testing showed no acute fracture or compression deformity, no evidence of hardware failure in the lower cervical spine, and moderate to severe multilevel degenerative changes with grade 1 subluxations of the middle cervical spine. Lumbar x-rays showed no acute findings with moderate to severe L5/S1 degenerative changes with no significant change. Bilateral shoulder x-rays showed no acute changes. Cervical and lumbar strains were noted to be chronic, while shoulder contusion was acute. A cervical collar was issued, and Petitioner was advised to follow up with his primary provider and neurosurgeon. (Rx3).

Respondent submitted a number of pre-accident records relating to Petitioner from Steger Clinic. He established care at this facility on 11/1/19. Prior medical histories of depression and alcoholism (but 5 years sober) were noted, including that he was on lithium previously and had a history of hepatitis C. He noted high stress and that he was taking care of a wife with cardiac issues. The diagnosis included depression, and Petitioner was prescribed Lexapro, Xanax, Losartan and ASA. A 12/6/19 visit referenced issues with blood sugar and dermatitis of the hands. On 4/3/20, Petitioner indicated he was feeling well at a telehealth visit during Covid, and his medications were refilled. On 7/31/20, Petitioner again reported he was feeling well with his anti-depressants and blood pressure, and his medications were again refilled. On 11/24/20, Petitioner's medications were again refilled. Diagnoses at this point included diabetes and hypothyroidism. On 2/23/21, Petitioner again indicated he was feeling good, and his medications were refilled. As part of the treatment plan in these records, an abbreviation is often noted, CPM, with no explanation as to what this means in this case. On 3/23/21, Petitioner returned to Steger Clinic with complaints of severe left hand pain without any known injury. His meds were refilled, and Prednisone was prescribed. On 4/30/21, Petitioner returned for follow up and with complaints of fatigue. Labs were ordered. On 6/22/21, Petitioner advised that he had been feeling good, with occasional use of depression medications, and he noted he had started a new job. A B12 injection was performed. On 10/26/21, Petitioner complained of limited right hand use due to increased pain and stiffness in the right 3rd finger. He was diagnosed with right hand pain and trigger finger, and Dr. Asadullah restricted Petitioner to light duty with no lifting over 5 pounds with the right hand. At 11/2/21 follow up, Petitioner was noted to have a frozen 4th finger, and his anxiety was increasing due to fear of losing his job. He had severe hand pain and inability to hold items without dropping them. He was continued on work restrictions and referred to an orthopedic specialist for right hand trigger finger. (Rx4).

Dr. Singh testified on 3/15/23 via deposition. Petitioner on 2/15/22 advised that when he slipped and fell, he developed low back pain as well as reported to treater Dr. Chang neck and bilateral shoulder pain. The Arbitrator notes this appears to be a clerical error by Dr. Singh in that there is no evidence Petitioner saw Dr. Chang after the 1/3/22 accident. Exam reflected a little bit of trace deltoid and bicep weakness, as well as in the tibialis which controls the ability to raise his foot up. The diagnoses were cervical and lumbar strains. He was

aware Petitioner had a 20 year old prior cervical fusion. Thoracic MRI was essentially normal. The lumbar spine had a little decreased signal at L5/S1 but nothing of structural significance. Cervical spine MRI showed solid fusion at C6/7 and there was adjacent level stenosis, particularly at C4/5 and C5/6. Cervical stenosis was an added diagnosis and therapy and anti-inflammatories were prescribed. He then had improvement in lumbar strength ("that was normalized") but had persistent half-grade weakness in the cervical spine. Per his 5/4/22 report, Petitioner was having therapy authorization issues. Given persistent symptoms and the prior fusion, Dr. Singh requested an upper extremity EMG on 6/1/22. By the 10/5/22 visit, Petitioner had been examined by Dr. Ghanayem, who found Petitioner had reached MMI and was full duty with a resolved cervical strain. In his opinion, Ghanayem's report was "very terse", did not reflect what records he reviewed, and his review of the MRIs was "very cursory" with no comment on specific spinal levels. Dr. Singh continued to recommend the EMG on 11/2/22, noting no changes in symptoms or exam findings. Petitioner had the prior cervical fusion, a half grade of motor weakness and multilevel cervical disease. He opined the pathology is coming from C4/5 and C5/6: "This provides an independent objective correlation with that and his pain complaints and my neurological findings. So the EMG validates his compression of the MRI and hopefully localizes it to one of two pathological levels." (Px9).

Dr. Singh opined that Petitioner's condition is related to the January 2022 fall via an aggravation of his underlying degenerative condition, specifically C4 to C6 spinal stenosis, that had not returned to a baseline state. His understanding is Petitioner did not have similar symptoms prior to the accident. Dr. Singh testified Petitioner's pain complaints correlated with C5 and C6 radiculopathy, he had objective findings of weakness in C5 and C6 distribution in the deltoid and biceps present for several months, and he had MRI findings at those levels above the prior fusion which correlates with his pain complaints and weakness. The fusion itself is solid and not causing the symptoms. In Dr. Singh's opinion, Petitioner had not reached MMI and needed the EMG, which will assist in determining next steps up to potential surgery. (Px9).

On cross examination, Dr. Singh agreed he didn't know how Petitioner fell. He was not aware of Petitioner seeing any other physicians between the accident date and his first visit with him on 2/15/22 and didn't review any records. Respondent's counsel identified a 4/20/22 physical therapy report stating Petitioner reported a prior history of right ring finger pain for which he was sent to Rush. While Dr. Singh did not document any complaints in a C8 dermatome, he agreed symptoms in the ring finger could be caused by C8 dermatome problems. He indicated he had no way to know what the therapist was referring to as to C8 dermatome and the therapist should be deposed for that info. He can only testify about his own exams. As to whether he was aware of Petitioner having any pre-accident symptoms in a C8 dermatome patters, Dr. Singh testified that, first, symptoms in a location can involve overlapping levels, and secondly, he could not say what symptoms Petitioner had 20 years ago that led to his fusion surgery. Dr. Singh agreed that Petitioner's lumbar spine injury, a strain, had reached MMI. There was no thoracic injury. He agreed at Petitioner's age its not surprising that Petitioner has cervical spinal stenosis or that he has stenosis at levels adjacent to the prior fusion. While he agreed there are many ways spinal stenosis could be aggravated, Dr. Singh did not believe Petitioner helping his dying wife was the basis of such aggravation – "Maybe Dr. Ghanayem does, but I don't believe so." Upon questioning regarding Petitioner's history of depression, Dr. Singh indicated this was irrelevant given the findings in this case. He agreed he didn't know Petitioner's exact duties as a janitor, but when asked if he could have performed sedentary duties, he simply testified that Petitioner was considered off work. (Px9).

Orthopedic surgeon Dr. Ghanayem was deposed on 3/27/23, reiterating the contents of his report. While Petitioner had subjective complaints, he was neurologically normal on exam. The triceps is a C7 distribution nerve, but per his exam the Petitioner did not have any weakness in the triceps or sensory loss in a C7 distribution. He opined there were no signs of acute trauma to the structural integrity of the lumbar, thoracic, or cervical spine. The radiographic findings, for which he reviewed the films himself, predate the work accident. Any aggravation of the conditions by the work injury were resolved by the time Petitioner saw Dr. Ghanayem,

as all he had were soft tissue findings. He opined the disc degeneration was not accelerated by the work injury. As to whether his soft tissue injuries had resolved by his exam of Petitioner, Dr. Ghanayem testified: "I mean he had subjective complaints which you know he says he hurts. He hurts. I'm not going to tell him he doesn't. But on an objective basis, he was neurologically normal and didn't have anything that required additional treatment or preventing his from returning back to his normal occupation." He had reached MMI as to his spine by 8/18/22. Petitioner's degenerative findings were age appropriate. (Rx1).

On cross, Dr. Ghanayem agreed he didn't find malingering with Petitioner. He had no reason to doubt Petitioner's stated history of accident. He is aware Petitioner saw Dr. Singh and may have reviewed his records, but he has his own findings and Dr. Singh has his. Petitioner did have disc degeneration that resulted in some stenosis. Dr. Ghanayem didn't believe Petitioner needed an EMG as he was neurologically normal and strong, so it has no value. He agreed Petitioner's scans were not "normal" in that they showed degenerative changes. He acknowledged that different examiners would differ on some of their findings. (Rx1).

Petitioner hasn't worked anywhere since January 2022. He currently has pain in his neck and left shoulder like a knife, as well as excruciating pain in both shoulders and shooting pain into his forearms. Both his legs and arms feel heavy all the time, like rowing a boat or water skiing after not having done so for a while. He testified he likes to walk. His wife passed away on 3/28/22 and has to do household activities himself, such as taking out the garbage, grocery shopping, and weeding his garden. He has to pay for lawn and snow removal services. He currently takes anti-depression/anxiety meds through Dr. Abdullah. Petitioner acknowledged he is not alleging that his psychological condition has been caused by the 1/3/22 accident, and that it started after his wife passed. Dr. Singh has prescribed a muscle relaxer but will not prescribe him pain pills.

On cross, Petitioner agreed the last time he saw Dr. Singh was on 11/2/22. He testified he is not familiar with seeing any Dr Chang at Midwest Ortho, but that the surgeon who performed his prior fusion was Dr. Chavez, who now would be in his late 80's or 90's. He agreed that the x-ray he underwent at Riverside Health on 1/10/22 Riverside was of the right elbow. He had no prior treatment there. Petitioner disagreed that he only complained of elbow and low back pain when he first went to Steger clinic on 1/7/22. He was assisting and caring for his wife at home at that time. On 1/18/22, the Steger Clinic notes report complaints of the right knee and low back. As to the history of falling indicated, Petitioner testified he has fallen both in the two years before 1/3/22 and has fallen five times since 1/3/22. He denied seeking treatment after these falls, as he has no insurance, other than once (3/17/23) when an ambulance was called to his or his fiancée's house because she couldn't get him up off the kitchen floor. He injured his right knee and arm (broken forearm) at that time, but acknowledged his back was hurt "somewhat", as well as his neck. He was brought to the Olympia Fields ER and had a bunch of x-rays. He did not dispute that the report indicated neck pain status post-fall and that he was provided a cervical collar. On further cross, after initially indicating he did not have treatment at Steger Medical, Petitioner testified he had sought treatment in 2021 for his right pinky finger. Steger then referred him to Frankfort, where he received an injection into the finger. He agreed on January 3rd he was diagnosed with low back pain at Franciscan Olympia Fields, and at a follow up on January 19th he underwent right knee x-rays and was diagnosed with right knee pain.

Petitioner was then asked to review his Application for Adjustment of Claim, which he agreed he signed on 2/5/22, and it reflects claimed injuries to the back, right elbow, and right knee. Respondent's counsel advised it also indicates four prior workers' compensation claims, including specific case numbers, and when asked about this, the Petitioner testified "There was never four workers comp cases in my life." Petitioner reiterated that there were no cones or "wet floor" signs up where he fell on 1/3/22.

On redirect testimony, Petitioner testified that he never missed a day of work with Respondent prior to 1/3/22, and that any medical treatment he underwent prior to that date did not inhibit his ability to work. With regard to

the five falls he testified occurred after the work injury at issue, Petitioner testified he fell because his legs gave out without warning. He had already been diagnosed by Dr. Singh prior to the 3/17/23 fall, had undergone EMG testing and Dr. Singh had already recommended treatment, with Petitioner's counsel referring to the fact that his deposition had already been obtained on 3/15/23, two days prior. He advised Franciscan Olympia Fields on 3/17/23 that his legs just gave out and he was diagnosed with "mechanical, chronic condition" per the report. The parties noted that the records received via subpoena from Franciscan had a certification page dated 2/22/23, and were not actually shipped until 4/26/23, but the 2/17/23 report was not contained in the records sent.

On recross, Petitioner initially testified he had no prior work restrictions before the accident date before agreeing he did receive restrictions from Dr. Asadullah as to the right hand on 10/26/21 and 11/2/21. He testified he had a trigger finger, alleging that he did a lot of repetitive work with his hands. He testified his pinky finger was injected and it got better. He'd had similar problems on the left hand earlier in 2021. He last treated for this in 2021 and he is not claiming this is related to his 1/3/22 work injury. No one indicated to him that this right finger problem was related to his neck or back. Petitioner agreed his EMG testing was recommended by Dr. Singh prior to his 3/17/23 fall, indicating his belief that the EMG would be for his neck and back.

Jose Guerrero testified he is an eight year employee of Respondent and was Petitioner's supervisor on 1/3/22 and was present when he fell that day. He testified Petitioner was walking, slipped and fell on the wet floor, and broke his fall with his right elbow. He heard Petitioner's testimony and indicated he didn't see Petitioner fall with his arms above his shoulders as he described but did agree he fell onto his buttocks. Asked to describe how hard Petitioner hit the floor on a 1 to 10 basis, he indicated it was a 6. He disagreed with Petitioner as to the scene, testifying that not only were there two orange cones in front of the wet area, but that it was Petitioner himself who had mopped the floor. While he agreed Petitioner did some minimal utility/forklift work if people called off, his work generally was just sweeping and cleaning. Petitioner's only complaint to him after the fall was his right elbow and that "he felt bruised." He offered Petitioner medical assistance after the fall, but Petitioner declined and continued working.

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:

It appears that Respondent has acknowledged that Petitioner lumbar injury is causally related to the 1/3/22 accident in terms of a lumbar strain. The Petitioner had initial complaints of the low back. The Arbitrator finds that the Petitioner's lumbar injury was causally related to the 1/3/22 work accident. That said, Dr. Singh testified that Petitioner has reached MMI with regard to this injury prior to his 3/15/23 testimony. Dr. Singh also testified that Petitioner did not sustain any thoracic spine injury.

As to the cervical condition, the first documentation of neck symptoms was Dr. Singh's 2/15/22 report, where he noted pain from the low back into the neck. Petitioner testified the condition of his neck and radiating pain continued to worsen over time.

Dr. Singh opined that Petitioner's cervical condition was related to the January 2022 fall based on the aggravation of an underlying degenerative cervical condition, and that he believed Petitioner's symptoms were related to the C4 to C6 spinal stenosis. His understanding was Petitioner did not have similar preexisting symptoms. He testified that Petitioner's pain complaints correlated with C5 and C6 radiculopathy, that he found

weakness in C5 and C6 distributions in the deltoid and biceps on exam, and that the MRI findings at those levels above the prior fusion correlated with the pain complaints and weakness.

Dr. Ghanayem, Respondent's examining physician, testified that Petitioner may have sustained soft tissue injuries to the lumbar and cervical spine, any such strain conditions had resolved prior to his examination. He noted Petitioner had an essentially normal neurologic exam and thus needed no further treatment or work restrictions. He did not dispute that Petitioner had ongoing subjective complaints.

The Arbitrator notes that the Respondent also argues that the Petitioner's testimony reflected several inconsistencies versus the other evidence presented.

"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." *Int'l Harvester v. Indus. Comm'n*, 93 Ill. 2d 59, 63–64, 442 N.E.2d 908, 911 (1982). "The salient factor is not the precise previous condition; it is the resulting deterioration from whatever the previous condition had been." *Schroeder v. Ill. Workers' Compensation Comm'n*, 2017 IL App (4th) 160192WC ¶ 26, 79 N.E.3d 833, 839 (4th Dist. 2017).

The Arbitrator finds that the Petitioner's cervical condition is causally related to the 1/3/22 accident by way of an aggravation of a preexisting condition.

The Arbitrator acknowledges that the Petitioner's testimony was concerning at times in terms of some of the inconsistencies noted by Respondent. That said, the Arbitrator notes a history of anxiety with this claimant, and that he came across at hearing as anxious and, at times, angry. While there were inconsistencies, such as his testimony that he had no prior workers' compensation claims, his own Application for Adjustment reflected multiple prior claims. It should also be noted, however, that these claims were all from at least 15 years prior to the hearing. Petitioner also testified in a fashion where he seemed to be blaming the Respondent for not identifying the wet floor where he fell, when Mr. Guerrero's testimony was that it was Petitioner himself who had just mopped the floor and that there were two cones present at the site.

While the Arbitrator certainly takes these inconsistencies into consideration, the evidence in this case supports that he did, in fact, fall as he described. The Arbitrator finds any inconsistencies as to exactly how he may have fallen, such s with arms outstretched, to carry minimal weight. The bottom line is there is no evidence which contradicts that this claimant slipped and fell onto his back/backside.

In this case, Petitioner's testimony indicates, supported by the medical records in evidence, that he underwent a cervical spine fusion approximately twenty years ago, and that he has consistently worked in a job similar to the job he had with Respondent with no evidence of ongoing problems in the years since the prior surgery and release. This includes working full duty as a custodian for a school district in Matteson, Illinois for 12 years and as a custodian for Yoshino's of America for more than 12 years without issue.

During the year that Petitioner worked for Respondent prior to the 1/3/22 accident, he testified he did not miss a single day of work. He did ultimately agree that he was on light duty in October and possibly November of 2021 due to right hand complaints involving his fingers. Supervisor Guerrero did not rebut this testimony. While Respondent attempts to some degree to argue that the hand complaint (noting he also had left hand complaints around that time as well) could possibly be related to a problem at C8. Based on a thorough review of the evidence, such an argument is speculative as no physician has opined that the hand problems in late 2021 could be related to the cervical spine. Petitioner was diagnosed with trigger fingers.

Dr. Singh acknowledged he did not review any of Petitioner's records from between 1/3/22 and 2/15/22. At the same time, while Dr. Ghanayem testified he did review medical records of the Petitioner, other than that he reviewed the actual MRI films, he could not identify which records he actually reviewed. There is no evidence of prior cervical treatment in the years before 1/3/22, nor any evidence that Petitioner had neck, shoulder, or arm complaints similar to what he has currently. Dr. Singh does not dispute Dr. Ghanayem's conclusion that Petitioner had no acute structural changes related to the 1/3/22 accident. At the same time, Dr. Ghanayem does opine that any injury Petitioner may have had was a strain that had since resolved. A review of the medical records in evidence do not reflect such a resolution of Petitioner's symptoms. Additionally, Dr. Singh credibly testified to subjective complaints, examination findings, and MRI films which all supported the conclusion that Petitioner had symptoms which correlated with the C4/5 and C5/6 area where significant canal stenosis exists.

While Dr. Ghanayem opined that Petitioner had not sustained any injury more severe than a neck strain, from the Arbitrator's review of his report and testimony, he did not specifically dispute a causal relationship between the accident and Petitioner's symptomatic complaints. It was his opinion that his exam and the MRI findings did not reflect a condition that needed ongoing treatment. Ultimately, Dr. Ghanayem's diagnosis and causal opinion appear to rest upon his determination that Petitioner was "neurologically normal", which is different than what Dr. Singh found, including weakness in areas that correlated with the noted cervical levels.

It is abundantly clear to the Arbitrator that the Petitioner's cervical condition of spinal stenosis is degenerative and preexisting. At the same time, no evidence has been produced that the Petitioner had any symptoms or diagnoses involving the cervical spine prior to 1/3/22, at least not since his prior surgery, which was a very long time ago.

Based on the preponderance of the evidence presented, the Arbitrator finds Dr. Singh more persuasive in this matter than Dr. Ghanayem, and further finds that Petitioner's cervical spine condition at C4/5 and C5/6 is causally related to Petitioner's 1/3/22 work accident.

Petitioner also had some relatively minor treatment relative to the right elbow and right knee, which the Arbitrator also finds to be causally related to the 1/3/22 accident, but which have since, based on no evidence of treatment in 2023 for these conditions other than after an unrelated fall at his home, reached a state of MMI. The Arbitrator also notes for the record that while the Petitioner did injure his neck at that time, it is accurate that Dr. Singh's findings and EMG order preexisted this fall.

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:

Noting the findings with regard to causation, the Arbitrator finds the Petitioner is entitled to payment of the medical expenses contained in Px2 through Px8 by the Respondent. Respondent is entitled to credit against all awarded medical expenses that have been paid by Respondent prior to the hearing date (See Rx2). It appears to the Arbitrator that much of the medical billing presented has, in fact, been paid.

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

The only current recommendation pending medically is Dr. Singh's request for an upper extremity EMG. The Arbitrator finds that this is reasonable based on the preponderance of the evidence. Given the Arbitrator's

findings regarding causation of the cervical spine, the Respondent shall authorize the prescribed EMG testing. As Dr. Singh has indicated that the results of this test will assist in guiding his future recommendations,

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:

According to Arbitrator's Exhibit 1, Petitioner claims entitlement to TTD from 1/18/22 to 6/16/23, the hearing date. Respondent argues that Petitioner is only entitled to TTD from 1/18/22 to 8/18/22, the date of Dr. Ghanayem's exam. Therefore, the only dispute is with regard to TTD benefits from 8/19/22 through 6/16/23.

Based on the Arbitrator's findings regarding causation, and the testimony of Dr. Singh that Petitioner was to be off work until the EMG was obtained and reviewed, the Arbitrator finds Petitioner is entitled to TTD from 1/18/22 through 6/16/23.

The Respondent is entitled to credit of $11,933.00 against this award.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC028789
Case Name	Greg Larsen v. NuVeterans Construction Services
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	24IWCC0090
Number of Pages of Decision	12
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Sean Stec
Respondent Attorney	Melissa McEndree

DATE FILED: 2/22/2024

/s/Kathryn Doerries, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF DuPAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

GREG LARSEN,

Petitioner,

vs. NO: 22 WC 028789

NUVETERANS CONSTRUCTION SERVICES,

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 accident, causal connection, temporary total disability, wage calculations, benefit rates, medical expenses, prospective medical, penalties under §19(k) and §19(l) and attorneys' fees under §16, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission affirms and adopts the Arbitrator's Decision in its entirety with the following modifications for the purpose of correcting certain scrivener's errors.

In the first paragraph, in the last sentence on page five of six pages, the Commission strikes the word "back" and substitutes the word "black." Therefore, the sentence now reads, "[d]uring direct examination, Petitioner did not testify that during the 10/31/22 phone conversation he told Mr. Anos about using the grinder, the circuit breaker issues, the black substance on the floor, which he believed was asbestos, or the excessive amounts thin-set and floor leveler."

Further, the Commission adds the word "not" to the fourth sentence in the second paragraph on page five of six so that sentence now reads, "Mr. Anos testified an air hammer and

chisel should not be used once the tile is removed because it would gouge the cement."

In the first complete sentence on page six of six, the Commission changes the word "preforming" to "performing." Therefore, the sentence now reads, "[b]ased upon the lack of symptoms while performing any work-related activities and the onset of symptoms while at home and Petitioner's lack of credibility, it is reasonable to infer that Petitioner was not injured at work on 10/31/22 and if Petitioner was injured it occurred after leaving work."

Finally, the Commission adds the word "not" to the first sentence in the first full paragraph on page six of six pages to comport with the remainder of the Arbitrator's Decision. Therefore, the sentence now reads, "[t]he Arbitrator does not give much weight to the treating physicians' causation opinions or histories contained in the medical records."

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed on February 2, 2023, is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's injury did not arise out of and in the course of employment and, as such, Petitioner is unable to recover under the Act. All other disputed issues are moot and need not be addressed based on the aforementioned finding.

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 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)(1).* 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.

February 22, 2024

O013024
KAD/bsd
42

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC028789
Case Name	Greg Larsen v. NuVeterans Construction Services
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	9
Decision Issued By	Frank Soto, Arbitrator

Petitioner Attorney	Sean Stec
Respondent Attorney	Melissa McEndree

DATE FILED: 2/2/2023

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

/s/Frank Soto, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Greg Larsen
Employee/Petitioner

v.

Nuveterans Construction Services
Employer/Respondent

Case # **22** WC **028789**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Frank Soto**, Arbitrator of the Commission, in the city of **Wheaton, IL**, on **January 9, 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. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [x] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] What temporary benefits are in dispute?
   [ ] TPD [ ] Maintenance [x] TTD
L. [ ] What is the nature and extent of the injury?
M. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [x] Other **Prospective Medical Treatment**

FINDINGS

On **10/31/2022**, 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 not*** sustain an accident that arose out of and in the course of employment.

ORDER

Petitioner's injury did not arise out of and in the course of employment and, as such, Petitioner is unable to recover under the Act. All other disputed issues are moot and need not be addressed based on the aforementioned finding.

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

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

By: /o/ Frank J. Soto **FEBRUARY 2, 2023**
Arbitrator

Procedural History

This case proceeded to trial on January 9, 2023 pursuant to Sections 19(b) and 8(a) of the Act. The disputed issues involve whether Petitioner sustained an accidental injury that arose out of and in the course of employment, whether Petitioner's condition of ill-being is causally connected to the injury, average weekly wage, whether Respondent is liable for unpaid medical expenses and TTD benefits, and whether Petitioner is entitled to receive prospective medical care. Petitioner filed a petition for penalties pursuant to Sections 19(k), 19(l) and 16 of the Act.

Findings of Fact

Greg Larsen (hereinafter referred to as "Petitioner") testified he has worked for Nuveterans Construction Service (hereinafter referred to as "Respondent") as a tile finisher since August 20, 2022. (T. 8). Petitioner testified he is employed fulltime and is regularly scheduled to work 8 hours a day 5 days a week. (T. 9). Petitioner testified he earns $44.18 per hour as a member of union Local 21. (T. 9, 10, 11). Petitioner testified he didn't work a full 40 hours work week from 8/14/22 through 8/31/22 due to either a lack of material, work, or scheduling. (T. 10). Petitioner testified he also didn't work for Respondent from 10/12/22 through 10/25/22 due to a lack of work but that he did work for another company called Johnson Flooring. (T. 12). Petitioner testified he was available for work from August 14, 2022 through October 31, 2022. (T. 10).

Petitioner testified he previously underwent two lumbar spine surgeries on 5/6/2008 and 9/1/2009 and completed treatment on or about 1/4/2010. (T. 13). Petitioner testified he had not sought any medical treatment for his lumbar spine since 1/4/2010 and he suffered no other low back injuries from 1/4/2010 through 10/30/22. Petitioner also testified he had no prior left knee injuries. (T. 14).

Petitioner's Testimony Regarding Accident During Direct Examination

Petitioner testified he was injured while working for Respondent on 10/31/22. (T. 15). Petitioner testified he was removing floor tile, mortar and thin-set in a second floor bathroom at Macy's using a Bosch air hammer with a chisel. (T. 17,18). Petitioner testified the air hammer was about 18-25 inches long when the chisel bit attached. (T. 20).

Petitioner testified he used the air hammer to remove tile flooring for one to two hours. (T. 22). Petitioner testified he had to position the air hammer an angle to separate the tile from the floor. (T. 22). Petitioner testified he stopped working because the chisel bit exploded. (T.

23). Petitioner testified, at that time, he called Mr. Anos (the owner of the company) to let him know the chisel broke. (T. 23). Petitioner testified Mr. Anos told him he could go home or wait for a different machine to arrive. (T. 23). Petitioner decided to go home. (T. 23).

Petitioner testified while at home he noticed he was experiencing severe pain radiating from his spine through his rib cage up to the scapula in addition to experiencing left knee pain and swelling. (T. 23). Petitioner testified, the following day, he did not go to work and he advised Mr. Anos of that fact[1]. (T. 24). Petitioner testified his ribcage was burning and felt crampy and his left knee also hurt. (T. 24). Petitioner testified he sought medical care at Mercy Urgent Care on 11/1/22. (T. 26).

Nick Anos Testimony During Direct Examination

Mr. Anos testified he is the owner of the company and he schedules all the labor since the company has only 15 employees and only operates 2-3 jobs at a time. (T. 57). Mr. Anos testified he inspected the job site on 10/28/22. (T. 60). Mr. Anos testified when he inspected the job site, he observed that all of the tile had been removed as well as a majority of the thin-set. (T. 60, 61). Mr. Anos testified the tile was removed the previous week. (T. 65). Mr. Anos testified because the tile was removed Petitioner was scheduled to use a walk behind grinder. (T. 62). Mr. Anos testified the walk behind grinder takes off the remaining thin-set and smooths the surface of the concrete. (T. 63). Mr. Anos testified there was no need for Petitioner to use the chipper since the only work needed to be done involved using the grinder and the chisel hammer gouges the concrete. (T. 66).

Mr. Anos acknowledged receiving a phone call from Petitioner on 10/31/22 but he said during the conversation Petitioner reported only that grinder was tripping the circuit breaker and he wanted to leave since the other area Petitioner could work was occupied by a drywall company. (T. 64). Mr. Anos testified during his conversation with Petitioner on 10/31/22, he never mentioned that he was using the chisel hammer or that the chisel hammer broke. (T. 70, 75, 79). Mr. Anos testified Petitioner failed to show up at work the following day, so he sent someone else to the job site who grounded off the thin-set the following day. (T. 68). Mr. Anos testified he inspected the chipping blades and did not find any broken blades. (T. 75).

[1] Petitioner submitted photocopies of text messages he sent to Mr. Anos. On November 2, 2022, at 6:44 a.m. Petitioner sent Mr. Anos a text message which said "*Hey Nick. I will not be in today…sorry for the late text* [Petitioner previously testified he starts work at 5 a.m. (T. 9*)]…I'm going to the doctor today…not feeling right…I'll get back to you.*" (Px. 4).

Petitioner's Rebuttal Testimony

On rebuttal, Petitioner changed this testimony and acknowledged that the tile was removed from the job site when he arrived at work on 10/31/22. (T. 90). Petitioner also acknowledged to trying to use the grinder and that it was blowing the circuit breakers. (T. 90). Instead of using the chipper to remove tile at that job site Petitioner testified he was using chipper to remove thin-set or some type of floor leveler. (T. 91). Petitioner testified there was an area of the floor that had at least a ½ inch or ¾ inch of some type of thin-set or floor leveler which went from the front, near the changing area, to the bathroom. (T. 91). Petitioner testified that a majority of the surface of the thin-set was black which he believed was asbestos. (T. 91). However, on cross-examination, Petitioner said the black area was only around the toilet flanges. (T. 96). Petitioner also testified that he told Mr. Anos about the asbestos during the 10/31/22 phone conversation with Mr. Anos. (91).

Rebuttal Testimony of Mr. Anos

Mr. Anos testified during his conversation with Petitioner on 10/31/22, Petitioner never mentioned the asbestos, using the chipper or the broken chisel. (T. 99, 100). Mr. Anos testified had Petitioner told him about a broken chisel he would have sent Petitioner to Home Depot to purchase a new one as done in the past. (T. 100).

The Arbitrator finds the testimony of Nick Anos credible but does not find Petitioner's testimony credible.

Petitioner's Medical Treatment

Petitioner presented to Dr. Frank Nicolosi at Mercy Urgent Care on November 1, 2022. (T. 26-27). Petitioner had left knee and low back x-rays. (T. 27). Petitioner presented to Dr. Nowak, a family doctor, on November 3, 2022 also at Mercy Health System. (T. 31) The doctor recommended a CT scan. (T. 31, 33). Petitioner requested a consultation with the neurosurgeon. (Px. 1). Dr. Nowak did not make recommendations related to the treatment of the left knee. (*Id.*).

Conclusions of Law

The Arbitrator adopts the above Findings of Fact in Support of the Conclusions of Law as set forth below. The claimant bears the burden of proving every aspect of her claim by a preponderance of the evidence. *Hutson v. Industrial Commission,* 223 Ill.App.3d 706 (1992).

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

To obtain benefits under the Act, a claimant must establish by a preponderance of the evidence that he sustained an accidental injury "arising out of" and "in the course of" his employment. 820 ILCS 305/1(d) (West 2014); *McAllister*, 2020 IL 124848, Par. 32; *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d. 193, 203 (2003); The "arising out of" component is primarily connected with causal connection. *McAllister*, 2020 IL 124848, Par. 36. An injury is said to "arise out of" one's employment if its origin is in some risk connected with or incidental to the employment so that there is a causal connection between the employment and the accidental injury. *Id.* Par. 36; *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58 (1989). A risk is "incidental to the employment" when it belongs to or is connected with what the employee has to do in fulfilling his or her job duties. *McAllister*, 2020 IL 124848, Par. 36; *Purcell v. Illinois Workers' Compensation Comm'n*, 2021 IL App. (4th) 200359WC, Par. 18. 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 Comm'n*, 83 Ill.2d 213, 46 Ill. Dec. 687, 414 N.E.2d 740 (1980). Internal inconsistencies in a claimant's testimony, as well as conflicts between the claimant's testimony and the medical records, may be taken to indicate unreliability. *Gilbert v. Martin & Bayley/Hucks*, 08 IL.W.C. 004187 (Ill. Indus. Comm'n 2010).

The Arbitrator finds Petitioner failed to prove by the preponderance of the evidence that he sustained an accidental injury that arose out of and in the course of his employment with Respondent on 10/31/22.

As stated above, the Arbitrator finds Petitioner testimony not to be credible. Petitioner originally testified he was injured while removing tile for one to two hours. (T. 17,18, 20). Mr. Anos, the owner of the company, testified the tile was removed prior to Petitioner's alleged work injury and, on 10/31/22, Petitioner was scheduled to use the walk behind grinder. (T. 62, 63, 66). After being confronted with evidence indicating the tile had been removed prior to his alleged work accident, Petitioner changed his testimony by alleging, on rebuttal, he was injured removing excess amounts of thin-set which included areas containing a black substance which, he believed, was asbestos.

In addition to changing his testimony regarding the scope of the work he performed on 10/31/22, Petitioner also attempted to change his testimony regarding the content of his 10/31/22 phone conversation with Mr. Anos. During direct examination, Petitioner testified the 10/31/22 phone conversation involved the chisel breaking and the decision to go home. (T. 23). However, on rebuttal, Petitioner admitted to speaking with Mr. Anos regarding the use of the grinder and the problems with the circuit breaker. It was only after being confronted with evidence showing the tile was removed prior to his alleged injury did Petitioner acknowledge using the grinder. Additionally, acknowledging the use of the grinder and the existence of the circuit breaker problems supports Mr. Anos testimony involving the content of the 10/31/22 phone conversation. The Arbitrator also notes Petitioner's rebuttal testimony also conflicts with his own testimony. During direct examination, Petitioner did not testify that during the 10/31/22 phone conversation he told Mr. Anos about using the grinder, the circuit breaker issues, the back substance on the floor, which he believed was asbestos, or the excessive amounts thin-set and floor leveler.

The Arbitrator finds that Petitioner was not using air hammer and chisel at work on 10/31/22. Mr. Anos testified Petitioner was scheduled to use the stand behind grinder on 10/31/22 because tile and most of the thin-set was removed the previous week. Mr. Anos testified since the tile and most of the thin-set was removed the grinder is used to smooth out the concrete surface. Mr. Anos testified an air hammer and chisel should be used once the tile is removed because it would gouge the cement. Mr. Anos testified he sent another employee to the jobsite who completed the work using the stand behind grinder. (T. 68). Mr. Anos also testified he inspected the chipping blades and did not find any broken blades. (T. 75).

The Arbitrator also finds Petitioner did not injury his back and left knee at the job site on 10/31/22. The Arbitrator notes that Petitioner did not testify to experiencing back or left knee symptoms while performing any work-related activities at the jobsite. Petitioner decided to leave the job site because the grinder was tripping the electrical breakers and not because he was experiencing any symptoms. Petitioner did not testify to experiencing any symptoms while performing work-related activities at the jobsite. Petitioner worked between one to two hours after arriving at the job site around 5 a.m. Petitioner testified he began to experience symptoms while at home. (T. 23). Petitioner did not proffer any testimony regarding the circumstances involving the onset of his symptoms. It is unknown what time Petitioner arrived at home, how

long Petitioner was home before experiencing symptoms, whether Petitioner went directly home or whether Petitioner was performing any physical activities at home when he began to experience his symptoms. Based upon the lack of symptoms while preforming any work-related activities and the onset of symptoms while at home and Petitioner's lack of credibility, it is reasonable to infer that Petitioner was not injured at work on 10/31/22 and if Petitioner was injured it occurred after leaving work. Petitioner's text message dated 11/1/22 supports the inference that Petitioner was not injured at work. The text message only states Petitioner was "not feeling right" and would not be at work and that he was going to a doctor. (Px. 4).

The Arbitrator does give much weight to the treating physicians' causation opinions or histories contained in the medical records. The medical records indicate Petitioner was using a jackhammer. As stated above, the Arbitrator found that Petitioner was not using an air hammer and chisel to remove tile at work on 10/31/22. Assuming *arguendo* that the Arbitrator found Petitioner was using an air hammer and chisel, the doctor's causation opinion appears to be based upon Petitioner operating a jackhammer and not a 20-pound hand tool for one to two hours. The Arbitrator also notes given Petitioner's rebuttal testimony acknowledging using the grinder and the issues involving the circuit breakers it is unlikely Petitioner was using the air hammer for the full one to two hours Petitioner was at the jobsite. The Arbitrator also notes a significant difference between the weight of a jackhammer and use of a jackhammer than a 20-pound about 18-25 inches long hand-held air hammer.

With respect to issues "F", "G", "J", "K" and "O", the Arbitrator finds as follows:

Having found that Petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury that arose out of and in the course of his employment by Respondent on October 31, 2021, the Arbitrator finds all other issues are moot and need not be addressed.

With respect to issue "M" penalties, the Arbitrator finds as follows:

The Arbitrator does not award penalties as Respondent had a good faith basis for the denial of Petitioner's benefits based on the disputed issues and discrepancies with Petitioner's accident history. Petitioner failed his burden to show he had a work-related accident by a preponderance of the evidence. As such, the petition for penalties is hereby denied.

By: /o/ Frank J. Soto — February 1, 2023

Arbitrator — Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC035903
Case Name	Alexander Parades v. FH Leinweber
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0091
Number of Pages of Decision	15
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	David Martay
Respondent Attorney	Jeffrey Rusin

DATE FILED: 2/22/2024

/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

Alexander Parades,
Petitioner,

vs. NO: 15 WC 35903

FH Leinweber,
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 benefit rates, medical, permanent disability, temporary disability and wage differential calculations 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 5, 2023, is hereby affirmed and adopted.

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

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

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.

February 22, 2024
o2/7/24
DLS/rm
046

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

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

/s/*Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC035903
Case Name	Alexander Parades v. FH Leinweber
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Nina Mariano, Arbitrator

Petitioner Attorney	David Martay
Respondent Attorney	Michael Rusin

DATE FILED: 4/5/2023

THE INTEREST RATE FOR THE WEEK OF APRIL 4, 2023 4.70%

/s/Nina Mariano, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Alexander Parades
Employee/Petitioner
v.
FH Leinweber
Employer/Respondent

Case # **15**WC **35903**

Consolidated cases:

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

DISPUTED ISSUES

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

FINDINGS

On **December 18, 2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**43,741.00** ***(excluding overtime bonuses)***; the average weekly wage was $**972.01.**

On the date of accident, Petitioner was **42** years of age, ***married*** with **4** dependent children.

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

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

Respondent shall be given a credit of $**23,769.90** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**23,769.90**.

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

ORDER

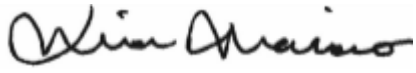
Arbitrator orders Respondent to pay for medical bills paid by Petitioner's Local No. 502 Welfare Fund related to Petitioner's groin, hernia and illoinguinal nerve neuralgia conditions. These bills shall be paid to Petitioner per the statutory medical fee schedule. Medical expenses specifically related to Petitioner's low back and hip conditions are denied.

Arbitrator orders Respondent to pay 43 and 1/7th weeks of temporary total disability and 275 and 1/7th weeks of temporary partial disability. The total award for the temporary total disability is $27,957.00 and the total award for the temporary partial disability is $89,146.29. Respondent is entitled to credit for benefits paid totaling $23,769.90, as indicated above.

Arbitrator orders Respondent to pay to Petitioner a weekly wage loss differential in the amount of $324.00 commencing on June 16, 2021 with an ongoing entitlement to weekly benefits pursuant to Section 8(d)1 of the Act until the petitioner reaches the age of 67 on September 9, 2038.

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 5, 2023

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Alexander Parades,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Case No. **15WC35903**
FH Leinweber,	)	
	)	
	)	
	)	
Respondent.	)	

FINDINGS OF FACT

This matter proceeded to hearing on September 21, 2022 in Chicago, Illinois before Arbitrator Nina Mariano on Petitioner's Request for Hearing. Issues in dispute include causal connection, earnings, medical bills, temporary benefits, nature and extent and wage loss differential. Arbitrator's Exhibit "Ax" 1. While accident itself is not in dispute, what injuries arose from the claimed accident is in dispute. Arbitrator notes that there is an error on page 1 of the Request for Hearing Form indicating that, "Petitioner and Respondent are prepared to try this matter to completion on 8/22/22 unless the Arbitrator approves other arrangements." The date of 8/22/22 was indicated in error and the matter was actually tried to completion September 21, 2022.

On the date of accident, December 18, 2014, Petitioner, Alexander Parades, was employed as a cement finisher for Respondent, whom he had worked for since 1997. (TR10). On the above date, Petitioner testified he was carrying buckets of cement from the first floor to the second floor weighing approximately 75-80 pounds when he dropped one and noticed significant pain immediately thereafter in his groin area. (TR12). According to Petitioner, he immediately notified his superintendent and filled out an accident report. He spoke to the owner, Peggy Leinweber, on the date of accident to inform her of his injury.

Petitioner reported to the emergency room the same day at Bolingbrook Hospital (PX1). Petitioner had a CT Scan performed of his abdomen and pelvis. He returned to the same hospital the next day and was diagnosed with a hernia. (PX1).

Petitioner reported to Dr. Goliath on May 5, 2015 and he was diagnosed with a left inguinal hernia and prescribed surgery. (PX1, 2). Dr. Goliath performed surgery which included a bilateral inguinal hernia repair on May 11, 2015. *Id.*

Petitioner returned to Dr. Goliath on May 19, 2015 and was provided with a 10 pound lifting restriction. Petitioner next saw Dr. Goliath on June 30, 2015 and was referred to see a pain specialist.

Petitioner reported to Dr. Gordon Tubic on July 14, 2015 and was advised that he was a candidate for nerve blocks due to pain issues he was having where the hernia surgery had been performed. (PX4). Petitioner underwent a nerve block to the inguinal area on July 24, 2015 performed by Dr. Tubic. Petitioner returned to Dr. Goliath on August 4, 2015 and was prescribed additional pain management.

Petitioner underwent a radiofrequency ablation performed by Dr. Tubic on August 19, 2015. He had another radiofrequency procedure performed by Dr. Tubic on September 21, 2015.

Petitioner reported to Dr. Ankur and was provided with a transverse abdominal plane block performed on December 3, 2015. Petitioner returned to Dr. Goliath on June 16, 2016 and was provided with a continued 10 pound lifting restriction.

On June 28, 2016 Petitioner began a course of physical therapy at Athletex (PX8). Petitioner saw Dr. Ankur on August 4, 2016 and another plane block was performed due to continued pain.

Petitioner was discharged from physical therapy at Athletex on August 8, 2016. Petitioner underwent a Functional Capacity Evaluation on September 6, 2016 at ATI. (PX6). The Functional Capacity Evaluation results placed Petitioner back to full duty work. (PX6).

Petitioner reported to NP Kalvoda on September 7, 2016 and recommended additional nerve blocks every 4 months due to continued pain at the surgical site. (PX3, 4). Petitioner returned to NP Kalvoda on September 7, 2016 and was referred back to Dr. Tubic for additional nerve blocks. Petitioner saw Dr. Tubic on December 2, 2016 and had a bilateral inguinal nerve block performed. (PX3. 4).

Petitioner returned to NP Kalvoda on January 3, 2017 and was prescribed medication due to continued pain. Petitioner next saw NP Kalvoda on February 17, 2016 and recommended additional radiofrequency ablations. Petitioner saw Dr. Tubic on April 14, 2017 and had a bilateral radiofrequency thermocoagulation performed.

Petitioner saw NP Kalvoda on July 20, 2017 and was recommended that Petitioner seek treatment with a psychologist due to continued pain issues. Petitioner underwent another bilateral

transverse plane injection this time performed by Dr. Douglas Suber on November 1, 2017. Petitioner saw Dr. Tubic on January 8, 2018 and was recommended to undergo additional pain block procedures. Petitioner had a plane injection performed by Dr. Suber on February 21, 2018. (PX3, 4). The injections and pain block procedures only provided temporary pain relief.

Petitioner reported back to Dr. Tubic on April 17, 2018 and was recommended that Petitioner have a spinal cord stimulator implanted. Dr. Tubic also recommended a psychiatric evaluation before having the pain stimulator implanted.

On July 6, 2018 Dr. Tubic implanted a dorsal root ganglion nerve stimulator. Petitioner saw Dr. Tubic on August 3, 2018 and was recommended that the spinal cord stimulator be permanently implanted.

The permanent nerve root stimulator was implanted on August 22, 2018. (PX3). Petitioner underwent another Functional Capacity Evaluation at ATI on September 18, 2019. (PX13). The results of the Functional Capacity evaluation placed him back to light medium level work which did not meet the job demands according to the therapist that performed the testing. (PX13)

Petitioner has follow up appointments with Dr. Tubic approximately every 6 weeks. Petitioner further testified that he continues to undergo nerve blocks because the stimulator is not always working. (TR28). Petitioner testified that he was paid workers' compensation benefits from May 11, 2015 through February 14, 2016. Petitioner had returned to work for the employer from March 8, 2016 through June 15, 2021. Petitioner testified that during the five plus years he worked for the employer subsequent to his work injury, he was only performing light duty work. The job that he performed subsequent to his work accident included "reading numbers, putting lasers, checking numbers, overseeing the jobsites, I wasn't working much." (TR29). For the time period between March 8, 2016 through June 15, 2021 he was working approximately 16 hours per week. While Petitioner was only working part time, he was still being paid his usual and regular hourly rate of $47.00 per hour.

Petitioner's job with FH Leinweber ended in June 2021 when the company closed down. Petitioner testified the owner of the company became ill and the family that owned the company decided to close the account of the company. (TR 31). At the time of hearing, Petitioner testified that he was working for Cel-Crete Decks. (TR32-33). He is still working through his Local 502 Union. He currently makes an hourly rate of $49.75 per hour. Petitioner further testified that due to his ongoing restrictions, he is only working part time and performing light duty work for his current employer. Petitioner testified that he is basically working the same number of hours on light duty with his current employer as he had

been performing for the previous five years for Respondent after his work injury. (TR33-35). At hearing, Petitioner introduced Petitioner's Exhibit 14 which is a letter signed by the owner of the Respondent company. According to the owner of the company, they were accommodating Petitioner on a light duty and part time basis and he was suffering a 50% reduction in earnings due to his restrictions. (PX14). Petitioner testified that he currently continues to work for his current employer with the same restrictions under the same earnings reduction, but did not present any current wage records supporting his testimony. (TR35-36).

Petitioner testified that at the time of hearing he continues to suffer left sided groin pain. Petitioner testified that one of the stimulators was out so that he was suffering more pain that normal on the left side. (TR37). Petitioner testified that he experiences a significant reduction in pain when the spinal cord stimulator is fully functioning. (TR39).

At the time of hearing, Petitioner was scheduled for additional surgery to have the implant put back in and the cords rerouted to try and minimize his pain again. (TR29). With respect to his activities of daily life, Petitioner testified that he cannot lift as much without experiencing significant pain in his back and groin area. Additionally, he has problems driving a car because he experiences pain where the stimulator is implanted when he drives for a longer period of time. (TR40). Petitioner further testified that he takes ibuprofen on a regular basis and also takes Norco which is prescribed by Dr. Tubic.

On cross examination, Petitioner testified that he suffered a second work accident while still working with Respondent. Petitioner suffered a work accident and was off work for 15 weeks. Case number 17WC033679 settled for 15% loss of use of the right leg. (RX5). The case did not involve a reinjury to the hernia/groin area. Petitioner further testified that he is still a current active member of his local union. In addition, Petitioner testified that when the spinal cord stimulator is fully functioning, he experiences approximately 90% reduction in his pain level. (TR50).

Dr. Tubic generated two reports on this case including a report dated May 9, 2018 and a report dated February 11, 2019. (PX 11, 12). According to Dr. Tubic, after the initial hernia repair, Petitioner developed significant neuropathic pain in the region of the repaired hernia. Dr. Tubic tried various narcotic and neuropathic medications to manage his pain. Petitioner also underwent transverse abdominal plane blocks in November 2017 and February 2018. Due to lingering pain, Dr. Tubic opined Petitioner was a candidate for a dorsal root ganglion nerve stimulator.

Dr. Tubic wrote a second report dated February 11, 2019 stating that after implantation of the dorsal root ganglion nerve stimulator, Petitioner's pain level significantly decreased by about 80%.

(PX12) Dr. Tubic also opined that there was a connection between the work related injury and the development of the neuropathic pain and subsequent care including his need for the spinal cord stimulator.

At the Respondent's request, Petitioner was sent for Section 12 evaluations with Dr. Thomas Gleason and Dr. Steven Boghossian. (RX 3, 4). Dr. Gleason is a board-certified orthopedic surgeon who evaluated Petitioner on September 18, 2018. Dr. Gleason opined that Petitioner has no condition related to his hips and lower extremities related to the work accident or due to Petitioner's work for Respondent. Dr. Gleason wrote in his report, "if treatment being referred to, as being recommended by Dr. Tubic was the spinal cord stimulator placed four weeks ago, which has since given the patient complete relief of his lower extremity symptoms, then I believe that the treatment was reasonable to cure or relieve Mr. Parades symptoms related to his lower extremities, although this would not necessarily be related to his hips and lower extremities directly specifically." He deferred to Dr. Tubic with regard to follow up care and return to work with regard to the dorsal root ganglion nerve stimulator.

Petitioner was examined by Dr. Stephen Boghossian on February 9, 2016. (RX1). Dr. Boghossian's report said that Petitioner did not provide him with an inciting trauma that would have caused the hernia. The doctor further wrote, "there is no history of any injury or any pre-existing condition. I did not elicit from the patient any work-related trauma that I could pinpoint as to the origin of his problems." The doctor further wrote, "more likely than not, this occurred at work, but again there is no inciting causal events." He opined that while the petitioner had pain, he felt that the petitioner could return to work and needed no further treatment for the hernia or for pain.

While undergoing pain management for the neuropathic condition involving his groin following the hernia surgery, Petitioner later treated for hip degenerative joint disease/osteoarthritis and lumbar degenerative disc disease, spinal stenosis and facet arthropathy. There are no opinions in the records from Petitioner's treating physicians as to whether those specific conditions are causally related to the hernia/groin injury or were aggravated at the time of the work injury or during post injury treatment. Petitioner testified that he did not know whether the hip and back were related but that he was told it was all related to nerve damage, but that opinion does not appear in the medical records. At the time of trial, Petitioner testified that the only related issue he had was left groin pain because his stimulator needed to be adjusted and he needed nerve blocks in the meantime to address the left groin pain.

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 credible witness. The Arbitrator compared Petitioner's testimony with the totality of the evidence submitted and did not find any material contradictions that would deem the witness unreliable.

F. Petitioner claims his current condition of ill being is causally connected to the injury or exposure; the Arbitrator finds the following:

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

nexus between the accident and the employee's injury." International Harvester v. Industrial Com., 93 Ill. 2d 59, 63 442 N.E.2d 908 (1982).

Petitioner testified that on the date in question he was injured while trying to carry 75-80 pound buckets of cement up a flight of stairs. He dropped the bucket and noted he had immediate onset of groin pain. Respondent is not disputing that an accident occurred at work. Petitioner was diagnosed the next day at Adventist Bolingbrook Hospital with an inguinal hernia. He underwent surgery for bilateral hernia repair but suffered significant complications resulting in several years of ongoing pain management treatment. Petitioner was eventually prescribed a spinal cord stimulator and a permanent spinal cord stimulator was implanted by Dr. Tubic.

Arbitrator finds that Dr. Tubic's opinions regarding causal connection to be more complete and more persuasive than Dr. Gleason's or Dr. Boghossian's. The Arbitrator notes that the report from Dr. Gleason focuses on Petitioner's hips and lower extremities and Dr. Gleason defers to the opinion of Dr. Tubic with respect to Petitioner's return to work status and follow up treatment related to the nerve stimulator.

The Arbitrator finds that Petitioner's hernia/groin injury, hernia repair, resulting condition of illoinguinal nerve neuralgia, continuing groin pain, as well as the need for the nerve cord stimulator are all causally connected to the work accident he sustained on December 18, 2014. Arbitrator finds that Petitioner's low back and hip conditions are not causally connected to the work accident and causal connection is not supported by the record as whole.

G. Petitioner claims his earnings during year preceding the injury were $80,000.00 and the wage calculated pursuant to Section 10 of the act was $1,900.00. The Respondent disputes these calculations and claims Petitioner earned $972.01 per week.

Petitioner's testimony at hearing was that he worked full-time for the Respondent prior to the work injury. The wage statement entered by Respondent as Respondent's Exhibit #4 shows that Petitioner rarely worked 40 hours per week. However, the Arbitrator notes that Petitioner did not earn any income in seven of the fifty-two weeks that predated the work accident.

Wherefore, the Arbitrator finds that Petitioner's average weekly wage prior to the work accident was $972.01 as alleged by Respondent.

J. Petitioner claims entitlement to medical bills paid by the Local Union totaling $154,901.82. Respondent has denied payment and claims all related bills have been paid to date. The Arbitrator finds the following:

Petitioner testified that he injured himself while carrying cement buckets from one floor to the next. He was diagnosed with a hernia one day after the accident. The treating doctors have opined that the medical care the Petitioner has received to date has been reasonable and necessary. Respondent's orthopedic expert recommended follow up care related to the nerve stimulator with Dr. Tubic. Further, the Arbitrator finds Petitioner's testimony credible that he injured himself at work and required medical care over several years due to continued pain complaints and still suffers from left groin pain, which nerve blocks and the nerve stimulator aim to control. With regard to Petitioner's low back and hip conditions, Arbitrator finds that due to the finding above that Petitioner's low back and hip conditions are not related to the work accident, Respondent is not ordered to pay for medical bills relating to those specific conditions.

Having found that Petitioner suffered a hernia/groin injury resulting in a condition of illoinguinal nerve neuralgia post hernia repair, which was causally related to the work accident and all related medical care that he has received to date has been reasonable and necessary, the Arbitrator finds that Respondent is responsible for reimbursement to Petitioner for any and all medical bills paid by the Local No. 502 Welfare Fund totaling $154,901.82 relating to the hernia/groin/illoinguinal nerve neuralgia conditions only. (PX9).

K. Petitioner claims entitlement to temporary total disability as well as temporary partial disability benefits. The Arbitrator finds the following:

Having found Petitioner suffered a compensable accident necessitating a nerve root stimulator and permanent work restrictions pursuant to the last functional capacity evaluation taken at ATI, the Arbitrator finds that Petitioner is entitled to 43 and 1/7 weeks of temporary total disability. In addition, the Arbitrator finds Petitioner's testimony credible especially in light of Petitioner's exhibit number 14 which confirms that Petitioner returned to work light duty suffering a "50% reduction" in earnings. (PX14).

The Arbitrator awards Petitioner temporary total disability benefits totaling 43 and 1/7 weeks from May 11, 2015 through March 7, 2016. In addition, Petitioner is entitled to temporary partial disability benefits from March 8, 2016 through June 15, 2021 totaling 275 1/7th weeks. As noted above, Petitioner suffered a 50% reduction in earnings due to his restrictions. This resulted in earnings lost of $25,272.26 on an annual average basis while he was back to work on light duty with Respondent. The Arbitrator

awards Petitioner two thirds the difference of his lost salary which is also equivalent to $324.00 per week for his temporary partial disability.

Wherefore, the Arbitrator finds that Petitioner is entitled to 43 and 1/7th weeks of temporary total disability and 275 and 1/7th weeks of temporary partial disability. Respondent is entitled to credit for benefits paid totaling $23,769.90

L & O. As it relates to nature and extent of the injury, Petitioner claims entitlement to a wage loss differential. The Arbitrator finds the following:

Section 8(d)1 of the Act states, "If, after the accidental injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing his usual customary line of employment, he shall… receive compensation for the duration of his disability… equal to 66 2/3% of the difference between the average amount he would be able to earn and the full performance of his duties and occupation as to which he was engaged at the time of the accident and the average amount which he is able to earn at some suitable employment or business after the accident."

In order to qualify for a wage differential award under Section 8(d)1 of the Act, "a claimant must prove: (1) a partial incapacity which prevents him from pursuing his "usual and customary line of employment" and (2) impairment of his earnings" Yellow Freight Systems vs. Indus. Comm., 351 Ill App.3d 789 (1st Dist. 2004). In this case, the evidence shows that Petitioner suffers a partial incapacity which prevents him from pursuing his usual and customary line of employment on a full-time full duty basis. Petitioner worked for the Respondent for several years as a cement finisher but is no longer able to do all the job requirements of the position. While Petitioner returned to work for the Respondent for five years, he was being accommodated on a light duty part time position as confirmed by the Respondent themselves. The Petitioner now has permanent work restrictions that do not allow him to return to his usual and customary work for the Respondent. The Respondent offered little evidence to refute the permanent restrictions imposed on Petitioner confirmed by the owner of the company, the Functional Capacity Evaluation taken at ATI Physical Therapy as well as the opinions and conclusions of the treating doctors including Dr. Tubic and Dr. Goliath. Petitioner offered into evidence PX14, which is a letter from the Respondent themselves confirming that Petitioner was suffering a 50% reduction in earnings. Further, after the Respondent went out of business, Petitioner sought new employment and credibly testified he continues to work on a part time light duty basis working about the same number of hours he worked for Respondent before going out of business.

The Arbitrator herein incorporates the above findings concerning his entitlement to temporary partial disability benefits and incorporates the same math to arrive at the conclusion Petitioner is entitled to a wage loss differential in the same amount. Wherefore, the Arbitrator finds Petitioner is entitled to a weekly wage loss differential in the amount of $324.00 commencing on June 16, 2021 with an ongoing entitlement to weekly benefits pursuant to Section 8(d)1 of the Act until the petitioner reaches the age of 67 on September 9, 2038.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC005241
Case Name	Arthur Schultz v. City of Joliet - Street Department
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0092
Number of Pages of Decision	19
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Taylor Matichak
Respondent Attorney	Nicole V. Russo

DATE FILED: 2/23/2024

/s/ Kathryn Doerries, 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 Choose direction	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ARTHUR SCHULTZ,

Petitioner,

vs. NO: 21 WC 005241

CITY OF JOLIET-STREET DEPARTMENT,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) and §8(a) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary total disability and temporary total disability credit, medical expenses, prospective medical, and permanent disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 20, 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.

Based upon the named Respondent herein, no bond is set by the Commission. *820 ILCS 305/19(f)(2)*. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

February 23, 2024

O013024
KAD
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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	21WC005241
Case Name	Arthur Schultz v. City of Joliet - Street Department
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	16
Decision Issued By	Roma Dalal, Arbitrator

Petitioner Attorney	Taylor Matichak
Respondent Attorney	Nicole V. Russo

DATE FILED: 6/20/2023

THE INTEREST RATE FOR THE WEEK OF JUNE 13, 2023 5.15%

/s/ Roma Dalal, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Arthur Schultz
Employee/Petitioner

v.

City of Joliet – Street Department
Employer/Respondent

Case # **21** WC **005241**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Roma Dalal**, Arbitrator of the Commission, in the city of **Kankakee**, on **April 25, 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 **Future TTD**

FINDINGS

On the date of accident, **January 26, 2021**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**81,817.32**; the average weekly wage was $**1,573.41**.

On the date of accident, Petitioner was **59** 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 $**84,418.45** for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $**84,418.45** .

Respondent is entitled to a credit of $**TBD- any potential future claim for left shoulder bills paid by group** under Section 8(j) of the Act.

ORDER

The Arbitrator finds that Petitioner's current conditions of ill-being in regards to his left knee and left shoulder are causally related to his January 26, 2021work accident.

Respondent shall pay Petitioner temporary total disability benefits of $1,048.94/week for 116 weeks, commencing February 2, 2021 through April 25, 2023, as provided in Section 8(b) of the Act.

Pursuant to Section 8(a) of the Act, the Respondent shall authorize and pay for, pursuant to the fee schedule, the treatment recommended by Dr. Pizinger in regards to the left knee, to include post-operative care following his left knee total arthroplasty. Petitioner reached maximum medical improvement for the left shoulder on September 1, 2022.

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 Illinois Orthopedic Institute, Oak Brook X-Rays and Imaging, Oak Brook Surgical Centre, Premier Physical Therapy, Network Durable Medical Equipment, and Center for Minimally Invasive Surgery as outlined in PX10.

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.

JUNE 20, 2023

Signature of Arbitrator

ICArbDec19(b)

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARTHUR SCHULTZ,	)	
	)	
Petitioner,	)	Case No. 21 WC 005241
v.	)	
	)	
	)	
CITY OF JOLIET,	)	
	)	
	)	
Respondent.	)	
	)	

FINDINGS OF FACT

The Parties proceeded to trial before Arbitrator Roma Dalal on April 25, 2023 in Kankakee, Illinois. The issues in dispute are causation, disputed medical bills, TTD benefits and prospective medical. (Arb. Ex.1, T.4).

Mr. Arthur Schultz (hereinafter "Petitioner") was employed by the City of Joliet (hereinafter "Respondent") on January 26, 2021 as a maintenance worker. (T.9). Petitioner described his job duties to include cutting down and trimming trees and doing roadwork to include repairing potholes, plowing snow, cutting grass, picking up garbage, to include a couch or mattress or a TV set. Petitioner testified he was expected to load these large items onto his truck by himself. (T.10-11). All his job duties required him to get in and out of his truck 50 to 60 times per day. (T.12).

Petitioner testified that prior to January 26, 2021 he did not have any left shoulder pain and had some right knee pain. (T.13). Petitioner confirmed he was not seeking any right knee treatment. (T.14). He also noted he never had left knee pain prior to January 26, 2021. (T.15). Prior to January 26, 2021, Petitioner testified that he was able to perform all of his job duties as a maintenance worker. (T.15-16).

On January 26, 2021, Petitioner was plowing snow and stopped to check the salt levels in the back of his truck. (T.16). In order to do so, he climbed up the side of his truck and pulled himself up to get a bird's eye view of the V box. (T.16). As he was climbing the side of the truck, he pulled himself up with his left arm when he heard a pop and felt severe left arm pain, causing his left arm to give out and his bilateral knees, primarily his left knee, and left hip to crash into the metal side of his truck. (T.16-17). Petitioner felt pain immediately following the incident in his left shoulder and left knee. (T.17). Petitioner was able to continue to work but subsequently reported the injury to Jim Anderson. (T.18, PX9). The Arbitrator noted Petitioner reported injuries to his left hip, bilateral knees, and left shoulder. (PX9).

Respondent presented a Supervisor Affidavit and Supervisor Injury Report which documented a reported left shoulder injury. (RX10, RX12).

Respondent's Witness (via Affidavit)- Supervisor Jim Anderson

Respondent offered into evidence a sworn affidavit testimony from Petitioner's supervisor Jim Anderson. (RX12). Mr. Anderson was Petitioner's direct supervisor on January 26, 2021. He represented that he is familiar with the City of Joliet salt trucks, including the specific truck that was operated by Petitioner on the date of injury. Mr. Anderson's signed, sworn statement documents he completed an injury report in response to the date of accident and no other alleged body parts aside from the left shoulder were reported to him. He further represented that if additional injured body parts were reported to him, he would have included them in the Supervisor Injury Report. He also stated under oath that "no mechanism of injury to the bilateral knees was reported to [me] or included in the report. (RX12).

Respondent's Witness – Mr. Derrick Dawson

Mr. Derrick Dawson testified on behalf of Respondent. Mr. Dawson has been employed as a private investigator for The Insight Group since 2002. (T.74). He testified that he was hired to investigate Petitioner to try to gauge his physical capabilities. Mr. Dawson attempted to conduct surveillance of Petitioner on 5 different dates between March 29, 2023 through April 8, 2023. He observed Petitioner on March 31, 2023 and April 5, 2023. (T.75-76). Mr. Dawson testified on April 5, 2023, he performed surveillance of Petitioner observing Petitioner arriving at his residence and entering his garage without a cane. (T.78). Petitioner was then observed later that day entering and exiting physical therapy while using a cane. (T.78). After leaving the therapy visit, Petitioner went to a gas station and pumped gas, entered, and exited the station, and walked back to his car, all without use of a cane. Mr. Dawson testified during his day of surveillance on April 5, 2023, Petitioner was observed using a cane only at the Premier Physical Therapy location. (T.78). Mr. Dawson also testified that he performed a social media check of Petitioner and noted Petitioner traveled to Mexico on multiple occasions, in the months of March and April 2023, which were documented by dated photograph postings. (T.79, 81).

Medical Summary

Treatment prior to January 26, 2021

On November 5, 2019, Petitioner was seen by Dr. Butler at Little Company of Mary Medical Group for an initial evaluation of bilateral knee pain. Petitioner noted he could barely walk. Petitioner reported his symptoms had worsened to the point where he was looking for a knee replacement. He described his work duties as including snow removal in the winter. Bilateral knee x-rays were obtained at that visit which showed severe tricompartmental degenerative joint disease of the right knee with some retained hardware and bone-on-bone medial compartment. The left knee showed tricompartmental degenerative joint disease as well that was moderately severe. Petitioner stated he wanted to proceed with surgery in the spring of 2020. He was diagnosed with arthritis in the knees, much worse on the right than the left. They discussed the idea of utilizing a cane. (RX1, p.9-14).

Treatment after January 26, 2021

Following the injury, Petitioner presented to Dr. Butler on February 2, 2021. Dr. Butler noted Petitioner drove a truck for the City of Joliet and injured himself checking the salt level in his truck on January 26. He pulled himself up with his left arm and felt a pop in his shoulder and crashed into the metal

of the truck, slamming his right knee, left knee and left hip. Petitioner was diagnosed with left shoulder pain and pain in both of his knees. Petitioner was recommended a left shoulder MRI and was ordered a cane. (PX1).

Petitioner returned to Dr. Butler on February 19, 2021. Petitioner followed up for his left shoulder MRI. Dr. Butler noted Petitioner's MRI revealed a full-thickness tear of his supraspinatus as well as some changes at the AC joint. Petitioner was recommended to see Dr. Henry Fuentes. (PX1).

On February 24, 2021, Petitioner began treatment with Dr. Ryan Pizinger with complaints of bilateral knee pain and left hip pain. Petitioner noted he was injured at work reaching with his left hand and hit the steel on the work truck. Petitioner complained of left knee pain. (PX3, p.16). Petitioner's diagnoses included left trochanteric bursitis, a complex tear of the left medial meniscus, bilateral primary osteoarthritis of the knee, left hip pain, left knee pain, and right knee pain. With regard to the right knee, Dr. Pizinger opined there was no need for further imaging given the hardware in place. He recommended a steroid injection and possible physical therapy; however, he noted that due to underlying pathology, Petitioner might require multiple surgeries. This would include removal of hardware from the proximal tibia followed by a joint replacement. With regard to the left knee, Dr. Pizinger opined Petitioner may have an underlying medial meniscus tear and ordered a left knee MRI. With regard to the left hip, Dr. Pizinger ordered a left hip MRI to evaluate any possible partial tears or tendon pathology. *Id.* at 18. Petitioner was off work. *Id.* at 66.

On February 25, 2021, Petitioner underwent an MRI of the left knee which revealed a tear at the junction of the posterior horn of the medial meniscus, and medial extrusion of the medial meniscus, a tear at the body and posterior horn of the lateral meniscus, extending to the external surface and tricompartmental osteoarthritis with joint effusion and suprapatellar synovial plica was documented. (PX3, p.62-63).

Petitioner followed up with Dr. Pizinger on April 12, 2021. Petitioner advised his pain was getting worse. Petitioner was diagnosed with left hip mild trochanteric bursitis and left knee medial and lateral meniscus tears with advanced degenerative joint disease and subchondral stress fracturing in the anterior lateral femoral condyle under the patella, superior central patella, and posterior medial tibial plateau in the area of the PCL attachment under the posterior horn of the medial meniscus. With regard to the left hip, since there was no sign of tearing and only mild degenerative changes, Dr. Pizinger recommended conservative treatment to include medication, therapy, and a possible steroid injection. For the left knee, Dr. Pizinger opined that an arthroscopic procedure could be considered but because Petitioner wanted to get back to life as soon as possible, he felt the total joint replacement would be the best option based on Petitioner's MRI exam. He noted that the meniscus tears could have happened with the injury and the arthritic changes could have been aggravated with the injury. Dr. Pizinger recommended a left total knee arthroplasty. Petitioner also brought up his left shoulder for which he was to return and be evaluated. (PX3, p.21). Petitioner remained off work. *Id*. at 67.

On May 3, 2021, Petitioner was seen by Dr. Pizinger regarding his left shoulder. Dr. Pizinger recommended left shoulder arthroscopic debridement with subacromial decompression, biceps tenodesis, and rotator cuff repair of the supraspinatus tendon. (PX3, p.23). Petitioner remained off work. *Id*. at 68.

On June 17, 2021, Petitioner underwent a left shoulder arthroscopic extensive debridement, subacromial decompression, rotator cuff repair of the subscapularis tendon, rotator cuff repair of the supraspinatus and infraspinatus tendons, and left shoulder open biceps tenodesis. (PX3, p.3-6).

Petitioner followed up on June 24, 2021 with aching, burning sharp pain. Petitioner was to wear his sling and return. He was off work. (PX3, p.26-27).

Petitioner underwent therapy from June 28, 2021 through October 25, 2021. (PX6).

Petitioner returned on July 22, 2021 with persistent shoulder pain. Petitioner had a significant amount of fluid from the subacromial region. Petitioner had an underlying subacromial space infection. Petitioner was recommended surgical intervention in an urgent fashion. (PX3, p.29-30). Petitioner remained off work. *Id*. at 70.

On July 22, 2021, Petitioner proceeded to the Emergency Room for an evaluation of cellulitis. Petitioner had a large abscess drained over the wound. There was concern that this was a surgical wound infection. Petitioner was admitted. (PX4, p.396-400). During the admission, Petitioner was seen by Dr. Rahul Agarwal indicating Petitioner was noted to have signs of possible subacromial space infection. Petitioner was to undergo a left shoulder arthroscopic debridement of the subacromial space with removal of hardware from the rotator cuff and proximal humerus. *Id*. at 403.

On July 23, 2021 Petitioner underwent another surgery to include a left shoulder arthroscopic incision, drainage, and debridement of the subacromial space with removal of hardware from the rotator cuff and proximal humerus, manipulation under anesthesia and subacromial decompression. (PX3, p.7-12, PX4, p.415). Petitioner was to continue on antibiotics. Petitioner was discharged on July 26, 2021 with a diagnosis of septic subacromial space, left I&D of the subacromial space with removal hardware from the rotator cuff and proximal humerus, antibiotics per infections disease. (PX4, p. 407).

Petitioner returned on August 2, 2021 with mild pain. Petitioner was provided a prescription for home therapy. Petitioner was to continue with antibiotic treatment per the infectious disease recommendations. Petitioner was to return and remained off work. (PX3, p.31-32, 71). Petitioner followed up with Dr. Pizinger on September 2, 2021 for his left shoulder. Petitioner was feeling good and was to begin outpatient physical therapy, return in a month and remained off work. *Id*. at 33-34, 72. Petitioner followed up on October 7, 2021. Petitioner was to continue with physical therapy and remained off work. *Id*. at 35-36, p.73. In a November 11, 2021 follow up, Petitioner still complained of shoulder pain. Given Petitioner's disability, Petitioner was recommended a left reverse total shoulder arthroplasty and remained off work. *Id*. at 38, 74.

On August 31, 2022 Petitioner presented to Dr. Van Thiel for an Independent Medical Examination. Dr. Van Thiel went over Petitioner's medical and work history. He opined to a reasonable degree of medical certainty, the left shoulder MRI showed a full thickness tear of the supraspinatus tendon. The knee x-rays as well as the left knee MRI showed severe degenerative joint disease in the right knee with moderate-to-severe degenerative joint disease in the medial compartment of the left knee with degenerative meniscal tearing in the posterior horn of the medial meniscus. Dr. Van Thiel opined to a reasonable degree of medical certainty based on the mechanism of pulling himself up with his left arm onto the salt truck with the immediate onset of pain and MRI, Petitioner sustained a left shoulder rotator

cuff tear as a direct result of the work injury. He causally related the subsequent treatment and infection. In regards to the bilateral knees, the right knee showed severe arthritic changes with previous surgical intervention. Dr. Van Thiel opined that more likely than not the mechanism of injury of hitting the knees against the salt truck after his shoulder had been injured would not be consistent with causing nor temporarily or permanently aggravating either the significant degenerative change in the right knee or the degenerative meniscal tears. Therefore, the right knee pain is a normal progression of a severe pre-existing right knee degenerative arthritis. In regards to the left knee, the left knee showed moderate to severe arthritic changes on the MRI with a degenerative meniscal tear. When taken in the context of the reported injury, this would not be consistent with a mechanism that would result in a tear of the meniscus. Therefore, the current symptomology related to the left knee would be related to a normal progression of preexisting moderate to severe arthritis with degenerative meniscal tear. He also opined the left hip was unrelated. (RX2).

On January 11, 2022, Petitioner presented for another Section 12 examination with Dr. Van Thiel to determine if the third shoulder surgery prescribed by Dr. Pizinger is reasonable and necessary as a result of the work injury. Dr. Van Thiel recommended an updated MRI to assess the status of the left shoulder and determine if a simple arthroplasty would suffice. (RX3).

On February 22, 2022, Petitioner underwent a left reverse total shoulder arthroplasty with Dr. Pizinger. Petitioner submitted this surgery through his personal insurance with the City of Joliet. (RX8 and RX13).

Petitioner followed up with Dr. Pizinger on March 16, 2022. Petitioner's current pain was a 3 out of 10. Petitioner underwent a reverse total arthroplasty. Petitioner was provided a prescription for physical therapy and was to return. Petitioner was off work. (PX3, p.39-40). Petitioner underwent post-operative physical therapy at Premier Physical Therapy. (PX6). Petitioner followed up on April 11, 2022. Petitioner was to continue progressing with his activities and physical therapy. Petitioner remained off work. *Id*. at 41-42, 76. In a May 19, 2022 follow up Petitioner noted he was improving with physical therapy. Petitioner was to continue with the same. Petitioner noted his left knee was really bothering him, so a left knee MRI was recommended. Petitioner remained off work. *Id*. at 43-44, 78. Petitioner returned again on June 30, 2022. Petitioner completed physical therapy and was working on strengthening and motion at home. Petitioner was to return in two months for his left shoulder. Petitioner remained off work. *Id*. at 45-46, 79. Petitioner followed up on September 1, 2022 for his left shoulder. Petitioner noted he only had occasional soreness. Petitioner was released from care and was to follow up on an as needed basis. *Id*. at 47-48.

Petitioner also saw Jacqueline Pizinger, NP, on September 1, 2022 for his left knee. Petitioner was ready to proceed with surgery. Petitioner was recommended a new MRI. Petitioner remained off work. (PX3, p.49-50, 80).

On October 26, 2022, Petitioner underwent an MRI of the left knee which revealed advanced degenerative chondral changes with areas of full-thickness cartilage loss, oblique undersurface tear of the posterior horn on the lateral meniscus and small oblique undersurface tear of the posterior horn of the medical meniscus and degeneration of the ACL. (PX3, p.64-65).

Petitioner returned on January 10, 2023. Petitioner was diagnosed with left knee degenerative joint disease, and a left total knee arthroplasty was recommended. Petitioner remained off work. (PX3, p.52-53, 81). On February 27, 2023, Dr. Pizinger performed a left knee total arthroplasty. *Id.* at 13-15.

On March 6, 2023, Petitioner followed up with Dr. Pizinger for his left knee. His incision was healing and was prescribed outpatient physical therapy. (PX3, p.54-55). Petitioner followed up with Pizinger, NP, on March 21, 2023. Petitioner had been out of town and was not doing physical therapy. Petitioner was to restart the same. *Id*. at 57-58.

Deposition Testimony

The Parties proceeded with the evidence deposition of Ryan Pizinger on November 29, 2022. (PX5). Dr. Pizinger is part of Illinois Orthopaedic Institute, treating patients with knee injuries. *Id*. at 5. Dr. Pizinger went over his initial medical history with Petitioner, noting Petitioner was climbing up the back of the truck to look at the salt levels and twisted his left knee, hip and hit both his knees against the truck box, describing bilateral knee pain and left hip pain. *Id*. at 11. Dr. Pizinger testified the mechanism of injury of swinging and slamming his body and knees into the side of a metal truck is a competent mechanism to cause a knee injury. *Id*. at 12. He opined it was an aggravation of an underlying pre-existing diagnosis. *Id*. at 12. He testified that degenerative conditions are very susceptible to aggravation or worsening, specifically with the bone bruising that occurs. *Id*. at 13. Dr. Pizinger stated that he originally thought Petitioner may have a meniscus tear and wanted him to undergo an MRI. *Id*. at 15. Dr. Pizinger stated based on the same he recommended him considering an arthroscopic procedure but also talked to him about a total joint replacement. *Id*. at 17. He noted Petitioner had multiple areas of subchondral edema and cystic change within the proximal tibial plateau, which were harder to treat with minimally invasive techniques. *Id*. at 17. He felt doing an arthroscopy was unlikely to give Petitioner full relief from the MRI findings. *Id*. at 18. Petitioner returned later for the left shoulder. Dr. Pizinger testified to the left shoulder treatment which delayed the knee treatment. *Id*. at 19. As of September 1, 2022 Petitioner was still recommended surgery. *Id*. at 24. Based on his treatment, he opined to a degree of medical and surgical certainty his current left knee symptoms were causally related to the work incident of January 26, 2021. *Id*. at 26. He further noted the mechanism of injury was a competent to cause an underlying preexisting asymptomatic degenerative joint disease of the left knee become symptomatic. *Id*. at 27.

On Cross-Examination, Dr. Pizinger opined he did not review any accident, injury reports or medical records prior to the evaluation. (PX5 at 33). He also noted he reported two separate injuries, one hitting the truck and one falling. He also did not review a job description or imaging of the truck. *Id*. at 41.

In regards to the left shoulder, he opined Petitioner only had occasional soreness with activity, no longer needed medication and released on an as needed basis. No further treatment was recommended for the shoulder. *Id*. at 45.

The Parties proceeded with the evidence deposition of Dr. Geoffrey Van Thiel on December 13, 2022. (RX4). Dr. Van Thiel is board certified in orthopedics with a subspeciality in sports medicine. *Id*. at 7. Dr. Van Thiel testified he first examined Petitioner on August 31, 2021. *Id*. at 11. Petitioner stated he was climbing on his truck to check the salt on the back of it, when using his left arm to pull him up he felt an immediate onset of pain and a pop in his left shoulder. This caused him to lose his balance, twisting,

and hitting the side of the salt truck with both of his knees as well as his hip. *Id*. at 12. Dr. Van Thiel testified that he examined Petitioner and reviewed complete medical records. *Id*. at 14-17. In regards to the left knee, he opined the MRI one month after the date of injury showed moderate to severe arthritic changes in the knee as well as degenerative changes in the meniscus. Based on the mechanism of injury, and review of imaging, the mechanism would be inconsistent with one that would result in degenerative tearing of meniscus or arthritis in the knee and would not have caused either a temporary or permanent aggravation of his preexisting arthritis or degenerative changes in the meniscus. *Id*. at 18. He opined this would not be related to the January 26, 2021 injury. *Id* at 20. With regard to the left hip, Petitioner was minimally symptomatic, and the MRI did not show any significant traumatic injuries to the left hip. He opined this would not be related to the January 26, 2021 work injury. *Id*. at 19-20. Absent the injury, he would expect to see progression of arthritis. *Id*. at 21. He noted the description was chronic in nature so longstanding. *Id*. at 22. He opined Petitioner would have no restrictions for the knees as they were preexisting conditions.

Dr. Van Thiel testified he examined Petitioner again on January 11, 2022. (RX4, p.25). With regards to the left shoulder, he recommended an updated MRI. *Id*. at 27. He believed if the rotator cuff was still healthy an argument could be made for a re-repair, if the rotator cuff was not existent of health, then a reverse shoulder replacement would be indicated. *Id*. at 28. He noted the surgery was a premature solution. *Id*. at 28. He opined the left shoulder was causally related to the work injury. *Id*. at 30. Again, with the bilateral knees as well as the left hip he did not feel they were causally related to the work injury. He further testified that a left knee replacement was not causally related to the alleged work injury. He opined that hitting the knees against the side of the salt truck would be inconsistent with any mechanisms that would result in any worsening or causation of an arthritis in the left knee. *Id*. at 34. He opined the total knee replacement would be recommended in order to treat arthritis of the knee. The physician was ultimately trying to treat the arthritis. *Id*. at 35.

On cross-examination, Dr. Van Thiel opined symptoms of degenerative joint disease would be pain and occasional swelling. (RX4, p.37). People can have degenerative joint disease of the knee and be asymptomatic. *Id*. at 37. He further opined that he does not believe that it is possible for someone with asymptomatic degenerative joint disease of the knee to suffer an injury which causes it to be symptomatic. *Id*. at 38. He opined an injury can cause pain within the joint but not cause the symptoms. He further opined it would not cause an acceleration or an aggravation of the degenerative process. *Id*. at 39. Dr. Van Thiel conceded he did not review any medical records from November 6, 2019 through January 26, 2021. *Id*. at 42. He noted he did not see any acute displacement fragments to the meniscus that would signify any traumatic etiology. *Id*. at 43. He opined it was possible for a person with an underlying asymptomatic meniscus tear to suffer an injury which causes it to become symptomatic. *Id*. at 45. He noted Petitioner's injury, however, was not a competent cause as hitting or direct impact onto the knees would be inconsistent with a mechanism that would result in causation or aggravation of a preexisting meniscus tear and would not have caused causation or aggravation of his specific meniscus tears. *Id*. at 46. Lastly, the Doctor noted if the MRI showed that the tendon was not repairable Petitioner should undergo the total shoulder reverse arthroplasty. *Id*. at 53.

Petitioner chose to have the third left shoulder surgery, which was submitted to his personal BC/BS group insurance plan. (RX13).

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 his testimony to be persuasive. The Arbitrator compared Petitioner's testimony with the totality of the evidence submitted and finds the witness reliable. While the Arbitrator did note some inconsistencies, the Arbitrator finds that any inconsistencies in her testimony are not attributed to an attempt to deceive the finder of fact.

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

The Findings of Fact and Conclusions of Law, as stated above, are adopted herein. To obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in her ensuing injuries. A work-related injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. "A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." *International Harvester v. Industrial Com.*, 93 Ill. 2d 59, 63 442 N.E.2d 908 (1982). Prior good health followed by a change immediately following an accident allows an inference that a subsequent condition of ill-being is the result of the accident. *Navistar International Transportation Co. v. Industrial Commission*, 315 Ill. App. 3d 1197, 1205, 248 Ill. Dec. 609, 734 N.E.2d 900 (2000).

When a preexisting condition is present, a claimant must show that "a work-related accidental injury aggravated or accelerated the preexisting [condition] such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of the preexisting condition." *St. Elizabeth's Hospital v. Workers' Compensation Commission*, 864 N.E.2d 266, 272-273 (5th Dist. 2007). Even when a preexisting condition exists, recovery may be had if a claimant's employment is a causative factor in his or her current condition of ill-being. *Sisbro, Inc. v. Industrial Commission*, 797 N.E.2d 665 (2003). Allowing a claimant to recover

under such circumstances is a corollary of the principle that employment need not be the sole or primary cause of a claimant's condition. *Land & Lakes Co. v. Industrial Commission*, 834 N.E.2d 583 (2d Dist. 2005).

In the instant case, the Arbitrator finds Petitioner's current condition of ill-being in regards to his left knee and left shoulder are causally related to his work accident. Petitioner testified he was working full duty in regards to his left shoulder and left knee.

The Arbitrator will first address the left shoulder. Petitioner testified he never had any prior left shoulder problems prior to the injury. In addition, the chain of events presented in this case show Petitioner's left shoulder became symptomatic after his work accident. There is no evidence whatsoever that prior to Petitioner's work accident, he received any medical treatment let alone a surgical recommendation. The record does not reflect Petitioner had ever taken time off work due to left shoulder pain. No evidence was introduced about Petitioner's pre-accident work performance not being satisfactory. There was no mention Petitioner requested any accommodation because of a shoulder condition. There was no evidence presented of intervening or subsequent injuries to the left shoulder that could explain Petitioner's injury and current condition. The Arbitrator finds Petitioner met his burden of proof by a preponderance of the evidence that his condition of ill-being was causally related to his work accident based on the chain of events in addition to the medical opinions contained in the record giving causal connection.

The Arbitrator finds both Dr. Pizinger and Dr. Van Thiel agreed Petitioner's mechanism of injury was a competent to cause his present condition and ongoing symptoms of left shoulder pain, thereby finding causation. The Arbitrator agrees with the opinions of Dr. Pizinger that a total shoulder arthroplasty was necessary to alleviate Petitioner's ongoing left shoulder symptoms. Petitioner testified that since his surgery, he no longer has left shoulder symptoms and feels significant improvement. Based on the same, the Arbitrator finds Petitioner's current condition of ill-being in regards to his left shoulder is causally related to his January 26, 2021 work injury.

In evaluating the left knee, the Arbitrator also finds Petitioner met his burden of proof by a preponderance of the evidence that his condition of ill-being was causally related to his work accident. In regards to the left knee, Petitioner had preexisting medical care on November 5, 2019. The Arbitrator notes Petitioner did not seek any treatment for the left knee from November 2019 until January 2021, more than a year later. The Arbitrator places limited weight on this preexisting injury as no medical records were produced of continued medical treatment. Based on the same, the chain of events presented in this case show Petitioner's left knee became symptomatic after his work accident.

There is no evidence that prior to Petitioner's work accident, he received any medical treatment the preceding year or required to take time off from work. Once again, no evidence was introduced about Petitioner's pre-accident work performance not being satisfactory. There was no evidence presented of intervening or subsequent injuries to the left knee that could explain Petitioner's injury and current condition. The Arbitrator finds Petitioner met his burden of proof by a preponderance of the evidence that his condition of ill-being was causally related to his work accident based on the chain of events in addition to the medical opinions contained in the record giving causal connection.

Petitioner reported he had left knee function prior to his date of injury. After his work accident, by contrast, Petitioner felt increasingly severe soreness and swelling in his left knee. Petitioner treated consistently for his knee, with the primary focus being on the left shoulder.

In evaluating the medical opinions, the Arbitrator finds Dr. Pizinger more persuasive than Dr. Van Thiel. The Arbitrator notes that Dr. Van Thiel opined symptoms of degenerative joint disease would be pain and occasional swelling. He further noted people could have degenerative joint disease of the knee and be asymptomatic. He did not believe that the mechanism of injury caused Petitioner's current complaints. Dr. Van Thiel opined an injury can cause pain within the joint but not cause the symptoms. He further conceded he did not review any medical records from November 6, 2019 through January 26, 2021. The Arbitrator does not agree with his analysis. Moreover, the Arbitrator notes that Dr. Van Thiel does not perform total knee replacements. (RX4).

In contrast, Dr. Pizinger explained that Petitioner's mechanism of injury was an aggravation of an underlying pre-existing diagnosis. He testified that degenerative conditions are susceptible to aggravation or worsening, specifically with the bone bruising that occurs. He further noted that an arthroscopic procedure would not have provided Petitioner with the necessary relief, given the MRI findings. Dr. Pizinger testified the left shoulder treatment delayed the knee treatment. Based on his treatment, he opined to a degree of medical and surgical certainty his current left knee symptoms were causally related to the work incident of January 26, 2021. (PX5).

The Arbitrator gives great weight to the medical records, which further corroborate the testimony in this case. Before his work injury, he was not being recommended any medical treatment for left knee pain. Here, the evidence, including the testimony of Dr. Pizinger, coupled with the supporting case law prove causation. Therefore, the Arbitrator finds Petitioner's current condition of ill-being is causally related to his work-injuries.

Based on the evidence set forth above, the Arbitrator finds that Petitioner's current condition of ill-being in his left knee is causally related to his work accident of January 26, 2021.

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

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

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

The Arbitrator finds Petitioner's treatment to be reasonable and necessary and finds Respondent has not paid for said treatment.

Respondent has not paid for the medical treatment Petitioner has received. The live testimony of Petitioner at trial, the opinions of Dr. Pizinger, Petitioner's treating physician, and the treatment history is consistent with this finding. Respondent shall pay reasonable and necessary medical services as billed by Petitioner's treating physicians for their dates of service directly to Petitioner pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act, to include: $1,155.00 to Illinois Orthopedic Institute; $7,000.00 to Oak Brook X-Rays and Imaging; $4,000.00 to Oak Brook Surgical Centre; $4,070.00 to Premier Physical Therapy; $52,175.00 to Network Durable Medical Equipment; and $79,354.02 to Center for Minimally Invasive Surgery.

As such, the Arbitrator orders Respondent to pay Petitioner the reasonable and necessary medical expenses incurred as outlined in Petitioner's Exhibit 10 in connection with the care and treatment of his causally related condition pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid.

With respect to Issue (K) whether Petitioner is entitled to any prospective medical care, the Arbitrator finds the follows:

The Arbitrator incorporates by reference the above Findings of Fact and refers to them by reference herein. Regarding the issue of whether Petitioner is entitled to any prospective medical care, the Arbitrator will address both body parts.

The Arbitrator finds that in regards to the left shoulder, Dr. Pizinger's records indicate Petitioner was discharged from care as of September 1, 2022. Petitioner noted he only had occasional soreness. Petitioner was released from care and was to follow up on an as needed basis. (PX3 at 47-48). Therefore, the Arbitrator finds Petitioner is at MMI and is need of no further medical care.

Regarding the issue of whether Petitioner is entitled to any prospective medical care for the left knee, following consideration of the testimony and evidence presented, the same is incorporated by reference, it is found Petitioner's condition is causally related to his work accident and has not stabilized or otherwise reached MMI. Petitioner seeks prospective care in the form post-operative care following his left knee total arthroplasty. The Arbitrator finds Petitioner is entitled to prospective medical care as recommended by his treating physicians. For the reasons stated above, Respondent shall authorize and pay for this and such other reasonable medical treatment pursuant to the statutory fee schedule.

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

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

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

Petitioner is claiming TTD benefits beginning on February 2, 2021 through the trial date, April 25, 2023 as provided in Section 8(b) of the Act. The Arbitrator finds Petitioner has not recovered from his injuries and has not reached Maximum Medical Improvement. The Arbitrator further finds Petitioner's physicians have not allowed him to return to unrestricted work since his January 26, 2021 accident.

Based on the same, TTD benefits are awarded at a rate of $1048.94 per week for 116 weeks, commencing February 2, 2021 through April 25, 2023 as provided in §8(b) of the Act. Respondent shall receive credit for amounts paid.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC016266
Case Name	David Sampson v. Prairie Farms
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0093
Number of Pages of Decision	7
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Hania Sohail
Respondent Attorney	Matthew Terry

DATE FILED: 2/26/2024

/s/Marc Parker, Commissioner

Signature

THE INTEREST RATE FOR THE WEEK OF FEBRUARY 21, 2024 5.10%

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

David Sampson,

Petitioner,

vs. No. 18 WC 016266

Prairie Farms Dairy,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary disability, permanent disability, prospective medical care, penalties and attorney's fees, and being advised of the facts and law, reverses the Decision of the Arbitrator.

Petitioner, 51, worked for Respondent as a maintenance man. His duties included repairing various machines in Respondent's plant when they broke down or malfunctioned. On May 17, 2018, he attempted to repair a hydraulic blow mold machine without first shutting it off, contrary to Respondent's rules. After attaching masking tape to the end of a plastic tube, he placed his hand and the tube into the machine. The machine amputated his right little finger, crushed part of his right hand, and fractured his fifth metacarpal.

Petitioner admitted he was aware of Respondent's rule requiring the machines be powered down before performing repairs, but testified that sometimes "quick fixes" could be made while the machines were still operating. He believed his supervisor, Kyle Hansen, had told him to *not* shut off the machines while making certain repairs, to avoid stopping production. Petitioner testified that once the blow mold machine was shut off, it could take up to an hour for it to become fully operational again.

In addition to Petitioner, other employees or former employees testified. Their testimony and documentary evidence established that employees sometimes performed repairs while the machines were operating, in contravention of Respondent's rule.

Respondent's Plant Manager, Jason Emery, testified that some repairs to Respondent's machines could be made while they were still running, and he acknowledged that the company's written rules were not always followed. He was familiar with the practice of using masking tape on plastic tubing to adjust the blow mold machine, and testified that the machine did not need to be turned off when using the plastic tubing in the machine's positions 1 and 6, though it did for repairs to the other positions, including the one Petitioner was attempting to repair.

Blaine Parnham testified that he worked as a maintenance man for Respondent from 2014 through 2017, when he voluntarily resigned. He testified that the maintenance men would strive to make "quick fixes" when the machines weren't operating correctly. He testified that when he worked at Respondent, he would not always turn off the machines, including the blow mold machine, before repairing them. Some of the "quick fixes" he made – with the machines still running – were in the presence of management. He did not recall ever being disciplined or reprimanded for doing that.

The Arbitrator found Petitioner failed to prove an accident, and denied benefits. The Arbitrator found that Petitioner voluntarily undertook an unreasonable and unnecessary risk which took him outside the course and scope of his employment. The Arbitrator noted that Petitioner had received copies of safety rules and extensive training regarding working on machines. The Arbitrator also considered that the day before Petitioner's accident, he received a verbal warning for violating a safety rule.

In concluding that Petitioner failed to prove accident arising out of his employment, the Arbitrator relied on *Saunders v. Industrial Comm'n,* 189 Ill.2d 623 (2000). In *Saunders*, the claimant was going to retrieve his lunch and was injured when he hitched a ride on a 1-man forklift driven by another employee. The employer's rule against riding double on a forklift was known in the plant, and had also been communicated to employees through training sessions and the employee handbook. The Supreme Court affirmed the Commission's finding that the claimant's injuries did not arise out of his employment because the claimant had engaged in a prohibited activity that was not a part of his work duties for Respondent but rather for his own personal benefit. The Arbitrator also relied on *Yost v. Industrial Commission,* 76 Ill.2d 548 (1979) wherein the court held Petitioner did not suffer an employment related injury when she cut her thumb while on a lunch break opening a can of candy sold by another employee.

Lastly, the Arbitrator found that Petitioner's act of placing his hand inside the machine while it was operating not only failed to serve any business interest of Respondent, but actually hurt Respondent's business interests by requiring production to be shut down after Petitioner's accident.

The Commission views the evidence differently than the Arbitrator, and finds Petitioner met his burden to prove that his injuries on May 17, 2018 arose out of and in the course of his employment by Respondent. In so finding, the Commission specifically focuses on whether Petitioner was benefitting his employer while violating the safety rule such that his injuries arose out of and in the course of his employment with Respondent. In this matter, the record supports that although Petitioner created the risk of injury by not properly shutting down the machine before attempting the repair, it was clear that Petitioner's actions were done with the intent to further employer's business i.e. avoiding a lengthy and costly shut down.

In determining whether Petitioner's injuries arose out of and in the course of his employment in light of his safety rule violation, we find the cases, *Hines Interests v. Industrial Comm'n*, 191 Ill. App. 3d 913 (1st Dist., 1989), and *J.S. Masonry, Inc. The Illinois Industrial Comm'n* 369 Ill. App. 3d 591 (1st Dist., 2007), informative. In *Hines*, the claimant was injured when he sought entry into a locked subbasement by attempting to lower himself through a hatchway, when other options to gain entry were available. The *Hines* court held that an employee's violation of a direct order from his employer was not sufficient to remove him from the scope of his employment, as long he remained within the sphere of his work. The Appellate Court affirmed the Commission's finding that, although that claimant acted negligently, his accident still arose out of his employment. The court found the claimant did not choose the action he performed for his own personal benefit, and that his action was consistent with his employer's instructions.

Hines also held, as a matter of law, that the claimant's negligence and failure to follow direct orders did not remove him from the scope of his employment. The court found that recklessly doing something persons are employed to do which is incidental to their work, differs considerably from doing something totally unconnected to their work. Significantly, *Hines* held that the ultimate issue is whether the claimant has exposed himself to a risk that is purely personal, or whether the risk is, "incidental to or connected with what the employee has to do in fulfilling his duties." Similarly, in *J.S. Masonry*, the Petitioner was injured after leaning against an unsecured gate which he intentionally left open to more efficiently transport materials from the ground to a scaffold. Benefits were awarded to Petitioner despite the unsafe situation he created in that he was furthering employer's work at the time of the accident and injury.

In the present case, we find Petitioner's actions, while negligent, were incidental to and connected with the work he was hired to do. His actions were intended to benefit his employer by not shutting down its production. Petitioner derived no personal benefit from his actions, and we find his actions did not remove him from the course or scope of his employment.

For these reasons, we find *Saunders* distinguishable from the present case. In *Saunders*, the claimant received a personal benefit from his actions, whereas Petitioner herein did not. Of note, *Saunders* also held that when an employee's violation of a rule does not remove him from the sphere of his employment, recovery is not barred, "no matter how many orders the employee disobeys or how bad his conduct may have been." For the same reasons, we also find *Yost*

distinguishable from the present claim. In *Yost*, the claimant's act of prying open a candy tin while on a break had no connection to her employment; the risk she undertook was purely personal, for her own benefit.

Having found Petitioner proved an accident which arose out of and in the course of his employment, we also find that his injuries to his right hand and arm were causally related to his accident, except for his emergency room visit to OSF St. Francis Hospital on September 3, 2018, and a follow-up visit on September 6, 2018. Petitioner's treatment on those dates was for an unrelated laceration to his right index finger, which he admitted occurred while he was performing work on his personal vehicle. We therefore award Petitioner the bills submitted in Petitioner's Exhibit 13, pursuant to the fee schedule, except for the bills incurred in treating his right index finger laceration on September 3, 2018, and September 6, 2018.

Petitioner testified that from his date of accident until he returned to work on January 7, 2019, he was either authorized off work completely, or given restrictions which Respondent did not accommodate. We therefore find Petitioner entitled to 33-3/7 weeks of temporary total disability benefits, for the period May 18, 2018 through January 6, 2019, at a weekly rate of $710.74. Pursuant to the parties' stipulation, we find Respondent entitled to a credit of $2,292.36 for TTD paid, and $6,131.64 in nonoccupational indemnity disability benefits paid.

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 from a physician; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b). The Commission has considered these factors, as follows:

(i) **Disability impairment rating:** no relevance or weight, because neither party offered a physician's impairment rating into evidence.

(ii) **Employee's occupation:** moderate relevance and weight, because Petitioner was able to return to his usual job and duties as a maintenance man.

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

(iv) **Future earning capacity:** moderate relevance and weight, because Petitioner testified that he now works for a different employer, and earns more than he earned at the time of his injury.

(v) **Evidence of disability corroborated by the treating records:** significant relevance and weight, because Petitioner's injuries were serious and included a crush injury to his dominant right hand, a fractured right 5th metatarsal, and the loss of his right fifth finger. Petitioner underwent three surgeries to his right hand, and required a skin graft from his right arm. Petitioner had to learn how to write again. Medical records from

> Dr. Ma show Petitioner continues to experience hand weakness and throbbing pain at night. However, although Petitioner has restrictions, he acknowledged he has learned to adapt, and that he has no issues with his hand which affect his ability to work.

Based upon our consideration of the above factors, we find the injuries Petitioner sustained as a result of his May 17, 2018 accident caused a 100% loss of his right 5th finger, a 25% loss of use of his right hand, and a 1% loss of use of his right arm.

Finally, we deny Petitioner's request for penalties under §19(k) and §19(l) of the Act, and attorney's fees under §16. There was sufficient evidence in the record to show Respondent investigated this claim, and that Respondent's defense, given the disputed issues and evidence presented, was not unreasonable, vexatious, or without good and just cause.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 4, 2022, is reversed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner temporary total disability benefits of $710.74 per week for 33-3/7 weeks, for the period of May 18, 2018 through January 6, 2019, as provided by §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner the reasonable and necessary medical expenses incurred in treating his right hand which are included in Petitioner's Exhibit 13 – except for his unrelated emergency room visit to OSF St. Francis Hospital on September 3, 2018, and follow-up visit on September 6, 2018 – as provided by §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner the sum of $639.67 per week for 22 weeks, as provided by §8(e)5 of the Act, for the reason that the injuries sustained caused a 100% loss of the right little finger.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner the sum of $639.67 per week for 51.25 weeks, as provided by §8(e)9 of the Act, for the reason that the injuries sustained caused a 25% loss of use of the right hand.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner the sum of $639.67 per week for 2.53 weeks, as provided by §8(e)10 of the Act, for the reason that the injuries sustained caused a 1% loss of use of the right arm.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's request for penalties and attorney's fees pursuant to §19(k), §19(l), and §16 of the Act, is denied.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid to or on behalf of Petitioner on account of said accidental injury, including but not limited to the parties' stipulation of credits in the amount of $2,292.36 for TTD benefits paid, and $6,131.64 for nonoccupational indemnity disability benefits paid.

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.

February 26, 2024
o: 01/11/24
MP/mcp
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	19WC023127
Case Name	Ashley Smith v. Chicago Transit Authority
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0094
Number of Pages of Decision	19
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Adam Scholl
Respondent Attorney	Andrew Zasuwa

DATE FILED: 2/27/2024

/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

Ashley Smith,

Petitioner,

vs. NO. 19WC 23127

Chicago Transit Authority,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, permanent disability, causal connection, 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 1, 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.

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.

February 27, 2024

MEP/sj
o-1/24/2024
49

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

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

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC023127
Case Name	Ashley Smith v. Chicago Transit Authority
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	16
Decision Issued By	Nina Mariano, Arbitrator

Petitioner Attorney	Adam Scholl
Respondent Attorney	Andrew Zasuwa

DATE FILED: 3/1/2023

/s/Nina Mariano, Arbitrator
Signature

THE INTEREST RATE FOR THE WEEK OF FEBRUARY 28, 2023 4.94%

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

Ashley Smith
Employee/Petitioner

v.

Chicago Transit Authority
Employer/Respondent

Case # **19** WC **23127**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Nina Mariano**, Arbitrator of the Commission, in the city of **Chicago**, on **September 28, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **8/2/19**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**57,749.64**; the average weekly wage was $**1,110.57**.

On the date of accident, Petitioner was **28** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**22,740.24** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**22,740.24**.

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

ORDER

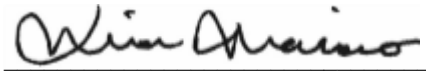
Respondent shall pay Petitioner directly for the following outstanding medical services, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act: Accredited Ambulatory Care ($17,975.38); Advanced Care RX ($3,405.64); Bone and Joint Clinic ($13,623.85); Chicago Pain and Orthopedic Inst. ($2,000); Chicago Pain and Orthopedic Inst. ($763.25); Integrated Behavioral Medicine ($8,120.00); Midwest Specialty Pharmacy ($9,429.61); and Windy City Anesthesia ($2,478.00).

The Arbitrator makes an award of 7 ½ % disability to the person as a whole under Section 8(d)(2), which corresponds to 37.5 weeks of permanent partial disability benefits at a weekly rate of $666.34. See Conclusions of Law for Arbitrator's considerations under §8.1b(b) of the Act.

All TTD has been paid in the amount of $22,740.24 and is not in dispute. There is no underpayment or overpayment of TTD.

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 1, 2023

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

ASHLEY SMITH,	)	
	)	
PETITIONER,	)	
	)	
v.	)	No.: 19 WC 23127
	)	
CHICAGO TRANSIT AUTHORITY,	)	
	)	
RESPONDENT.	)	

FINDINGS OF FACT

This matter proceeded to hearing on September 28, 2022 in Chicago, Illinois before Arbitrator Nina Mariano on Petitioner's Request for Hearing. The Request for Hearing Form indicates the matter was tried to completion on September 27, 2022, but that is incorrect, and it actually proceeded on September 28, 2022, the date indicated on the Request for Hearing Form that the Form was submitted on . The disputed issues in this matter involve the following: 1. whether petitioner's claim of psychological injuries arose out of and in the course of employment; 2. whether petitioner's current condition of ill-being is causally connected to her alleged injury; 3. whether respondent is liable for unpaid bills; and 4. the nature and extent of the injury. Arbitrator's Exhibit "Ax" 1.

On August 2, 2019, petitioner was employed as a bus operator by respondent. (T.7) She had worked in that capacity for four and a half years. (Id.) Petitioner testified that her essential duties were operating the bus and picking up and dropping off passengers. (T.8)

On August 2, 2019, petitioner was assigned the No. 4 Cottage Grove route. (T.8,9) On said date, petitioner was driving southbound on Cottage Grove Avenue. While operating her bus, she noticed an erratic driver behind her blowing his horn and trying to go around her bus and other cars. Petitioner stated that she had then curbed her bus to pick up passengers and lost sight of the erratic driver. (T.9) Petitioner moved forward after stopping and continued her route. When she reached the intersection of 61st Street and Cottage Grove Avenue, she noticed the same erratic driver proceeding eastbound on 61st Street drive. The erratic driver drove then through a red light at the intersection. (Id.) The erratic driver then struck an automobile that was driving alongside her bus and then hit a northbound vehicle. (Id.) Petitioner stated that one of the cars spun around and came towards the bus. (Id.) Petitioner applied the brakes which caused the bus to pull right causing the bus to collide with one of the vehicles, which she defined as the red car. (T.9,10) The contact occurred at the driver's side of the bus towards the front of the vehicle. (T.10) After petitioner was able to bring the bus to a full stop, she noticed her body being very tensed up, she felt very nervous, overheated and what she described as shock. (T.10,11)

After the incident, emergency personnel came to the scene. Petitioner stated that emergency care was directed to the passengers of the automobiles first. (T.12) After ten minutes, she was looked at by emergency personnel (Id.) Petitioner testified that at this juncture, she felt tightness in her body, her arms and neck were in pain, and her left shoulder was hurting. (T.12,13) She further testified that emotionally she was very shaken. (T.13) She called her mother crying from the scene because she was so scared. (Id.) She further testified that she thought she would be at fault for the accident. (Id.)

Petitioner testified that she was transported by ambulance to the University of Chicago emergency room. (Id.) She was seen by the medical staff and released the same day. (T.13,14)

The medical records of Dr. Kelley reflect that petitioner was first seen on August 6, 2019 for psychological care, four days after the accident. (PX3, p.12) Petitioner provided a history of the incident and informed Dr. Kelley that on the day of the accident she thought she was going to be killed when the car came flying in front of her and that she thought the passengers of the other vehicles were dead. (Id.) She described that since the work accident she had been experiencing sleep disturbance, irritability, crying, anxiety, hyperarousal, heart racing, chest pains, flashback/intrusive thoughts, and emotional dysregulation. (Id. at 12-13) Dr. Kelley performed an evaluation and set forth a preliminary diagnosis of adjustment disorder with anxiety. He indicated that petitioner would benefit from cognitive behavioral therapy. (Id. at 14) Dr. Kelley also recommended that petitioner be off of work. (Id.) There was no mention of Petitioner experiencing fear from being at fault for the accident in the notes from Dr. Kelly's initial evaluation.

Petitioner received care from Dr. Kelley through December 21, 2019. Dr. Kelley noted on the December 21, 2019 visit that petitioner had evidenced significant progress in her emotional/psychological function and that her anxiety symptoms had decreased. (Id. at 70) Given her improvement, Dr. Kelley released petitioner from care and permitted her to return to her employment as a bus operator. (Id.)

With regard to petitioner's physical injuries, she sought medical care with Dr. Joseph Rabi of Chicago Pain and Orthopedic Institute on August 8, 2019. (T.14) (PX2, p.5) Petitioner provided a history of the incident and related symptoms of neck and left shoulder pain. (Id.) The medical examination of petitioner revealed positive findings with cervical facet loading, positive Neers and Hawkins test of the left shoulder, and tenderness to touch. (Id at 5,6) Dr. Rabi ordered MRIs for the left shoulder and cervical spine. (Id. at 6). Dr. Rabi also prescribed physical therapy and a consult with an orthopedic doctor concerning the shoulder. (Id.)

On August 12, 2019, Petitioner was seen by Bone & Joint Clinic for an initial consultation concerning physical therapy with Dr. Thomas Dzielawski. (PX4, p.124) Petitioner described her neck discomfort as sharp, stiff, and shooting with motion. (Id.) As to the shoulder, she stated that her symptoms were worsening with time and rated her pain as 8/10. (Id.) Petitioner was evaluated and a physical therapy program was initiated. (Id. at 120-123)

Petitioner underwent MRIs to both her left shoulder and cervical spine on August 16, 2019. On August 19, 2019, Dr. Steven Sclamberg conducted an examination and reviewed the MRI of the left shoulder on August 19, 2019. (PX2, p.16,17) Dr. Sclamberg noted mild positive impingement signs and decreased passive range of motion. (Id.) He stated that the MRI and x-ray of the shoulder were essentially normal.

(Id. at 17) It was recommended that petitioner attend physical therapy three times per week for six weeks and remain off work. (Id.)

On September 5, 2019, petitioner returned to Dr. Rabi concerning the cervical spine. Petitioner noted improvement with therapy, but still had neck pain at 6/10 (Id. at 20) Dr. Rabi noted that the MRI of the cervical spine demonstrated disc bulges at C3-4 measuring 2.5 mm and at C4-5 measuring 1.55 mm. (Id.) Dr. Rabi advised petitioner to continue with physical therapy. He believed her pain emanated from the cervical facet joints. (Id. at 21)

At petitioner's return visit to Dr Rabi on September 17, 2019, she reported that her neck pain remained the same. (Id. at 24) Dr. Rabi recommended left-sided cervical medial branch blocks at C4-C7. (Id. at 25) On November 17, 2019, Dr. Rabi administered left cervical medial branch blocks to the levels of C4-7. (Id. at 38) At her November 26, 2019 follow-up visit with Dr. Rabi, petitioner reported 90% pain relief on the left side. (Id. at 40) she complained that her pain was now more on the right side and requested an injection on the right side. (Id.) Dr. Rabi recommended right sided cervical medial branch blocks to C4-7 (Id.)

On January 4, 2020, Dr. Rabi administered the recommended branch blocks to the right side of petitioner's cervical spine. (Id. at 44) Petitioner followed-up with Dr. Rabi on January 21, 2020 and stated that she had 70-80% pain relief to the right side. (Id. at 46) She stated that overall she was better and her pain levels were 2/10. (Id.) Dr. Rabi recommended one more month of physical therapy and continued her off work status. On February 27, 2020, petitioner returned to Dr. Rabi stating her pain was 0/10, but did have muscle spasms occasionally. (Id. at 50) Dr. Rabi released petitioner back to work as of March 2, 2020 and encouraged her to perform a home exercise program. (Id.)

Petitioner had one final visit with Dr. Rabi on April 2, 2020. The appointment was mainly to get FMLA paperwork filled out. (Id. at 69) On that visit she reported her pain as 1/10. (Id.) She was advised that her problems could be a chronic issue and there would be days that she would have pain. (Id.)

Petitioner stated that she did return to work as a bus driver upon her release and has been doing the same job ever since. (T.22) She has sought additional medical care through her primary care physician for pain and has received prescriptions for muscle relaxers. (T.23) She stated that she takes the muscle relaxers maybe once or twice a month for neck and shoulder pain. (Id. at 23, 24)

Petitioner stated that prior to the accident she never had any issues with her neck or shoulder. (T. 24) At present, petitioner testified that she still gets stiffness of the neck and shoulder from work which requires her to take a muscle relaxer or use her TENS machine. (Id.) Emotionally, she still tenses up around erratic drivers or speeding drivers while driving the bus. (T.25) On occasion she still has dreams of the accident. (T.26)

On cross-examination, petitioner acknowledged that she had a painting and wallpaper business, for which she took out a loan from the Paycheck Protection Program in 2021. (T.27-28) When she applied for the loan, she indicated that she was the only employee. (Id.) Petitioner testified that she had not performed any work for the company since August of 2019 and any jobs after that date were performed by either her brother or father. (T.28, 29) The last time she had performed any work for the business was probably in June of 2019 or before the accident. (T.29) When she did perform work, she used her right

arm since she is right-handed and did not stand on ladders. (T.30-31). She stood mainly on the ground and performed this work for 3-4 hours for 2 days on the weekends and worked part-time. (Id.) Petitioner stated on re-direct that the business has not had any jobs the last two years and the business has gone by the wayside. (T.33)

Utilization Reviews

Respondent's Exhibits 1 through 19 contain Utilization Review determinations regarding various treatment orders recommended by Petitioner's treating physicians. (R.X.1-19)

A Utilization Review determination dated August 29, 2019 was addressed to Dr. Steven Sclamberg. The treatment being addressed was physical therapy for the left shoulder 3x6 weeks. Dr. Siya Ayyar, Board Certified in Occupational Medicine with an IL license did not find 3x6 weeks of physical therapy medically necessary. Instead, Dr. Ayyar believed that a trial of six sessions of physical therapy would be medically necessary. In support of this determination, Dr. Ayyar opined that the Official Disability Guidelines ("ODG") stipulate that care should initially be delivered via a six-session clinical trial, with any continuing treatment contingent on evidence of claimant moving in a positive direction. (R.X.1)

On August 21, 2019, a Utilization Review Determination was addressed to Dr. Joseph Rabi concerning orders for physical therapy dated August 14, 2019 for the neck and low back. The order for physical therapy for the next 2-3 times per week for 4 weeks was modified down to a six-session trial by Dr. Siya Ayyar, Board Certified in Occupational Medicine. The rationale was based on ODG guidelines recommending an initial six-session clinical trial with additional treatment based on evidence of positive direction. (R.X.2)

On September 20, 2019, CorVel corporation reviewed a treatment requested by Dr. Sclamberg for physical therapy effective August 19, 2019 for a total of 18 visits, 3 times a week for 6 weeks. Dr. Carl DiLella, DO, a Board-Certified Orthopedic Surgeon licensed in Illinois, modified the request to a total of 6 visits, 3 times a week for 2 weeks. Dr. DiLella did not believe additional visits were indicated without documented substantial gains and documented continued objective deficits. (R.X.3)

On October 7, 2019, Dr. Michael Chen, DO certified a request for Celebrex #80 100mg with a date of services of September 3, 2019. (R.X.4)

On October 8, 2019, Dr. Michael Chen authored a UR determination finding that the prescription by Dr. Rabi for Lidocaine Topical Patch #30 dispensed on September 3, 2019 was not medically necessary. Dr. Chen noted that ODG guidelines do not recommend Lidocaine transdermal patches for first-line treatment for neuropathic pain. Dr. Chen noted that the medical documentation failed to document that the claimant had trialed and failed all first-line neuropathy medications. There was also no documentation of functional gains or improvement with the use of medication. (R.X.5)

On October 8, 2019, Dr. Chen authored a UR determination finding that prescriptions for Lidocaine 5% topical patch with dates of service August 9, 2019 were not medically necessary. Lidocaine was not medically necessary due to a lack of documentation that claimant had trialed and failed all first-line neuropathy medications (tri-cyclic or SNRI anti-depressants or an AED such as Gabapentin or Lyrica). Celebrex was medically necessary. (R.X.6)

On October 14, 2019, Dr. Eddie Sassoon, Board Licensed in Illinois, authored a UR determination finding that a total of 7 visits for physical therapy recommended by Dr. Rabi on August 28, 2019 was medically necessary. However, subsequent physical therapy ordered on September 17, 2019 by Dr. Rabi for a total of 8-12 visits was not medically necessary. In support of this determination, Dr. Sassoon noted documentation of gains in the left shoulder and no recent change in the cervical spine. (R.X.7)

On November 22, 2019, Dr. Edwin Rabin, an Illinois licensed Chiropractor, authored a UR determination finding an Ultima Combo TENS & EMS unit and AlignMed Spinal Q Pro Bracing System ordered on October 24, 2019 were not medically necessary. Dr. Rabin noted that ODG guidelines do not support TENS unit for the shoulder and electrical muscle stimulation for the neck and shoulder. ODG does not recommend TENS as a primary treatment modality. Dr. Rabin could not recommend the AlignMed bracing system as there were no quality published studies to support claims in the marketing materials. (R.X.8)

On October 17, 2019 a UR determination was authored by Dr. Matthew Colman, an Illinois licensed Orthopedic Surgeon. Dr. Colman found the physical therapy for the left shoulder recommended by Dr. Melanie Coderre on October 7, 2019 to be not medically necessary. In making this determination, Dr. Colman reviewed the MRI reports as well as the records of Dr. Rabi and the physical therapy notes. Dr. Colman noted that ODG recommends 10 visits over 8 weeks for medical treatment of sprained shoulder. Dr. Colman noted that Petitioner had decreased pain in the left shoulder and only minimally reduced range of motion. The physical therapy was not certified by Dr. Colman due to the minimal complaints in the neck and left shoulder reported in the medical records. Dr Colman felt Petitioner was best suited for a home exercise program. (R.X.9)

On November 21, 2019 and November 2021, Dr. Sassoon authored a UR determination regarding a Lidocaine patch of 5% ordered on October 28, 2019 by Dr. Rabi. Dr. Sassoon noted that Petitioner had cervical facet syndrome and continued pain in the neck and left shoulder with facet loading test and trigger points. Dr. Sassoon noted that ODG does not recommend Lidocaine for treatment of myofascial pain and trigger points. There was no reported intolerance to oral neuropathy medications given her noted ongoing use of gabapentin. The records also did not note any improvement in pain with use of Lidocaine. Dr. Sassoon could not find the prescription for Lidocaine medically necessary. (R.X.10 R.X.19)

On December 12, 2019 Dr. Sassoon authored a UR determination in which he could not find the proposed left cervical medial branch blocks as medically necessary. Dr. Rabi appealed the determination and Dr. Cynthia Willingham, was unable to recommend the requested treatment. Dr. Willingham noted that ODG did not recommend more than 2 levels of the spine to be injected in one session. (R.X.11)

On January 14, 2020, Dr. Sassoon authored a UR determination finding that the prescription of Cyclobenzaprine ordered by Dr. Rabi on November 27, 2019 was not medically necessary. Dr. Sassoon noted that ODG does not recommend long term use of a muscle relaxant. (R.X.12)

On January 28, 2020, Dr. Sassoon was unable to recommend full certification of physical therapy recommended by Dr. Rabi for physical therapy for the cervical spine from November 1, 2019 through November 26, 2019 2-3 per week for 8 weeks. Dr. Sassoon found that physical therapy was only

medically necessary for 2 sessions on November 12, 2019 and November 14, 2019. The doctor felt these visits were supported as to optimize the benefits from the medial branch block injection. All other visits were not medically necessary due to the fact that Petitioner had 39 visits from August 12, 2019 through November 16, 2019 and the documentation revealed no exceptional factors or incidents of acute flare up of symptoms with prior failed attempts at a home exercise program. (R.X.13) Dr. Sassoon did feel the right medial branch blocks ordered by Dr. Rabi on January 4, 2020 were medically necessary. (R.X.14)

On March 9, 2020 and January 28, 2021, Dr. Sassoon authored a UR determination finding the prescription for Cyclobenzaprine 7.5 mg ordered by Dr. Rabi on January 31, 2020 medically unnecessary. The rationale noted that Petitioner was complaining of neck pain of 1/10 as of January 31, 2020. Improvement was reported following medial branch blocks. This treatment was unnecessary considering Petitioner had been prescribed the medication since the initial visit, pain reports of 1/10 as of January 31st and no physician follow up supporting the presence of muscle spasms or specific efficacy supporting prolonged use outside of ODG guidelines. (R.X.15, R.X. 18)

On May 21, 2020, and May 22, 2020 Dr. Sassoon was unable to find prescriptions for Lidopro 4% (DOS 04/03/2020) and Lidothol Patch (DOS 04/03/2020) ordered by Dr. Rabi to be medically necessary. The doctor notes that there was no support in the records that Petitioner had an intolerance to oral medications. The UR determination found both medications non-certified under ODG guidelines. (R.X.16, 17)

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).

Petitioner testified in open hearing before the Arbitrator who had the opportunity to view Petitioner's demeanor under both direct and cross examination. The Arbitrator found the Petitioner's demeanor to be sincere and her testimony credible. Furthermore, it was found that her testimony was corroborated by the stipulated facts, the medical records, and the record as a whole.

WITH REGARD TO ISSUE (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE EMPLOYMENT:

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 employment. 820 ILCS 305/1(b)3(d). To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of his or her claim, *Odette v. Industrial Commission*, 79 Ill.2d 249, 253 (1980) including that there is some causal relationship between his employment and the injury. *Caterpillar Tractor v. Industrial Commission*, 129 Ill.2d 52, 63 (1989).

As previously stated, respondent does not dispute that petitioner's physical injuries arose out of and in the course of employment. The issue at hand is whether petitioner's claimed psychological injury arose out of the course of employment. The seminal case handling "mental-mental" injuries is *Pathfinder Co. v. Industrial Commission*, 62 Ill. 2d 556, 559 (1976). The court in *Pathfinder*, for the first time permitted recovery for a psychological disability when the claimant sustained no physical injury to her person. *Id*. The claimant suffered a severe, immediate emotional trauma after she had extracted the severed hand of a coworker from a punch press that amputated the coworker's hand at the wrist. *Id*. The court stated that it "must conclude that an employee who, like the claimant here, suffers a sudden, severe emotional shock traceable to a definite time, place and cause which causes psychological injury or harm has suffered an accident within the meaning of the Act, though no physical trauma or injury was sustained." *Id*, at 917. Since *Pathfinder,* the courts have adhered strictly to the requirement of a "shocking event" in order to recover for purely psychological injury.

In the matter at hand, the claim of petitioner is not a true mental-mental claim as petitioner had an undisputed physical injury associated with the accident. Physical-mental injuries have traditionally been the easiest to prove, as compensability has been found if the mental injury can be traced to a physical trauma, and that physical trauma is *a causative factor* in the mental injury. *City of Springfield v. Industrial Comm'n,* 291 Ill. App. 3d 734, 738 (4th Dist. 1997) In this claim, petitioner is not claiming that her mental condition stems from the toll of her physical injuries but rather from the shock of the incident itself. For that reason, a *Pathfinder* analysis seems appropriate.

In *Matlock v. Industrial Commission*, 321 Ill. App. 3d 167, 173-74 (1st Dist. 2001) the court acknowledged that a claimant may recover if the claimant can prove: "(1) the mental disorder arose in a situation of greater dimensions than the day-to-day emotional strain and tension which all employees must experience; (2) the conditions exist in reality, from an objective standpoint; and (3) the employment conditions, when compared with the non-employment conditions, were the major contributing cause of mental disorder." *Id.* at 171.

In *Diaz v. Illinois Workers' Compensation Commission, 989 N.E.2d 233 (2013)* the Appellate Court stated that, "...we believe that whether a worker has suffered the type of emotional shock sufficient to warrant recovery should be determined by an objective, reasonable-person standard, rather than a subjective standard that takes into account the claimant's occupation and training." 989 N.E.2d at 242.

In examining the facts of this claim, petitioner was involved in a multi-vehicle accident. Petitioner witnessed the cars colliding and one of the cars striking the driver's front side of the bus. Four days after

the incident, petitioner informed her psychologist that at the time of injury she feared for her own life and for the lives of the individuals in the vehicles. She thought her life was over. She testified that she felt nervousness and shock following the crash. She subsequently received psychological care from Dr. Kelley in which she described experiencing anxiousness, sleep disturbance, irritability, hyperarousal, flashback/intrusive thoughts, and emotional dysregulation following the accident. (PX3, p.12,13)

Considering the nature of the accident and the case law cited, it is the Arbitrator's finding the multi-vehicle accident in which petitioner was involved was a shocking event which warrants recovery. Consequently, it is the Arbitrator's finding that the petitioner's psychological injury arose out of and in the course of employment. The Arbitrator relies on the undisputed testimony concerning the accident, the consistent histories of the accident provided to her medical providers, and the emotional responses she exhibited immediately following the accident.

WITH REGARD TO ISSUE (F), WHETHER PETITIONER'S CURRENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR RENDERS THE FOLLOWING FINDINGS:

To establish causation under the Illinois Workers' Compensation Act, 820 ILCS 305/1 et seq. (2012), a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injury. 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. An injury arises out of a claimant's employment where it "had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Sisbro, Inc.v. Industrial Comm'n,* 207 Ill. 2d 193, 203 (2003). "A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." *International Harvester v. Industrial Com.*, 93 Ill. 2d 59, 63 442 N.E.2d 908 (1982). "In a workers' compensation case, the claimant has the burden of proving, by a preponderance of the evidence, all of the elements of his claim." *R & D Thiel v. Illinois Workers' Compensation Comm'n*, 398 Ill. App. 3d 858, 867 (2010). "'[A] preexisting condition does not prevent recovery under the Act if that condition was aggravated or accelerated by the claimant's employment.'" *Absolute Cleaning/SVMBL v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 463, 470, (2011), quoting *Caterpillar Tractor Co. v. Industrial Comm'n*, 92 Ill. 2d 30, 36, (1982).

Petitioner testified that prior to her accident she never had any medical issues with her neck or shoulder area. There was no testimony or medical records to refute petitioner's assertion. After the accident, petitioner had immediate neck and shoulder pain. She received treatment for these injuries shortly after the accident from Dr. Rabi and Dr. Sclamberg of Chicago Pain and Orthopedic Institute. There is no indication or evidence that reflects any break in the chain of events. There was also no conflicting medical evidence presented by Respondent. Accordingly, the Arbitrator finds a causal relationship between the work-related accident and petitioner's diagnosed physical injuries.

Similarly, there is no evidence to reflect that petitioner had any psychological issues prior to accident. She denied any prior mental health history to Dr. Kelley. (PX3,p.12) Immediately following the accident, she testified feeling in shock and was crying. She was seen by Dr. Kelley four days after the

incident with multiple symptoms which were diagnosed by Dr. Kelley as adjustment disorder and anxiety. She thereafter underwent a course of treatment for the disorder for a period of four months. There is no evidence to reflect a break in the chain of events. There was also no conflicting medical evidence presented by Respondent. Accordingly, the Arbitrator finds a causal relationship between the work-related accident and petitioner's diagnosed mental injuries.

WITH REGARD TO ISSUE (J), HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR REASONABLE AND NECESSARY MEDICAL SERVICES*?*

Petitioner has presented nine medical bills from eight different providers. In defense of some of the charges contained within, respondent introduced 19 utilization reviews challenging the reasonableness and necessity. The Arbitrator has addressed each medical bill separately below, but overall finds that the care and treatment Petitioner underwent improved her condition and allowed her to return to work without restrictions in a reasonable time period after the accident. The Arbitrator finds the significant improvement of Petitioner's condition to indicate that Petitioner's care and treatment was reasonable and necessary and the directions of the treating doctors to be more persuasive than those of the Utilization Review physicians with regard to the majority of her care and treatment.

Accredited Ambulatory Care ($17,975.38)

The medical bill of Accredited Ambulatory Care pertains to facility charges for the cervical medical branch blocks that were administered to Dr. Rabi on November 7, 2019. (PX1, p.2)(PX2, p.38) Prior to the injections, petitioner reported persistent left-sided neck pain at her visit of November 4, 2019. (Id. at 35) At petitioner's follow-up on November 26, 2019, she reported 90% pain relief to the left side of her neck. Respondent introduced a utilization review dated December 12, 2019 prepared by Dr. Eddie Sassoon. Dr. Sassoon's review did not include the medical records after October 18, 2019. It was his determination that the branch blocks are limited to patients with cervical pain that in non-radicular and no more than two levels bilaterally. (RX11, p.5) With the benefit of hindsight it is apparent that the injections administered to the left side of the cervical spine were successful and that petitioner did obtain significant pain relief. Wherefore, it is the arbitrator's finding that the bill of Accredited Ambulatory Care was reasonable and necessary. Respondent shall pay to petitioner the amounts owed subject to Section 8.2 of the Act.

Advanced Care RX ($3,405.64)

The medical bill of Advanced Care RX pertains to prescriptions received between the dates of August 9, 2019 and October 28, 2019. The medications provided were for Celebrex, Lidocaine topical patches, Cyclobenzaprine, and Gabapentin. (PX1,p.3) Respondent introduced four exhibits challenging the charges contained within the bill of Advanced Care RX concerning Lidocaine patches. (RX4, RX5, RX6, RX10) The medication Celebrex was received by petitioner on August 9, 2019 and September 3, 2019. Respondent paid the September 3, 2019 charge, but did not pay the August 9, 2019 charge. Per the utilization reviews corresponding with said dates, Celebrex was certified by the reviewing physician, Michael Chen, M.D. (RX4, p.1 and RX6, p.1) Accordingly, the respondent shall pay to petitioner the unpaid charges of Advanced Care RX for the medication Celebrex subject to Section 8.2 of the Act.

Regarding the prescribed Lidocaine patches, the utilizations reviews submitted by respondents non-certified that medication for dates August 9, 2019, September 3, 2019, and October 28, 2019. (RX5, RX6, RX10) Physician Michael Chen, M.D. and Eddie Sassoon, M.D. both stated within their respective reports that Lidocaine patches were not recommended as a first line treatment for neuropathic pain. It is recommended for trial purposes if there is evidence of localized pain that is consistent with neuropathic etiology and it is used with a first-line neuropathy medication such as Gabapentin. (RX5, p.5) According to the records of Chicago Pain and Orthopedic, petitioner was prescribed Gabapentin on September 6, 2019. (PX2, p.20) Neither reviewing doctor took that into account in their respective reviews. The Arbitrator has considered all the evidence and notes the positive recovery made by petitioner. As such, the Arbitrator finds that respondent shall pay to petitioner the unpaid charges for Lidocaine patches subject to Section 8.2 of the Act.

Bone and Joint Clinic ($13,623.85)

The medical bill of Bone and Joint Clinic corresponds to physical therapy treatment received by petitioner between August 12, 2019 and February 26, 2020. Respondent has submitted six utilizations reviews concerning the physical therapy prescribed. (RX1, RX2, RX3, RX7, RX9, RX13). The bill reflects that petitioner underwent 59 physical therapy sessions within the time period she treated with Bone and Joint Clinic. Respondent paid for 23 of the 59 sessions. (PX1, p.4-20) The utilizations reviews reflect that 15 sessions were certified, however there was no utilization review ever performed for therapy received after January 6, 2020. (RX13) The medical bill reflects that respondent did pay for 6 sessions after that date. (PX1, p.4-20) These sessions correspond to treatment following her second set of medial branch blocks.

The bases for non-certifications of treatment stated within the utilization reviews was that the therapy prescribed exceeded ODG guidelines. The utilization reviewers also non-certified physical therapy later on in petitioner's care due to their impression that petitioner's condition had stabilized.

The Arbitrator has reviewed the medical records of both Chicago Pain and Orthopedics and Bone and Joint Clinic and finds that petitioner clearly exhibited improvement in her symptoms with the combination of physical therapy and medical branch blocks. Though the utilization review rely on ODG guidelines, those guidelines are established by data accumulated nationwide. Not every patient is the same and it cannot be assumed that the guidelines are applicable to every patient. In this particular matter, though petitioner certainly received a large amount of physical therapy sessions, it is apparent that she benefited from the treatment received allowing her to return to work full duty with minimal pain. As such, it is the arbitrator's finding that the treatment received from Bone and Joint Clinic to be reasonable and necessary. As such, the Arbitrator finds that respondent shall pay to petitioner the unpaid charges of Bone and Joint Clinic subject to Section 8.2 of the Act.

Chicago Pain and Orthopedic Inst. ($2,000)

The medical bill of Chicago Pain and Orthopedic Institute pertains to professional services rendered to petitioner on November 7, 2019. (PX1,p.21,22) On said date, petitioner received medial branch blocks to the left side of her cervical spine from Dr. Rabi. (PX2,p.38) Based on the same reasoning that medical bill of Accredited Ambulatory Care was awarded for the same date of service, the Arbitrator finds the professional service charges of Chicago Pain and Orthopedic Institute to be reasonable and necessary.

As such, the Arbitrator finds that respondent shall pay to petitioner the unpaid charges stated herein subject to Section 8.2 of the Act.

Chicago Pain and Orthopedic Inst. ($763.25)

The medical bill of Chicago Pain and Orthopedic Institute relates to professional services rendered on August 19, 2019, October 7, 2019, and November 4, 2019. (PX1, p.23) These visits all correspond to reasonable treatment that petitioner received for her shoulder from Dr. Sclamberg or his physician's assistant. (PX2, p.16, 17, 28, 35) Respondent has not presented any medical records or utilization review that refutes the reasonableness and necessity of the medical care rendered to petitioner's left shoulder. As such, the Arbitrator finds that respondent shall pay to petitioner the unpaid charges stated herein subject to Section 8.2 of the Act.

Integrated Behavioral Medicine ($8,120.00)

The bill of Integrated Behavioral Medicine relates to psychological care rendered by Dr. Daniel Kelley. (PX1, p.24,25) As previously discussed, it was determined by this Arbitrator that petitioner's psychological injury did arise out of and in the course of employment and was causally related to the injury. The Arbitrator has reviewed the clinical notes of Dr. Kelley and finds that the cognitive therapy provided was reasonable and necessary to treat the petitioner. Respondent has not presented any medical records or utilization review that refutes the reasonableness and necessity of the medical care rendered. As such, the Arbitrator finds that respondent shall pay to petitioner the unpaid charges of Integrated Behavioral Medicine subject to Section 8.2 of the Act.

Midwest Specialty Pharmacy ($9,429.61)

The bill of Midwest Specialty Pharmacy pertains to pharmacy received between August 6, 2019 through May 5, 2020. (PX1, p.26,27) Respondent has introduced six utilizations reviews contesting the prescriptions of Cyclobenzaprine, Lidopro ointment, Lidothol patches, and Lidocaine patches. (RX12, RX15, RX16, RX17, RX18, RX19) It was the reviewers' determination that the mediation of Cyclobenzaprine had no reported functional benefit associated with the medication. As to the Lidopro ointment, the reviewer stated that such ointment is for neuropathic pain which petitioner did not have and it is not a first-line therapy. The reviewers made similar conclusions with regard to the Lidothol and Lidocaine patches.

The Arbitrator has considered the all the evidence and notes the positive recovery made by petitioner from the medical care received from her providers. As such, the Arbitrator finds that respondent shall pay to petitioner the unpaid charges of Midwest Specialty Pharmacy subject to Section 8.2 of the Act.

Procare DME ($4,929.93)

The bill of Procare DME relates to durable medical equipment prescribed by Fayaz Ather, D.C of Bone & Joint Clinic. (PX1,p.28) The charges correspond to a neuromuscular stimulator combo TENS and EMS unit for the shoulder and cervical spine and a bracing system for the shoulder and upper back. (RX8, p.6) Respondent has submitted a utilization review and a denied appeal which sets forth that both apparatuses were non-certified. (RX8) It was the opinion of the reviewer that the medical treatment guidelines do not support the use of this equipment for petitioner's injuries.

The records of Dr. Ather of Bone & Joint Clinic are devoid of the basis for his recommendation of the equipment. (PX4) Wherefore, the arbitrator finds that the charges of Procare DME are not reasonable and necessary under Section 8(a) of the Act.

Windy City Anesthesia ($2,478.00)

The bill of Windy City Anesthesia pertains to services provided on the day petitioner received the medial branch blocks to her cervical spine. Based on the same reasoning that medical bill of Accredited Ambulatory Care and Chicago Pain and Orthopedic were awarded for the same date of service, the Arbitrator finds the professional service charges of Windy City Anesthesia to be reasonable and necessary. As such, the Arbitrator finds that respondent shall pay to petitioner the unpaid charges stated herein subject to Section 8.2 of the Act.

WITH REGARD TO ISSUE (L), WHAT IS THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR RENDERS THE FOLLOWING FINDINGS:

In determining PPD benefits, Section 8.1b(b) of the Act directs the Commission to consider: "(i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records." 820 ILCS 305/8.1b(b); Con-Way Freight, Inc. v. Illinois Workers' Compensation Comm'n, 2016 IL App (1st) 152576WC, ¶ 22, 67 N.E.3d 959. "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b).

Under Section 8.1b(b)(i), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The statute does not require the claimant to submit an impairment rating. It only requires that the Commission consider such a report if in evidence and regardless of which party submitted it. See Continental Tire of the Americas, LLC v. Illinois Workers' Compensation Comm'n, 2015 IL App (5th) 140445WC, ¶ 17, 43 N.E.3d 556. Therefore, the Arbitrator gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes petitioner worked as a bus operator. After receiving treatment for both her physical and psychological injuries, petitioner was able to return back to her normal job duties. The Arbitrator therefore gives lesser weight to this factor.

With regard to subsection (iii) of §8.1b(b), age of the employee, the Arbitrator notes that petitioner was 28 years old at the time of the accident. Because of her young age and significant amount of work-life ahead of her, the Arbitrator therefore gives greater weight to this factor.

With regard to subsection (iv) of §8.1b(b), petitioner's future earnings capacity, the Arbitrator notes that Petitioner was able to return to work in her same profession and no evidence was presented indicating a detrimental effect on her future earning capacity. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that petitioner has residual issues concerning her cervical spine which affect her normal everyday activities. She testified that she continues to experience neck stiffness and pain which require her to take muscle relaxers when the condition flares up after long days of work. Additionally, petitioner credibly testified that she continues to experience nervousness and anxiety when driving the bus. The Arbitrator therefore gives greater weight to this factor.

Based on the above factors and the record in its entirety, for Petitioner's physical and psychological injuries, the Arbitrator awards petitioner 7.5 % loss use of man as a whole or 37.5 weeks at the PPD rate of $666.34 per week. Respondent shall pay petitioner compensation accrued from the date she reached maximum medical improvement or April 2, 2020 to the date of this decision.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC012226
Case Name	Erica Garcia v. H.D. Supply
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	24IWCC0095
Number of Pages of Decision	11
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Peter Cobb
Respondent Attorney	Christopher Jarchow

DATE FILED: 2/27/2024

/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

Erica Garcia,

Petitioner,

vs. NO: `18 WC 12226

H.D. Supply,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, causal connection, permanent partial disability, medical expenses, prospective medical care, employer-employee relationship, benefit rate, and notice, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 2, 2023, is hereby affirmed and adopted.

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

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

The bond requirement in Section 19(f)(2) of the Act is only applicable when the Commission has entered an award for the payment of money. Therefore, no bond is set by the Commission. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

February 27, 2024
MP:yl
o 2/15/24
68

/s/ *Marc Parker*
Marc Parker

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC012226
Case Name	Erica Garcia v. H.D. Supply
Consolidated Cases	
Proceeding Type	19(b)/8(a) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	Elaine Llerena, Arbitrator

Petitioner Attorney	Peter Cobb
Respondent Attorney	Christopher Jarchow

DATE FILED: 8/2/2023

THE INTEREST RATE FOR THE WEEK OF AUGUST 1, 2023 5.27%

/s/Elaine Llerena, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)/8(a)

Erica Garcia
Employee/Petitioner
v.
H.D. Supply
Employer/Respondent

Case # **18** WC **012226**

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 **January 30, 2023**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ 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 27, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**34,099.00**; the average weekly wage was $**644.76**.

On the date of accident, Petitioner was **30** years of age, ***married*** with **3** dependent children.

Respondent shall be given a credit of $**5,785.78** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**5,785.78**.

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

ORDER

The Arbitrator finds Petitioner failed to prove she sustained an injury that arose out of and in the course of her employment on March 27, 2018.

All remaining issues are moot.

Compensation is denied.

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

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

Elaine Llerena
Signature of Arbitrator

AUGUST 2, 2023

ICArbDec19(b)

FINDINGS OF FACTS

This matter proceeded to hearing on January 30, 2023, in Chicago, Illinois before Arbitrator Elaine Llerena on Respondent's Request for Hearing. The issues in dispute are accident, causation, Petitioner's earnings, medical expenses, temporary total disability benefits, and prospective medical care. Arbitrator's Exhibit 1 (AX1).

Job Duties

Petitioner was hired by Respondent as a warehouse associate with various job duties. The "Position Purpose" of a warehouse associate as described in Respondent's Exhibit No. 5 includes being responsible for specialized warehouse tasks in receiving, inventory, customer service, and/or order processing. The job duties that are particularly relevant to the case at bar include packing, unpacking, and marking stock items, using identification tags, stamps, or electronic marketing tool or other labeling equipment, and delivering products, supplies, and equipment to a designated area. The job also may include operating a forklift or other machinery in order to complete tasks. (RX5) The job required the ability to lift and carry up to 50 pounds in a physical environment.

Prior Medical Condition

Petitioner testified that she had suffered from back pain related to her menstrual cycle prior to the date of accident on March 27, 2018. (T. 9) Petitioner further testified that the pain she experienced in her back due to her menstrual cycle was nowhere near as severe as it was after her work accident. *Id.* Petitioner explained that her pain was from menstrual cramps, and she was still able to do normal things. (T. 10)

Accident

On March 27, 2018, Petitioner was working for Respondent when she tripped and fell. (T. 6-7) Petitioner was moving a box to another station when she tripped over a pallet with another box on it. (T. 7) Petitioner testified that after tripping over the pallet she fell forward onto her hands and knees and landed on her face. (T. 7-8). Petitioner notified her manager of the accident after feeling discomfort in her back. (T. 8) The following morning, Petitioner woke up with pain so severe that she could not get out of bed or dress herself. (T. 8) At that point, Petitioner sought medical treatment. *Id.*

Summary of Medical Records

Petitioner sought treatment at Loyola Gottlieb Memorial Hospital Emergency Department on March 28, 2022. (RX6) Petitioner complained of ongoing back pain beginning two weeks prior. (RX6, p. 277) Petitioner reported the back pain was accompanied by abdominal cramping. Petitioner complained of bilateral low back pain radiating into her lower abdomen and pelvic area which she experienced with intermittent vaginal spotting during the prior two weeks. (RX6, p. 274) Petitioner reported that she usually experienced back pain in conjunction with her menstrual periods and denied any specific trauma or an acute injury to her back. (RX6, p. 281) A CT scan of the lumbar spine showed normal alignment of the lumbar spine with preservation of height of the vertebral bodies with normal bone density with minimal degenerative changes at L4-5. (RX6, p. 294) On a triage form completed during this visit, Petitioner denied her back pain was work-related. (PX4, p. 37)

Petitioner returned to Gottlieb Memorial Hospital Emergency Room Department on April 2, 2018. (RX6, p. 322) Petitioner again reported that she began to have pain two weeks prior after she possibly lifted something heavy at work.

Petitioner was seen at Occupational Health Center of Illinois on April 4, 2018. (PX5) Petitioner presented with complaints of lower back pain from lifting injury two weeks prior. Petitioner then stated she had a slip and fall one week prior. Petitioner was assessed with a lumbar strain and referred to physical therapy. Petitioner underwent physical therapy at Occupational Health Centers of Illinois on April 5, 2018, and April 9, 2018.

Petitioner returned to Gottlieb Memorial Hospital on April 11, 2018. (RX6, p. 367) Petitioner reported that she fell at work on March 27, 2018, and continued to experience low back pain which tingled to both hips without numbness. Petitioner was diagnosed with lumbar radiculopathy and a lumbar strain.

Petitioner saw Dr. Alexander Ghanayem on April 23, 2018. (PX4, p. 102-104) Petitioner reported that her back pain began after tripping on a box on March 27, 2018. Dr. Ghanayem reviewed the CT scan and believed it showed mild degenerative changes at L4-5 which were age-appropriate. Dr. Ghanayem recommended physical therapy and restricted Petitioner to light duty work.

Petitioner saw Dr. Avi Bernstein on June 4, 2018, on referral from her attorney. (T. 27, PX6) Petitioner reported that she injured herself on March 28, 2018, when she tripped over a box and fell at work. (PX6) Dr. Bernstein noted that Petitioner had suffered a low back injury as a result of a work-related accident. Dr. Bernstein recommended physical therapy and a repeat MRI and took Petitioner off work.

Petitioner underwent a lumbar MRI on June 15, 2018, the results of which revealed disc protrusions at L4-5 and L5-S1 associated with minor degenerative disc changes and no distinct disc herniation causing nerve root compression.

On June 25, 2018, Dr. Bernstein reviewed the lumbar MRI and recommended physical therapy.

Petitioner underwent a Section 12 examination (IME) with Dr. Julie Wehner on June 25, 2018, at Respondent's request. (RX3) Dr. Wehner diagnosed the Petitioner with a low back strain. Dr. Wehner indicated that Petitioner was at maximum medical improvement (MMI) and cleared for full duty work.

On July 23, 2018, Dr. Bernstein recommended a trial of epidural steroid injections. (PX6) On August 6, 2018, Dr. Bernstein reviewed Dr. Wehner's IME report and noted that Petitioner had attempted to return to work for the last two or three weeks, but was incapable of doing so. Dr. Bernstein kept Petitioner off work and again recommended epidural steroid injections. Petitioner returned to Dr. Bernstein on October 8, 2018, reporting mild improvement. Dr. Bernstein diagnosed Petitioner as having discogenic low back pain. Dr. Bernstein indicated that Petitioner likely required an epidural steroid injection. On December 17, 2018, Dr. Bernstein noted that the recommended injections were not performed and felt that they were unlikely to relieve Petitioner's pain at that point since it had been months since the alleged work accident. Dr. Bernstein recommended a multi-level lumbar discogram to confirm whether the lumbar disc injury was responsible for Petitioner's chronic low back pain. Dr. Bernstein explained that if the discogram findings were positive, Petitioner would be a candidate for a lumbar fusion.

Petitioner was seen for an annual physical on July 3, 2019. (RX6, p. 437) The visit note makes no mention of back pain.

Petitioner continued to treat with Dr. Bernstein on a monthly basis through April 20, 2020. (T. 26; PX6) Dr. Bernstein continued to recommend a discogram. Petitioner did not undergo any injections or a discogram. (T. 25-26) Petitioner has not returned to Dr. Bernstein or seen any other physician for her low back since April 20, 2020. (T. 27)

On January 3, 2022, Dr. Wehner issued an addendum report. (RX4) Dr. Wehner reviewed additional medical records and Dr. Bernstein's evidence deposition. Dr. Wehner diagnosed Petitioner as having chronic low back pain. Dr. Wehner opined that Petitioner did not require a discogram and that a discogram would not be able to determine a discogenic injury or need for surgery. Dr. Wehner further opined that Petitioner did not require any additional treatment, can return to work without restrictions and no treatment is needed for a work injury.

Petitioner testified that while she treated at Concentra, about a month after the alleged accident, Concentra recommended that Petitioner attempt to return to work light duty. (T. 11-12) Petitioner returned to work for Respondent doing light duty work of completing paperwork and sitting. (T. 12) Petitioner was unable to do this work, explaining that the prolonged sitting and then moving would trigger her pain. (T. 12-13)

Petitioner admitted that she treated at Westlake Memorial Hospital in 2017 for low back pain from her menstrual cycle. (T. 23)

Testimony of Dr. Avi Bernstein

Dr. Bernstein testified via evidence deposition on May 24, 2021. (PX7) Dr. Bernstein's testimony was consistent with his medical records. Dr. Bernstein did not review Dr. Ghanayem's records nor any of the physical therapy records. (PX7, p. 29-30) Dr. Bernstein acknowledged that he did not really need a discogram to make a recommendation for surgery. (PX7, p. 20) Dr. Bernstein further explained that he was not sure if a discogram was needed in this case, but it seemed to be an appropriate thing to do when dealing with an insurance carrier that is not approving care. *Id.*

Testimony of Dr. Julie Wehner

Dr. Wehner testified via evidence deposition on January 18, 2022. (RX2) Dr. Wehner's testimony was consistent with her reports. Dr. Wehner disagreed with the need for the discogram or future medical treatment, citing studies that called into question their medical utility. (RX2, p. 33)

Petitioner's Current Condition

Petitioner testified she has difficulty performing activities of daily living like doing chores. (T. 16) Petitioner explained that at the end of the day, Petitioner has back pain and she takes medicine, lies down and rests. *Id.*

Petitioner testified she attempted to return to work for Cevo Logistics in December 2022 through an employment agency, Staff Mark. (T. 17-18) Petitioner testified she worked up to five days a week, eight hours per day. *Id.* Petitioner testified she earned $19.00 per hour and that her job duties included office and clerical type work. (T. 18-19)

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).

The Arbitrator questions the veracity of Petitioner's testimony give her questionable and jostled testimony paired with the history outlined in the medical records. As such, the Arbitrator finds Petitioner not credible regarding the March 27, 2018, alleged accident.

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

The Arbitrator notes that Petitioner's described mechanism of injury does not corroborate descriptions she provided medical providers during her initial medical visits. The medical records contain at least three different mechanisms of injury and several dates of onset, all incompatible with Petitioner's testimony.

At Loyola-Gottlieb Hospital on March 28, 2018, just a day after the alleged incident, Petitioner complained of back pain she would normally suffer in combination with menstrual periods and denied any trauma to her back. When Petitioner returned to Loyola on April 2, 2018, Petitioner reported pain after possibly lifting something heavy a work. When Petitioner was seen at Occupational Health Centers by Dr. Ghanayem in April 2018 Petitioner described an injury after tripping and falling at work. Petitioner testified she injured her back while lifting an item and tripping over a box.

The Arbitrator further notes that the medical records are filled with a number of inconsistent dates of accident. On March 28, 2018, Petitioner reported back pain beginning two weeks prior. On April 2, 2018, Petitioner reported back pain two weeks prior after lifting at work. On April 23, 2018, she described an acute injury on March 28, 2018. Finally, Dr. Bernstein documented a March 28, 2018, injury.

The Arbitrator understands that perhaps Petitioner is a poor medical historian. However, the medical records are full of inconsistent and irreconcilable versions of events, even compared to the Petitioner's live testimony. When provided the opportunity to clarify her story on both direct and redirect examination she failed to do. Even the date of accident is unclear, occurring sometime in mid-March 2018, March 27, 2018, or March 28, 2018.

Given the clear inconsistencies in the medical records and the Petitioner's testimony, the Arbitrator finds Petitioner failed to prove she sustained an injury that arose out of and in the course of her employment on March 27, 2018.

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

Based on the Arbitrator's finding that Petitioner failed to prove she sustained an injury that arose out of and in the course of her employment on March 27, 2018, the issue of causal connection is moot.

WITH RESPECT TO ISSUE (G), WHAT WERE THE PETITIONER'S EARNINGS, THE ARBITRATOR FINDS AS FOLLOWS:

Based on the Arbitrator's finding that Petitioner failed to prove she sustained an injury that arose out of and in the course of her employment on March 27, 2018, the issue of Petitioner's earnings is moot.

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

Based on the Arbitrator's finding that Petitioner failed to prove she sustained an injury that arose out of and in the course of her employment on March 27, 2018, the issue of medical expenses is moot.

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

Based on the Arbitrator's finding that Petitioner failed to prove she sustained an injury that arose out of and in the course of her employment on March 27, 2018, the issue of prospective medical care is moot.

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:

Based on the Arbitrator's finding that Petitioner failed to prove she sustained an injury that arose out of and in the course of her employment on March 27, 2018, the issue of temporary total disability benefits is moot.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC018558
Case Name	Michael Malone v. Eden South Shore
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0096
Number of Pages of Decision	21
Decision Issued By	Christopher Harris, Commissioner, Marc Parker, Commissioner

Petitioner Attorney	Gregg Mandell
Respondent Attorney	Christopher Jarchow

DATE FILED: 2/27/2024

/s/Christopher Harris, Commissioner

Signature

DISSENT: /s/Marc Parker, Commissioner

Signature

24IWCC0096

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

MICHAEL MALONE,

Petitioner,

vs. NO: 20 WC 18558

EDEN SOUTH SHORE,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, the reasonableness and necessity of the medical treatment and charges, temporary total disability ("TTD"), permanent partial disability ("PPD"), and evidentiary issues, 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.

For reasons explained below, the Commission finds that the Petitioner failed to establish that his congestive heart failure, hypertension, myocarditis, and cardiomyopathy are causally related to his exposure to and contraction of COVID-19 while working for the Respondent. The Commission further finds that the Petitioner is entitled to TTD benefits from June 7, 2020 through December 31, 2020. As a result of his COVID-19 and resulting shortness of breath, the Commission finds that the Petitioner is entitled to 5% person-as-a-whole. All else is affirmed and adopted.

The parties stipulated that the Petitioner contracted COVID-19 at his workplace on April 30, 2020, and was subsequently admitted to Advocate Christ Medical Center on June 7, 2020 for ongoing shortness of breath. The history indicated that Petitioner reported a 10-to-12-year history of elevated blood pressure. Testing revealed a lower ejection rate, pneumonia, and congestive heart failure. It was noted that the doctors discussed with the Petitioner that the new onset of heart failure

was likely secondary to years of long-standing uncontrolled hypertension +/- viral illness. The discharge note indicated this was not work-related. At hearing, the Petitioner denied stating that he had a history of high blood pressure.

Thereafter, the Petitioner was examined by Dr. Tavel and Respondent's Section 12 examiner, Dr. Robin. Dr. Tavel noted that the contraction of COVID-19 resulted in severely reduced cardiac function consistent with inflammation of the heart muscle which has persisted. He opined that Petitioner's congestive heart failure including shortness of breath was causally related to his COVID-19. Dr. Tavel noted there was nothing in the record to suggest Petitioner had congestive heart failure or high blood pressure prior to contracting COVID-19.

Conversely, Dr. Robin diagnosed Petitioner with classic hypertensive cardiomyopathy which, he stated, is the "most common reason for cardiomyopathy in middle-aged African Americans." He stated that Petitioner's weakened heart muscle was related to poorly controlled blood pressure. This was supported by the echocardiograms that showed massive left ventricular hypertrophy, which he stated could only be due to years of "long standing and poorly-controlled high blood pressure." Dr. Robin testified that while a viral insult could cause cardiac dysfunction and a drop in ejection fraction, it would not have caused this sort of "severely diseased remodeling of the heart." Dr. Robin opined that Petitioner's COVID-19 had nothing to do with his cardiomyopathy.

It is the province of the Commission "to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence." *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674, 928 N.E.2d 474, 340 Ill. Dec. 475 (2009).

The Commission finds Dr. Robin's opinion more persuasive. Dr. Robin credibly testified that it was coincidental that Petitioner was diagnosed with congestive heart failure while in the ER and that it was not possible for Petitioner's condition to have developed that rapidly and cause the severely diseased remodeling of the heart. Dr. Robin's opinion is supported by the ER records which note that Petitioner's congestive heart failure is related to uncontrolled hypertension and is not work related. The ER records coupled with Dr. Robin's testimony credibly establish that Petitioner's high blood pressure was a coincidental finding and that his congestive heart failure is related to his uncontrolled high blood pressure. While the Commission agrees that Petitioner's shortness of breath is causally related to his exposure to and contraction of COVID-19, the Commission finds that the congestive heart failure, hypertension, myocarditis, and cardiomyopathy are not causally related to his COVID-19.

Next, the Commission modifies the Arbitrator's award of TTD benefits from June 7, 2020 through April 21, 2021. The record establishes that the Petitioner was off work beginning June 7, 2020. Dr. Rifai then noted Petitioner was to be off work as of August 11, 2020 and that his disability would continue through December 31, 2020. While the Petitioner testified that he last treated with Dr. Rifai on April 21, 2021, no records were offered confirming Petitioner's treatment. The only record confirming Petitioner's treatment with Dr. Rafai was the 1-page uncertified record from Dr. Rifai stating that Petitioner's disability would continue through December 31, 2020. The Commission also examined Dr. Smith's medical certificate dated December 16, 2021. Dr. Smith

diagnosed Petitioner with cardiomyopathy and systolic heart failure with reduced ejection fraction and noted Petitioner is disabled. As stated above, the Commission has found those conditions unrelated to Petitioner's COVID-19. Based upon the record as a whole, the Commission finds that Petitioner is entitled to TTD benefits from June 7, 2020 through December 31, 2020.

The Respondent objected to the admission of the 1-page exhibit into the record. Petitioner's attorney advised the Arbitrator that Dr. Rifai did not respond to 2 subpoenas and multiple phone calls in an attempt to obtain the medical records. The Arbitrator allowed Dr. Rifai's 1-page uncertified record into evidence noting that a foundation was laid for this record and that the Petitioner testified to receiving this record and providing it to his employer. After examining the record, the Commission finds that the Arbitrator's ruling was harmless error as Respondent was not prejudiced by its admission.

Finally, while the Commission agrees with the Arbitrator's well-reasoned analysis of Section 8.1b, the Commission assigns lesser weight to subsection (v). The Commission has found that the Petitioner developed shortness of breath as a result of his COVID-19 and that his other conditions are not causally related to COVID-19. The surveillance evidence demonstrates that the Petitioner is capable of lifting weights, running on a treadmill, and performing jumping jacks. He testified that he exercises up to 5 times a week. He further testified that he is about 60 percent improved and takes medication for his COVID-19. Based on the evidence in the record, the Commission finds that the Petitioner is entitled to 5% person-as-a-whole based on his development of COVID-19 and resulting shortness of breath.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed July 3, 2023, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $426.66 per week for a period of 29-5/7 weeks, June 7, 2020 through December 31, 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 to Petitioner the sum of $384.00 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 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 $40,301.60 for medical expenses under §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 $62,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

February 27, 2024

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

O: 2-15-24
CAH/tdm
052

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

DISSENT

I respectfully dissent from the opinion of the majority and would affirm the well-reasoned Decision of the Arbitrator.

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC018558
Case Name	Michael Malone v. Eden South Shore
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	16
Decision Issued By	Jacqueline Hickey, Arbitrator

Petitioner Attorney	Gregg Mandell
Respondent Attorney	Christopher Jarchow

DATE FILED: 7/3/2023

/s/Jacqueline Hickey, Arbitrator

Signature

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Michael Malone
Employee/Petitioner

v.

Eden South Shore
Employer/Respondent

Case # **20** WC **018558**

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 **Jacqueline Hickey**, Arbitrator of the Commission, in the city of **Chicago**, on **December 28, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **April 30. 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 $**33,280.00**; the average weekly wage was $**640.00**.

On the date of accident, Petitioner was **49** years of age, ***single*** with **1** dependent children.

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

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

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

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

ORDER

The Arbitrator finds that Petitioner's current condition of ill being is causally related to Petitioner's COVID-19 exposure at work for Respondent and further orders:

Respondent shall pay Petitioner the reasonable and necessary medical expenses including any unpaid medical charges from the following providers: Roseland Community Hospital, Advocate Christ Hospital, Advocate Healthcare, Integrated Imaging Consultants, Midwest Diagnostic Pathology, Heart Care Centers of Illinois, Consultants in Cardiology & Electrophysiology LLC and South Hub, pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act. *See Rider to Decision and Petitioner Exhibit 3.*

Respondent shall pay Petitioner temporary total disability benefits of $426.66/week for 45 3/7 weeks, commencing 6/8/20 through 4/21/21, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $384.00/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.

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.

Jacqueline C. Hickey

Signature of Arbitrator

July 3, 2023

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MICHAEL MALONE,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No.** 20 WC 018558
	)	
EDENS SOUTH SHORE**,**	)	
	)	
Respondent.	)	

RIDER TO DECISION

This matter proceeded to hearing on December 28, 2022 in Chicago, Illinois before Arbitrator Jacqueline Hickey. Issues in dispute include causation, medical bills, TTD and nature & extent. *See Arbitrator's Exhibit "Ax" 1.*

The parties agree that on April 30, 2020, Petitioner and Respondent were operating under the Illinois Workers' Compensation or Occupational Diseases Act and their relationship was that of employee and employer. The parties further agree that Petitioner gave the respondent notice of an April 30, 2020 COVID-19 exposure within the time limits stated in the Act and that Petitioner contracted COVID-19 from his employment with Respondent. The parties agree that Petitioner's average weekly wage is $640.00. (AX1) Petitioner alleges and Respondent disputes that Petitioner's current condition of ill being as it relates to his heart and specifically myocarditis and his congestive heart failure is related to his contraction of COVID-19 at work for Respondent.

FINDINGS OF FACT

Testimony of Petitioner

COVID-19 Exposure

Petitioner testified he worked for Respondent in maintenance since January 2020. (Tr. 14) Petitioner testified that early to mid-April 2020 he felt fatigued and short of breath (Tr. 18- 19) Petitioner testified on April 30, 2020 he tested positive for COVID-19 at Roseland Community Hospital after initially testing negative. (Tr. 17) Petitioner immediately returned to work after his COVID diagnosis. (Tr. 102)

Medical Treatment

On June 7, 2020, Petitioner presented to Advocate Christ Hospital (PX4) with complaints of shortness of breath. (RX4 p.113) On June 8, 2020 Dr. Luay Rifai diagnosed Petitioner with congestive heart failure and "most likely hypertensive heart disease." (RX4 p.140) Petitioner consulted with Dr. Rifai on June 10, 2020 who again diagnosed petitioner with "most likely hypertensive heart disease. " (RX4 p.172) Petitioner was discharged from the hospital June 11, 2020. (PX4 p.58)

Petitioner testified he was ordered off work following the hospital admission (Tr. 105-106). Petitioner was provided discharge instructions on how to manage his hypertension, heart failure, and pneumonia. (PX4, p.79-91)

Petitioner testified he continued to follow up with cardiologist Dr. Rifai after being released from the hospital (Tr. 31-32) Petitioner testified he treated with Dr. Rifai for approximately one year (Tr. 33-34). Petitioner testified Dr. Rifai prescribed medication and ran tests (Tr. 34) Petitioner testified his condition stabilized and his stamina increased (Tr. 34)

Petitioner testified at some point he came under the care of internist Dr. Rudyard Smith (Tr. 42, 52) Petitioner testified he saw Dr. Smith December 16, 2021. Petitioner testified Dr. Smith recommended he begin exercising (Tr. 43-44).

Petitioner admitted to obtaining a $20,833.00 Paycheck Protection Program (PPP) Loan in February 2021, from driving Uber prior to April 30, 2020. Petitioner denied earning any income from employment since June 2020 although he admitted to obtaining the PPP loan (Tr. 96-102)

Petitioner Prior Medical Condition

The Petitioner, Michael Malone, testified that he was a healthy individual with no heart nor blood pressure condition until the onset of on-the-job Covid contraction sometime prior to April 30, 2020 (T. 52-53) the date of the first positive Covid test, performed at Roseland (Px2, the Roseland Hospital positive Covid documentation). Petitioner testified that he was very active, energetic and athletic prior to Covid (T. 23- 24, 81). He engaged in regular strenuous workouts. He further testified that his blood pressure was fine prior to his Covid and that his blood pressure and temperature was taken daily at Edens South Shore (T. 94). Petitioner testified that he had other physical examinations prior to his employment at Edens South Shore and that he was never told of any cardiac nor blood pressure concerns (Id.) nor was he told of any high blood pressure at Roseland Hospital (T. 95). Had the Petitioner been aware of blood pressure or heart issues, he would have immediately addressed this. He testified that once he became aware of his Covid contraction that he was fully compliant with his treatment regimen, inclusive of attending his medical appointments, taking all prescribed medications, wearing the Zoll Life Vest and, later, resumption of regular exercise (T. 35, 36 and 45).

Petitioner Current Condition

Petitioner testified in February 2022 he started regular exercise sessions at Planet Fitness (Tr. 47). Petitioner admitted going to the gym regularly and explained he exercised at Planet Fitness 4-5 days per week, usually for two hours at each session. (Tr. 47, 68, 82) Petitioner testified he would start at the treadmill to "get the heart going" (Tr. 47) Petitioner testified he then used weight machines and free weights for strength training (Tr. 47-48). Petitioner testified he would walk and run on the treadmill. (Tr. 83-84). Petitioner testified he would also lift 3-4 sets of 10-16 repetitions of bench press at 135-145 pounds (Tr. 84-85) Petitioner testified he would also conduct abdominal work outs on a machine, approximately three to four sets of 30 repetitions at a 90-pound weight resistance. (Tr. 86- 87) Petitioner testified he would perform jumping jacks in between exercises to keep his heart rate up (Tr. 88-89)

Testimony of Miranda Wachtor

Ms. Miranda Wachtor testified she was employed by Allied Universal as Surveillance Investigator II. (Tr. 147-148). Ms. Wachtor testified Allied Universal investigates insurance fraud. (Tr. 147) Ms. Wachtor testified she conducted surveillance efforts and obtained video footage of Petitioner on June 2, 2022, November 18, 2022, November 22, 2022, and November 29, 2022. (Tr. 150-151). Ms. Wachtor testified that for each date she ensured her cameras were operating in proper working order. Ms. Wachtor testified once she captured the footage she uploaded the videos to the Allied's video upload portal. (Tr. 152) Ms. Wachtor identified the subject of the surveillance video as the Petitioner. (Tr. 151-152). Ms. Wachtor testified that she personally observed Mr. Malone perform all of the exercise activities on June 2, 2022, November 18, 2022, November 22, 2022, and November 29, 2022. Surveillance video of Petitioner's exercise routines on June 7, 2022 and June 8, 2022 were admitted as RX8. Surveillance video of Petitioner's exercise routines on June 2, 2022, November 18, 2022, November 22, 2022, and November 29, 2022 were admitted as RX9.

Testimony of Dr. Morton Tavel

Dr. Tavel testified via evidence deposition on May 24, 2022. (PX4) Dr. Tavel testified he maintained a medical license since 1957, though his curriculum vitae lists him as being retired since 2014 (PX4 p.5; P. Dep. Ex. 1) Dr, Tavel testified consistently with the findings contained in his report marked as Tavel 3. (Px4). His report was read into testimony and he agreed with his findings previously given. Dr. Tavel opined COVID 19 led to severely reduced cardiac function consistent with myocarditis which persisted to at least January 2022. (PX4). Petitioner's symptoms of marked fatigue and shortness of breathe have persisted to this time, rendering him totally disabled for any type of employment and likely to result in ongoing disability. (Id.)

Dr. Tavel testified he reviewed several medical records, including the recent stress test that was performed with nuclear technology. (PX4, p.15,17-18) Dr. Tavel concluded that Petitioner's viral COVID 19 infection and congestive heart failure were related and that symptoms of viral infection preceded symptoms of congestive heart failure (PX4, p.24) Dr. Tavel testified his opinions are based on "ongoing cardiac disability or dysfunction that has been well documented in both his record as well as the world literature." (PX4, p.35) The doctor testified that there was no prior history of congestive heart failure (Id. at 22) and one mention in the records of prior high blood pressure 10-12 years before (Id. at 23). Dr. Tavel explained that a negative profusion study means there is no significant obstruction of coronary arteries which means Petitioner does not have nonischemic cardiomyopathy. (Id. at 67-68). Dr. Tavel also relied on the nuclear stress test which showed cardiac function was markedly depressed and even more so than his initial review for the Social Security record. (Id. at 17). He further reviewed the 12/31/21 nuclear cardiac perfusion study which showed persistently reduced ejection fraction of 27%. (Px4).

Dr. Tavel testified that due to shortness of breath and fatigue the claimant is totally disabled. (PX4, p.56) Dr. Tavel testified that based on his review of the records petitioner was "unable to do much else, besides just ordinary sedentary activities around the household," though later admitted Petitioner could work in a sedentary capacity. (PX4, p.61-62)

Testimony of Dr. Jason Robin

Dr. Jason Robin testified via evidence deposition on June 13, 2022. (RX3). Dr. Robin testified he is the director of sports cardiology at NorthShore University Health System, a program designed to address COVID's relationship to myocarditis in young athletes. (RX3, p.7)

Dr. Robin testified that the echocardiogram demonstrated petitioner had an enlarged heart with left ventricular hypertrophy, otherwise described as a thickening of the heart muscle. (RX3 p. 10, 13-14) The Arbitrator notes that Dr. Robin testified petitioner's diagnosis was "classic hypertensive cardiomyopathy which is most common reason for cardiomyopathy in middle aged African Americans." (RX3 p.20-21) Dr. Robin explained the weakened heart muscle was due to poorly controlled blood pressure not COVID-19. (RX3 p.21-22). Dr. Robin explained the echocardiogram showed a massive left ventricular hypertrophy, which could only be caused by long standing poorly controlled blood pressure (RX3 p.22) Dr. Robin further explained that the left ventricular hypertrophy would not be induced by a viral insult, rather chronic uncontrolled blood pressure. (RX3 p. 21-22) The basis of his opinion was that COVID 19 induced myocarditis w/ cardiomyopathy is extremely rare. Id. Dr. Robin's opinion also relies on the statement from Advocate Christ Medical Records which states petitioner had a history of high blood pressure for 10-12 years prior. (Id at 24 and 44.) Dr. Robin finds that the treatment through his examination was reasonable and necessary. (Id. at 24). The doctor finds it extremely unlikely but possible COVID 19 caused cardiomyopathy but very possible hypertension caused cardiomyopathy. (Id. at 46). Further, the doctor admits that it is possible pneumonia was brought about by COVID 19 and that pneumonia may have triggered symptomology for underlying heart issues. (Id. at 59). Lastly, Dr. Robin testified "COVID 19 may have caused him to go into a little bit of congestive heart failure in June 2020." (Rx4, pg. 62).

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). A decision by the Commission cannot be based upon speculation or conjecture. *Deer and Company v. Industrial Commission,* 47 Ill.2d 144, (1970). A Petitioner seeking an award before the Commission must prove by a preponderance of credible evidence each element of the claim. *Illinois Institute of Technology v. Industrial Commission,* 68 Ill.2d 236, (1977).

In the case at hand, the Arbitrator observed Petitioner during the hearing and finds him to be a credible witness. None of the physicians who treated or examined him noted any symptom magnification. Petitioner's testimony appeared to be consistent with the medical records as a

whole. The Arbitrator notes that Petitioner's testimony regarding his ability to work out at the gym and the exercises he can perform were consistent with the surveillance videos submitted into evidence under Respondent's Exhibits 8 and 9.

The Arbitrator finds Ms. Miranda Wachtor to be a credible witness regarding her testimony of obtaining surveillance of Petitioner. The Arbitrator finds both Dr. Tavel and Dr. Robin to be credible witnesses in their testimony regarding Petitioner's heart condition in relation to his developing COVID-19 on the job. However, the Arbitrator finds Dr. Tavel to be more persuasive than Dr. Robin in his medical opinions, further explained below.

Issue F, whether Petitioner's current condition of ill-being is causally related to the injury or exposure, the Arbitrator finds as follows:

To establish causation a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injury. 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, ¶ 1, 11 N.E.3d 453. An injury arises out of a claimant's employment where it "had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Sisbro, Inc. v. Industrial Comm'n,* 207 Ill. 2d 193, 203 (2003).

The parties stipulated that Petitioner's contraction of COVID-19 arose out of the course and scope of his employment with Respondent and the Arbitrator further finds the Petitioner's current condition of ill-being to be causally related to the work related COVID-19 virus exposure. The Arbitrator finds that Petitioner's was first diagnosed as suffering from COVID-19 on April 30, 2020, when his condition of ill-being was confirmed as a COVID-19 disease. Therefore, the Arbitrator concludes that the Petitioner is the entitled to benefits under the ODA, as further explained below.

The Petitioner, Michael Malone, testified that he was a healthy individual with no heart nor blood pressure condition until the onset of on-the-job Covid contraction sometime prior to April 30, 2020 (T. 52-53) the date of the first positive Covid test, performed at Roseland (Px2, the Roseland Hospital positive Covid documentation). Petitioner testified that he was very active, energetic and athletic prior to Covid (T. 23- 24, 81). He engaged in regular strenuous workouts. He further testified that his blood pressure was fine prior to his Covid and that his blood pressure and temperature was taken daily at Edens South Shore (T. 94). Petitioner testified that he had other physical examinations prior to his employment at Edens South Shore and that he was never told of any cardiac nor blood pressure concerns (Id.) nor was he told of any high blood pressure at Roseland Hospital (T. 95). Had the Petitioner been aware of blood pressure or heart issues, he would have immediately addressed this. He testified that once he became aware of his Covid contraction that he was fully compliant with his treatment regimen, inclusive of attending his medical appointments, taking all prescribed medications, wearing the Zoll Life Vest and, later, resumption of regular exercise (T. 35, 36 and 45).

Notwithstanding the positive Covid test on April 30, 2020, Petitioner continued to work, albeit at greatly reduced efficiency (T. 23-27) for several weeks until the shortness of breath and fatigue became so overwhelming that he presented himself to Advocate Christ Hospital emergency room on June 7, 2020 whereupon he was admitted until discharge on June 11, 2020 (T. 18, 19, 23, 24 and 27-29).

While an in-patient there, he came under the care of cardiologist Luay Rifai, M.D. (T. 31) and he continued under his care until April 2021 (T.33-34). Dr. Rifai had Petitioner wear a Zoll Life Vest, essentially a personal defibrillator, for several months (T. 35-37). He continued to experience considerable shortness of breath and extreme fatigue, the exact extent of which waxed and waned (trial transcript page 66). He testified that on some dates he…"felt like a champ"…and on other days he could barely get by (T.55-56, 67-68, 89-90). Petitioner further stated that, following the hospital release, he was not physically capable of returning to work as a janitor nor any other position Petitioner testified that he had not worked since June 7, 2020 due to Covid complications (T. 23-25). He testified that Dr. Rifai had taken him off work from June 8, 2020 to April 21, 2021. Petitioner's care with Dr. Rifai ended as Petitioner had no health insurance coverage and he was not otherwise able to afford to pay for the care (T. 33, 40 and 41). Petitioner testified that he secured State of Illinois health insurance coverage (trial transcript page 32) and thereafter came under the medical care of Rudyard Smith, M.D. as his primary care physician sometime in 2021 (T. 42). He remains under the Covid care with Dr. Smith (T. 78). Dr. Smith never returned him to work (trial transcript page 79)

Dr. Smith concurred in the Covid diagnosis and the cardiac deficits brought about therein (Px4). Petitioner testified that Dr. Smith directed him to resume an exercise regime to improve his shortness of breath and his endurance (T. 43-44). Dr. Rifai earlier recommended a return to exercise (T. 39). Petitioner adhered to his directive and began working out at Planet Fitness sometime in February 2022 (T.43,44 and 29,30). His workouts were far less strenuous than his pre-Covid workouts (T.29, 30) and he testified that afterwards he would be exhausted and done for the day (T. 67,68). Other than occasional trips to the store, he would remain home, due to exhaustion. While home he would nap 4 to 5 times a day (T. 56). Respondent's substantial surveillance confirmed the workouts Petitioner testified and how he would return home afterwards or stop at the store. (Rx8 and 9).

On December 16, 2021, Dr. Smith wrote a medical certificate stating that Petitioner was under his care for Covid related issues, and further stating Petitioner was disabled with shortness of breath and chronic fatigue due to Covid (Px4), that Petitioner continues with difficulty in walking and engaging in usual activities, that Petitioner has severe limitations in functional capacity and that Petitioner was placed in at least a Class 3 New York Association Heart Failure Model. (PX4) The doctor provided a diagnosis of cardiomyopathy and systolic heart failure. Dr. Smith then wrote a prescription for Petitioner to undergo another stress test, specifically, a myocardial perfusion imaging/stress test, which was done at Advocate Christ Hospital on December 31, 2021 (Px4). This confirmed these findings and diagnosis of an extreme abnormal ejection rate of 27% (Px4).

Petitioner filed a claim with Social Security Disability Benefits (SSDI) and a hearing took place. The Government's hearing officer appointed a cardiologist, Morton E. Tavel, M.D., to act as a neutral medical expert to render medical opinions as regards the disability (T. 61-64). Dr. Tavel has been in practice for some 65 years. (Px4)He has served as a medical expert/consultant in SSDI hearings for some 20 years. He testified that reviewed Mr. Malone's medical history and records. He relied upon these records in providing his medical opinions therein. Dr. Tavel thereafter agreed to render medical opinions and testify at Mr. Malone's workers compensation proceedings (Px4).

Dr. Tavel's evidence deposition was taken on May 14, 2022 (Px4). Dr. Tavel reviewed and relied upon Petitioners' medical records, inclusive of a 487 page Advocate Christ Hospital emergency room/in-patient chart, December 31, 2021 stress test, the April 21, 2022 echocardiogram and records from Dr. Rifai and Dr. Smith. He relied upon these records in the formulation of his medical opinion (Px4) Dr. Tavel further states that he acknowledged statements in the Advocate Christ Hospital chart that spoke of a 10-12 year cardiac and high blood pressure history but he testified that that does not appear accurate and that there was no other history or evidence of earlier congestive heart failure nor high blood pressure (Px4, 22-23).

Furthermore, the Advocate Christ Hospital chart contains additional entries providing that Petitioner had no cardiac nor blood pressure issues, that his health was good, (RX4 121-122, 136, 138, 142) The history note on page 143 of Rx4 reads: no vessel disease, normal arteries. (Id.) The Arbitrator notes that other chart histories provide that the patient is female. Almost all of the history notations in the chart state that Petitioner reported no prior history, which is consistent with his testimony (Rx4).

Dr. Tavel provides a number of medical opinions concerning the Covid related illness. Dr. Tavel concurs with the COVID 19 diagnosis (Px418). Dr. Tavel continues: (Petitioner) developed clear evidence of congestive heart failure with clinical findings that included severe shortness of breath, combined with findings during a cardiac catheterization study performed on June 9, 2020, at which time he demonstrated an enlarged left ventricle with an estimated ejection fraction of 20 to 25 percent, normal being greater than 50 percent and markedly elevated left ventricular filling pressure of.. (Px4 page 20, lines 9-17) Dr. Tavel further notes that these findings were further compounded by a large pleural effusion outside the lungs (Px4 page 21, lines 1-8). Significantly, Dr. Tavel rules out coronary artery disease as the culprit (Px4 page 22, lines 1-9). Dr. Tavel further states that it was Covid that was responsible for the cardiac deficit Px4, page 27, lines 8-22). These findings were confirmed by the December 31, 2021 stress test (Px4 page 28, lines 19-24, page 29, lines 1,2). Dr. Tavel states that Petitioner's symptoms of shortness of breath and loss of stamina have persisted and preclude a return to work (Dr. Tavel's evidence deposition, page 30, lines 11-29, page 28, lines 23, 24).

Dr. Tavel summarizes his findings and opinions in the next exchange (Px4 page 29, lines 19-24, page 30, lines 1-15):

"He contracted Covid viral infection prior to April 2020, this resulted in a severely reduced cardiac function consistent with inflammation of the heart function, the heart muscles, which we call myocarditis, which has persisted to at least January of 2022. Reduced cardiac function has been commonly found in cases after contracting Covid, and they persist for lengthy periods after the initial infection. Also contributing to the disability is a strong likelihood of reduced lung function, as suggested by both his symptoms and various published scientific studies, which I can supply. His symptoms of marked fatigue and shortness of breath have persisted to this time, rendering him totally disabled for any type of employment and likely to result in permanent ongoing disability."

Dr. Tavel continues that, in his opinion, Petitioner did not have prior history of congestive heart failure nor high blood pressure (Px 4, 38-40) Dr. Tavel testified that Petitioner has been compliant with his medical care (Px4, 34) and that this medical care was both reasonable and necessary (Px4, 38)

Respondent retained Jason Robin, M.D. also a cardiologist as their medical expert witness. (Rx3, 30) Dr. Robin also did not examine Petitioner nor did he undertake an Independent Medical Evaluation (IME) (Rx3) Dr. Tavel conceded during his deposition "it was the pneumonia that tipped him over and it allowed him to manifest the syndrome of congestive heart failure" (Rx3 58-59)

The Arbitrator notes that Dr. Robin and Dr. Tavel agree on a number of facts and issues:

1. Petitioner contracted Covid (Rx3, 49, lines 8-10) (Px4, 19-20)
2. COVID-19 affected Petitioners' heart and lungs (Rx 2, 52, lines 9-13) (Px4, 32, lines 8-12)
3. Petitioner's course of medical care was both reasonable and necessary, through Dr. Robin review (Rx3, 24, lines 6-12) (Px4, 38, lines 4-8)
4. Petitioner was compliant with his medical care (Rx3, 43 and 48) (Px4, 34 and 44)
5. No diagnosis of heart and blood pressure issues was ever made prior to onset of Covid (Rx3, 52 and 55) (Px4, 38-40)
6. Covid and/or complications from Covid caused the congestive heart failure (Rx3,52, lines 9-12, p. 55, lines 12-23)
7. It is possible Pneumonia was brought about by the Covid (Rx3, 59, lines 13-18)
8. The myocardiogram stress test is a well-known and accepted functional heart test (Rx3, 43, lines 9-20)
9. A normal ejection rate would be 50% - 55% (Rx3, 34, line 20) (Px4, 20, lines 20-22, p. 58, lines 3, 4)
10. A 27% ejection rate signifies very significant heart disease (Rx3, 34, lines 8-24, p. 35, lines 1-4, p. 37, lines 13-18)
11. The New York Heart Association Heart Failure Model is an important template in assessing heart health (Rx3, 35, lines 18-21)
12. A Class 3 New York Heart Association Heart Failure Model would preclude a return to work (Rx3 36, lines 4-24, p. 57, lines 1-5) (Px4, 30, lines 11-15, p. 68, lines 12-20)

Dr. Robin concedes that only two (2) chart entries on page 143 and 147 in the 487 page Advocate Christ Hospital chart mention prior heart and blood pressure issues (Rx3, 143 and 170) and that his opinions rest largely on that purported history (Rx3, 23, lines 22-24). Dr. Robin further acknowledges the possibility that pneumonia was brought about and came after the Covid (Rx3, page 55, lines 12-24) and he acknowledges that the Covid, in conjunction with the pneumonia may have triggers symptoms for Petitioner's condition of cardiac ill-being and finally that the Covid may have caused the congestive heart failure (Rx3 61-62). Dr. Tavel continues to state that he thought Dr. Robin, placed undue reliance and weight on two electrocardiogram(s) and Dr. Tavel further elaborates that Dr. Robin's reliance on a finding of myocarditis is misplaced (Px4, 40, lines 12-24, p. 41, lines 1-9) and is not a reliable basis to rule out Covid contraction symptoms (Px4,41, lines 23, 24, p. 42, lines 1-17).

Dr. Robin places a great reliance on the EKG's, yet, he acknowledges that this test is not necessarily accurate to detect heart disease in black man (Rx3, page 13, lines 14-20. He concedes that an electrocardiogram was consistent for a severely depressed ejection rate fracture (Id. at 12) Dr. Tavel, in his opinion, Petitioner did not have prior history of congestive heart failure nor high blood pressure (Px4, 38, line 24, page 39, lines 1-24, page 40, lines 1-11).

Dr. Robin had no answer to explain away the fact that Petitioner did not experience shortness of breath nor fatigue prior to the onset of Covid except to say that the timing was simply coincidental (Rx3, 49, lines 1-10, page 51, lines 15-22)

The Arbitrator herein incorporates the findings of fact and conclusions of law explained above and finds that Petitioner's contraction of COVID-19 was causally connected to the exposure he faced at work. However, Petitioner's current condition of ill-being is not solely limited to COVID-19, but myocarditis, cardiomyopathy, shortness of breath, pneumonia, congestive heart failure and overall reduced cardiac function as well. The Arbitrator finds that Petitioner's current cardiac medical condition is causally related to his exposure to and contraction of COVID-19 while working for Respondent on or about April 30, 2020. In support of such a finding, the Arbitrator relies mostly on corroborative testimony of both Petitioner and Dr. Tavel, the medical records and the admissions of Respondent's Section 12 Examiner, Dr. Robin, as explained above.

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 incorporates findings and conclusions stated above. Petitioner testified to his positive Covid test at Roseland Hospital on April 30, 2020, to his in-patient stay at Advocate Christ Hospital from June 7 – 11, 2020 his (subsequent) care with cardiologist, Luay Rifai, M.D. and related medical services therein. Petitioner further testified that these bills were not paid and remain due. Overall, the Arbitrator finds Petitioner's treatment for the COVID-19 virus and subsequent cardiac related issues, including myocarditis, to be reasonable, necessary, and related, and finds that Respondent has not paid for all of said treatment. As such, the Arbitrator orders

Respondent to pay Petitioner directly for the following outstanding medical services, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act from:

Roseland Community Hospital	$575.00
Advocate Christ Hospital	36,473.00
Advocate Healthcare	390.60
Integrated Imaging Consultants	330.00
Midwest Diagnostic Pathology SC	423.00
Heart Care Centers of Illinois	340.00
Luay Rifai, M.D.	1,440.00
South Hub	330.00

See Petitioner Exhibit 3.

There is no dispute that the treatment Petitioner has received for his COVID-19 related cardiac condition, including myocarditis and cardiomyopathy, has been reasonable and necessary, as both Dr. Tavel and Dr. Robin testified it had been. Petitioner presented medical bills at trial totaling $40,301.60 in charges that were not paid by workers' compensation insurance. The Arbitrator orders Respondent to pay Petitioner for reasonable and necessary medical expenses specifically for any unpaid medical charges from the following providers: Roseland Community Hospital, Advocate Christ Hospital, Advocate Healthcare, Integrated Imaging Consultants, Midwest Diagnostic Pathology, Heart Care Centers of Illinois, Consultants in Cardiology & Electrophysiology LLC and South Hub as itemized above. These bills are attached as a part of Petitioner's Exhibit 3 which contains a list of all bills, charges and dates of service for each provider.

Issue K, what Total Temporary Benefits Are in Dispute?

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.

Having found Petitioner sustained a compensable condition of ill-being arising out of in in the course and scope of his employment and that his condition of ill-being is causally related to his exposure to the COVID-19 virus at work, any periods of temporary total disability incurred would be the responsibility of Respondent. In so finding, the Arbitrator notes that Petitioner testified that his last day of work at Respondent was June 7, 2020. Petitioner further testified that he did not return to work and further that he was not physically capable of a return to work. Petitioner's cardiologists, Luay Rifai, M.D. took Petitioner off work as of his in-patient stay at Advocate Christ Hospital on June 8, 2020. Petitioner testified that the doctor wrote disability slips and did not clear Petitioner to return to work and further that this was in-place at least through Petitioner's care with Dr. Rifai which went to April 21, 2021. Rudyard Smith, M.D., Petitioner's primary care physician, wrote of Petitioner's disability and physical inability to return to work on December 16, 2021. The Petitioner's severe cardiac disease and associated limitations precluded a return to work. Dr. Tavel further testified that the stress test of December 31, 2021 established a severely damaged heart which would preclude a return to work. Dr. Robin likewise concluded that the emergency room established in that the stress test may well prevent a return to work. The evidence established physical limitations that precluded Petitioner's return to work for significant period of time but not through the trial date of December 28, 2022. The evidence presented shows Petitioner's condition somewhat improved and he was able to return to working out and other activities he was previously unable to do. His medications help him improve and recover from his work-related condition related to his heart, as did the other care provided by his treating physicians.

It is hereby ordered that Respondent is to pay TTD benefits from June 8, 2020 through April 21, 2021. The evidence and record as a whole establish physical limitations that preclude Petitioner's return to work at least to April 21, 2021, the last appointment and examination date with cardiologist Luay Rifai, M.D.

Petitioner alleges and the evidence in the records support, that Petitioner was temporarily and totally disabled for the period of June 8, 2020 through April 21, 2021, a period of 45 3/7 weeks. As such, the Arbitrator finds Petitioner to be entitled to 45 3/7 weeks of TTD at Petitioner's TTD rate of $426.66/week.

Issue L, the nature and extent of the injury, the Arbitrator finds as follows:

For injuries occurring on or after September 1, 2011, Section 8.1b applies. 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). "None of the factors set forth in section 8.1b is to be the sole determinant of the claimant's disability." *Corn Belt Energy Corp. v. Illinois Workers' Compensation Comm'n*, 2016 IL App (3d) 150311WC, ¶ 49.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no impairment report was submitted into evidence and therefore the Arbitrator gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that Petitioner was employed as a Janitor. Petitioner never specifically described his job duties however the treating physicians and Dr. Tavel opined he could not return to janitorial work. The arbitrator acknowledges that Petitioner's condition has appeared to improve per the evidence in the record, and Petitioner can now exercise regularly and is more active. Petitioner also testified he only worked at this job for approximately 3 months prior to April 30, 2020 (Tr. 14) The Arbitrator therefore gives less weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 49 years old at the time of the COVID-19 exposure in April 2020. Because Petitioner has a permanent cardiac condition as a result of the work related COVID-19 virus, while improved since the last cardiac testing was one, he will have to manage his heart condition if he returns to work for any employer until the time he reaches 67 years old. Therefore, the Arbitrator gives more weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes Petitioner has not returned to work in any capacity since June 7, 2020. However, it is clear Petitioner's condition has improved despite having a permanent decreased function of his heart. There was no evidence presented of alternative employment pursued other than Petitioner driving for Uber prior to his COVID-19 exposure at work for Respondent. Therefore, the Arbitrator gives some 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 as a result of the COVID-19 exposure and subsequent cardiac issues that developed, myocarditis, Petitioner is permanently and partially disabled. The evidence is that Petitioner's COVID-19 related cardiac condition has resulted in permanent decreased function of his heart, as seen in the medical and testified to by Dr. Tavel. His COVID-19 related heart condition was deemed to be permanent by Dr. Tavel, whom the Arbitrator previously found to have testified credibly. The same doctor also opined that Petitioner developed clear evidence of congestive heart failure with clinical findings that included severe shortness of breath, combined with findings during a cardiac catheterization study performed on June 9, 2020, at which time he demonstrated an enlarged left ventricle with an estimated ejection fraction of 20 to 25 percent, normal being greater than 50 percent and markedly elevated left ventricular filling pressure. Dr. Tavel further notes that these findings were further compounded by a large pleural effusion outside the lungs. Significantly, Dr. Tavel rules out coronary artery disease as the culprit. Dr. Tavel further states that it was COVID 19 that was responsible for the cardiac deficit. These findings were confirmed by the December 31, 2021 stress test. Dr. Tavel states that Petitioner's symptoms of shortness of breath and loss of stamina have persisted and preclude a return to work. Dr. Tavel continues that, in his opinion, Petitioner did not have prior history of congestive heart failure nor high blood pressure. Dr. Tavel testified that Petitioner has been compliant with his medical care and that this medical care was both reasonable and necessary. Despite the opinion that Petitioner cannot return to employment, it is apparent to the Arbitrator that Dr. Tavel had not seen the surveillance footage of Petitioner at the gym nor that

the doctor was aware of Petitioner's improved condition. While the Arbitrator finds Dr. Tavel's more persuasive than Dr. Robin's with regards to causal connection between Petitioner's current heart condition and the COVID-19 exposure at work, the Arbitrator does not find that Petitioner is precluded from any and all work at this time. It is clear by Petitioner's own testimony and Respondent's surveillance, (Rx8 &9) that petitioner is now physically active and can exercise up to five times per week. While Petitioner is still not working, the Arbitrator finds Petitioner is capable of working to some extent, based on his own testimony and the surveillance video. 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 10% loss of use of man as a whole, pursuant to §8(d)2 of the Act which corresponds to 50 weeks of permanent partial disability benefits at a weekly rate of $384.00/week.

For the reasons stated above, Petitioner is entitled to an award of benefits under The Illinois Workers' Compensation Act and Occupational Disease Act, consistent with the findings herein.

It is so ordered:

Jacqueline C. Hickey **Arbitrator**

July 3, 2023

Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC002191
Case Name	Peter Palenius v. Southfield Corporation
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0097
Number of Pages of Decision	16
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Stephen Wauck
Respondent Attorney	Brad Antonacci

DATE FILED: 2/27/2024

/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

Peter Palenius,

Petitioner,

vs. NO. 20WC 2191

Southfield Corporation,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses, prospective medical care, causal connection, credit due to Respondent for benefits paid, 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 May 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.

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.

February 27, 2024
SJM/sj
o-2/7/2024
44

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

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

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC002191
Case Name	Peter Palenius v. Southfield Corporation
Consolidated Cases	
Proceeding Type	
Decision Type	Amended Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Rachael Sinnen, Arbitrator

Petitioner Attorney	Stephen Wauck
Respondent Attorney	Brad Antonacci

DATE FILED: 5/17/2023

THE INTEREST RATE FOR THE WEEK OF MAY 16, 2023 4.98%

/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
AMENDED

Peter Palenius
Employee/Petitioner

v.

Southfield Corporation
Employer/Respondent

Case # **20** WC **2191**

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 **February 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 **June 8, 201**, 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 $***64,751.96***; the average weekly wage was $***1,245.23***.

On the date of accident, Petitioner was ***41*** 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 ***$118.59*** for TTD, $***11,610.95*** for TPD, $***0*** for maintenance, and $***9,393.31*** for other benefits, for a total credit of $***21,122.85.***

Respondent is entitled to a credit of $***14,829.85*** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner directly for the outstanding medical services submitted into evidence (PX1, 3, 5, 7, 8) 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. Respondent shall be given a credit of $14,829.85 for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $830.15 / week for 26 3/7 weeks, commencing March 11, 2022 through September 11, 2022, as provided in Section 8(b) of the Act. Respondent is entitled to a credit of $118.59 in TTD payments and $9,393.31 in nonoccupational indemnity disability benefits.

The Arbitrator makes an award of 27% loss of use of the left foot under Section 8e(11) which corresponds to 45.090 weeks of permanent partial disability benefits at a weekly rate of $747.14. See Conclusions of Law for Arbitrator's considerations under §8.1b(b) of the Act.

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

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

MAY 17, 2023

Signature of Arbitrator

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Peter Palenius,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Case No. 20WC2191
Southfield Corporation,	)	
	)	
	)	
Respondent.	)	

FINDINGS OF FACT

This matter proceeded to hearing on February 2, 2023 in Chicago, Illinois before Arbitrator Rachael Sinnen on Petitioner's Request for Hearing under the Illinois Workers Compensation Act "Act." Issues in dispute include causation, unpaid medical bills, temporary total disability "TTD" benefits, and the nature and extent of the injury. Arbitrator's Exhibit "Ax" 1.

Petitioner's Job Duties & Prior Medical Condition

Petitioner has been employed by Respondent for nearly ten years as a truck driver, driving semi-trucks, straight trucks, and dump trucks. He delivers bricks to construction sites. When at the job sites, he utilizes a Moffett, which he described as similar to a forklift, to unload his trucks. The Moffett attaches to the back of the truck trailers. Before 2018, Petitioner testified he had no issues with his left ankle.

June 28, 2018 Accident

On June 28, 2018, Petitioner was making a delivery to Aldi. He completed his delivery and had re-attached the Moffett to the back of his truck. As he stepped down from the Moffett, his left foot became stuck on the Moffett. He lost his balance and he felt a sudden sharp pain in his left ankle and foot. While he took a moment to rest in his truck, he called his dispatcher to report the accident.

Summary of Medical Records

Petitioner first presented to Concentra on June 28, 2018 and was seen by Dr. Peter Sorokin. (PX1, p. 15). Petitioner reported that he "hurt his left ankle/foot as he was working with a work machine" (PX1, p. 99). The main symptoms were "located in the left lateral ankle and left lateral foot." (Id.). The attending doctor's physical examination of Petitioner's left ankle showed "swelling laterally" and "tenderness in the lateral malleolus" (Id. at 100). He had a full range of motion, but with pain

(Id.). He was diagnosed with a sprain of his left ankle and foot, given a hot/cold pack and dispensed Naproxen sodium (Id. at 102).

Petitioner continued to work full duty for a short period of time after the accident. He then performed light duty work for the Respondent starting July 9, 2018 through December 23, 2018, working in dispatch while wearing a boot. (AX1; RX4).

Dr. Sorokin eventually recommended Petitioner undergo physical therapy (PX1, p. 2) which he underwent at Concentra from July 6, 2018 through July 20, 2018. Petitioner was wearing his brace 12 hours per day and demonstrating improvement in activities of daily living. (Id. at p. 34). On July 23, 2018, Physician Assistant Dayton noted that Petitioner's lateral foot became very painful after a massage in physical therapy. The Physician Assistant recommended Petitioner start Ibuprofen and referred Petitioner to orthopedics. (Id. at p. 18-21).

Petitioner then began treating with Dr. Patel on July 25, 2018 at Northwestern Medicine. (PX2, p. 275). Dr. Patel diagnosed a left ankle sprain with peroneal tendon sprain and cuboid bone contusion. He recommended a CAM walker boot and physical therapy. He continued Petitioner on light duty restrictions but since Petitioner was not able to operate the clutch on a truck while wearing a CAM walker boot, he did office work for Respondent at a lower wage rate, and Respondent began paying temporary partial disability ["TPD"] benefits for 24 weeks. (See AX1, no. 8).

Suspecting a possible peroneal tendon tear, Dr. Patel eventually recommended an MRI which was performed at Northwestern on August 24, 2018. The MRI revealed intact peroneal tendons without significant tendinosis or tenosynovitis, mild subcutaneous soft tissue edema along the lateral border of the mid foot, and Stieda process with mild posterior subtalar chondral loss and small subtalar effusion. (PX2, p. 271).

Dr. Patel's reading of the MRI was that it demonstrated "peroneus brevis insertional tendonitis" (Id. at 262). At the September 28, 2018, appointment, Dr. Patel characterized the MRI as showing "lateral peroneal tendon inflammation" (Id. at 250), and at the November 2 appointment, Dr. Patel said that the MRI showed "an injury to his lateral collateral ligaments as well as peroneal tendons" (Id. at 246).

Petitioner's improvements were slow but by December 21, 2018, Petitioner felt ready to move out of the boot and back to his regular job as a truck driver (Id. at 240). On March 22, 2019, Dr. Patel noted Petitioner did not return to work due to a slow season in construction. Dr. Patel continued to recommend unrestricted work and anticipated MMI at the next visit. (Id. at 202).

When Petitioner returned to Dr. Patel on July 19, 2019, he reported that he had begun driving a different type of truck, which required him to use a lot more pressure in his left ankle and foot to operate the clutch. (Id. at 193). Dr. Patel explained that Petitioner's ankle will never feel "normal" again, but that surgery was not recommended given his MRI. He recommended a lace-up ankle brace. (Id. at 193).

When Petitioner returned to Dr. Patel on September 6, 2019, he noted Petitioner did not like the brace, which he claimed made his symptoms worse. (Id. at 133). Dr. Patel noted Petitioner's symptoms were difficult to explain and vague in nature. He recommended another MRI after Petitioner requested it. Dr. Patel diagnosed a left ankle sprain and osteochondritis.

The October 4, 2019 MRI revealed an intact talar dome. (PX3). It also revealed the Stieda process with reidentified posterior subtalar chondral loss as well as a small subtalar joint effusion. These findings were not significantly changed from the prior study.

On January 17, 2020 (PX2, p. 41), Dr. Patel reviewed the second MRI, which demonstrated "mild synovitis over the peroneal tendon" but "no tendinosis or obvious tears" (Id.). Dr. Patel discussed a PRP injection "versus a possible exploration of the lateral aspect of the peroneal tendons" (Id.). He told Petitioner that a PRP injection had a "50/50 chance of working" (Id.). He noted that the surgical option was a last resort.

Petitioner presented to Dr. Hamid on February 10, 2020, at Midwest Orthopaedics at Rush for a second opinion. (PX4). On physical examination Dr. Hamid recorded that Petitioner "reports 'pulling sensation' at peroneals with resisted eversion" and he noted that Petitioner was "tender to palpation over ATFL/CFL (Id. at 3). He assessed Petitioner with subtle left ankle instability. He agreed with Dr. Patel's recommendation for a PRP injection and discussed how surgery may be a reasonable option should Petitioner not improve after the injection. (Id.).

Petitioner's final appointment with Dr. Patel came on March 10, 2020, where Petitioner agreed to the PRP injection (Id. at 29). However, the PRP injection was not approved until September 20, 2021 (RX3, p .1), after a Section 12 examination with Dr. Petrov. Petitioner never underwent the injection.

Petitioner sought no medical treatment from March of 2020 until November 8, 2021 at which time he saw Dr. Hamid again, who was now located at Loyola Medicine. (PX4, p. 1). Petitioner testified that he continued to work full time, full duty as a truck driver during this gap in treatment. He testified it was difficult to find Dr. Hamid after he transferred to Loyola.

On November 8, 2021, Dr. Hamid noted that Petitioner had not made appreciable progress since his last visit. Dr. Hamid recorded a new finding – that Petitioner was now having pain over his peroneals. (PX 6, p. 20). Dr. Hamid opined on November 22, 2021 that Petitioner's most recent MRI revealed a torn CFL and longitudinal tear in the peroneus longus tendon. (PX5, p. 22). Dr. Hamid recommended surgery which was delayed due to Petitioner's unrelated hernia surgery that left him off of work for two months at the end of 2021.

Petitioner underwent a third MRI on February 9, 2022. This MRI was read by the radiologist to reveal a partial calcaneal fibular ligament (CFL) tear with an intact anterior talofibular ligament. There was noted to be overlying peroneal tendinosis without tear or subluxation. (RX1, p. 22).

Dr. Hamid performed surgery on March 11, 2022. The operative report shows that Dr. Hamid performed four procedures: (1) tenolysis of peroneals; (2) repair of dislocating peroneals without fibular osteotomy; (3) rerouting of peroneal tendons beneath CFL; and (4) partial calcanectomy

(excision of peroneal tubercle at level of friction on peroneus longus tendon) (Id. PX 6, p. 86). In the operative report, Dr. Hamid noted that the "ankle was found to be grossly unstable" (PX5, p.85). There was also "subluxing in the peroneus longus" and "the tendons were grossly snapping over the peroneal tubercle." (Id.).

As of the date of his last treatment on September 8, 2022, Dr. Hamid noted Petitioner was overall doing well again. Petitioner was noting mild pain over the peroneal tendons and his ankle instability had improved. Dr. Hamid recommended Petitioner continue wearing supportive shoes and perform weightbearing as tolerated. He recommended over-the-counter medicine for pain management and for Petitioner to continue his home exercise program. He allowed Petitioner to return to full duty work as of September 12, 2022, and he recommended Petitioner return to the clinic in two to three months for a final evaluation. Petitioner did not return to Dr. Hamid.

Respondent's Section 12 Examiner, Dr. Oleg Petrov

Dr. Oleg Petrov examined Petitioner on August 3, 2021. (RX2). He also testified via evidence deposition on September 21, 2022. (RX1).

Dr. Petrov diagnosed left lateral ankle pain, possible peroneus brevis tendinitis, and subtle lateral instability. (Id. at 10). Dr. Petrov opined in his IME report that Petitioner's "current condition of ill-being is causally connected to the alleged work accident" however, he was of the opinion that Petitioner had "reached maximum medical improvement for the left ankle/foot condition…in March 2020" (RX2, pp. 3-4). Dr. Petrov further opined that a PRP injection was "a reasonable course of treatment," and that exploratory surgery might be a "consideration after the PRP injection and determination of its effect" (Id.).

At his deposition, Dr. Petrov opined that, had the partial tear of the CFL been connected to the 2018 injury, it would have appeared on Petitioner's first two MRIs. Dr. Petrov further stated that there would be inflammatory change of the peroneal tendons and evidence of subluxation tear in the first two MRIs. As he noted, the third MRI was far too distant in time to relate its findings to the sprain that occurred in 2018. (RX1, p. 23). Dr. Petrov admitted he only reviewed radiologists' reports of the MRI's, and never the actual imaging. (Id. at 31).

According to Dr. Petrov, the February 9, 2022 MRI findings have no causal relationship to the work injury. (Id. at 23). The August 24, 2018 MRI report showed no damage to the peroneal tendon. If the ankle sprain from the original injury had caused a partial peroneal tendon tear, it would have shown on this MRI. Dr. Petrov saw nothing to lead him to believe the MRI was of poor quality as well. (Id. at 12-15). He again noted that the October 4, 2019 MRI showed no significant differences from the August 24, 2018 MRI. (Id. at 16-18). There was no demonstration of damage to the peroneal tendons. If the sprain had caused a partial tear, it would have shown on this MRI. There were no objective findings to support Petitioner's complaints of pain. (Id. at 21). The difference on the February 9, 2022 MRI was that there was an impression of some partial tear of the calcaneofibular ligament. The first two MRIs showed no damage or injury to this ligament. (Id. at 22-23).

Although Dr. Petrov opined in his IME report that an exploratory surgery might be a consideration (RX2, p. 4), at his deposition he opined that Petitioner should have never undergone surgery. (RX1, p. 20). Dr. Petrov pointed out that at the CFL has no impact on the peroneal tendons, and there was no damage to the peroneal tendons. As Dr. Petrov noted, during surgery, Dr. Hamid performed tenolysis of the peroneal tendons where Dr. Hamid removed some scar portion of the tendon or tendon sheet around the peroneals. (Id. at 25-26). The peroneal tendons were never documented to be dislocating in objective findings or on MRI. The symptoms and physical exams of the ankle showed full muscle strength, full range of motion, and did not specify subluxing or dislocating peroneal tendons. There was just no objective physical findings to warrant surgical treatment.

Dr. Petrov opined that the operative repair did not involve a change in the peroneal tendon groove, and this was significant in that it goes along with the objective findings from the past four years that the peroneal tendons were not actively dislocating. (Id. at 26-27). They were not popping out of the groove, and thus there was no need for any repair of the fibula to alter the shape of the groove because the peroneal tendons were in the groove.

Dr. Petrov again clarified that the need for surgery was not causally related to the 2018 injury. (Id. at 28-29). The peroneal tendons were not dislocating. They suffered no damage as a result of the sprain. The peroneal tubercle that was present on the calcaneus and on the side of the calcaneus was not a result of the sprain. Dr. Petrov opined that none of these conditions could be directly related to the sprain that was initially sustained. Further, the peroneal tubercle, in all likelihood, was a pre-existing bump that is typically found on the side of the calcaneus. And the peroneal tendons, on the initial two MRIs, were found to be intact.

Dr. Petrov additionally opined that it is unlikely a peroneal tendon would develop a tear or partial tear if there is chronic ankle instability. (Id. at 36). A partial tear of the CFL is more likely than not a slow, progressive, chronic problem rather than the result of an acute injury. Dr. Petrov opined that an isolated partial tear of the calcaneofibular ligament is not uncommon. (Id. at 38).

Dr. Petrov noted that Petitioner's age, weight, and activity level would contribute to a partial tear. (Id. at 29). In particular, he thought that Petitioner's "rather active work life, physically active," was such that "normal wear-and-tear can result in subtle damage to ligaments and tendons" (Id. at 30). Nevertheless, he thought it "unlikely" for a person's peroneal tendons to develop a tear in the presence of chronic ankle instability (Id. at 37).

Deposition Testimony of Dr. Hamid

Dr. Hamid testified via evidence deposition on August 25, 2022. (PX6). Dr. Hamid thoroughly explained the nature of an ankle sprain. "There are ligaments that surround all of our joints, and the ligaments keep the bones close to each other and maintain their relationships and stability of the joints. When somebody twists or rolls a joint, it can stretch those ligaments and cause there to be some looseness or instability." (Id. at 13). He also explained the effect that the spraining of these ligaments can have on the peroneal tendons. "The peroneal tendons are two tendons called the peroneus longus and the peroneus brevis that run behind the fibula and next to the ligaments that are stretched during an ankle sprain. Because of their proximity there, they undergo the same

stresses and loads that those ligaments do, so people that roll their ankles oftentimes will have damage to their peroneal tendons as well." In Dr. Hamid's experience, it is "common to develop peroneal pathology over time" (Id. at 22). The mechanism of this peroneal pathology had to do with the stretching of the ligaments in an ankle sprain. "There are ligaments that keep the peroneal tendons in place, not just the ankle; and if these get stretched out, they may compensate well early on. But as time progresses, the tendons may start to slip around the side of the fibula, and as they start to slip around the side of the fibula, there is a little sharp edge right there, and they rub against and start to tear overtime" (Id.). "And so subtle peroneal tendon instability can be exacerbated by just gross laxity of the ankle" (Id. at 47). It is this progressive development of pathology that explains why Petitioner's earlier MRI looked "relatively good" (Id. at 37)

In Petitioner's specific case, Dr. Hamid's review of the MRI at the November 22, 2021, appointment showed specifically that "the [ATFL and CFL] ligaments are intact, but they were stretched or sprained" (Id. at 23). He also noted on the MRI a "longitudinal tear in the peroneus longus tendon and appearance of subluxation of the tendons with an incompetent superior peroneal retinaculum and fibrocartilage rim" (Id.). Dr. Hamid explained that "the ankle ligaments on the outside of [Petitioner's] ankle [were] stretched and torn, which is leading to his ankle instability. It also [meant] that the soft tissue constraints that keep the peroneal tendons in place have also stretched out as well and have let the peroneal tendons slide suddenly over the outside part of the fibula and that the patient has developed a small tear in his peroneus longus tendon due to this clinical subluxation of his peroneal tendons" (Id. at 23, 24).

As to the need for surgery, Dr. Hamid stated that surgery was often a reasonable option instead of a PRP injection (Id. at 15), the reason being that "in the specific realm of ankle instability, there is not, as least that I'm aware of, any great research that shows overwhelmingly that they are helpful or not helpful." (Id. at 16). Surgery, in fact, "is a common treatment for ankle instability that does not improve with standard conservative measures." (Id. at 17). By standard conservative measures, Dr. Hamid meant that the majority of "garden-variety ankle sprains…will heal oftentimes with some physical therapy, but even bad ones can potentially heal within a few months" (Id. at 39). In Dr. Hamid's opinion, Petitioner's "pathology was relatively obvious when we went into the surgery and his ankle was very lax and loose, as well as he did have a tear in his tendon" (Id. at 25, 26). He thought that "the PRP [injection] would have just been an additional cost without enough evidence to say that I absolutely had to do it" (Id. at 26).

Dr. Hamid admitted Petitioner did not have a tear of his peroneal tendon in July of 2018 and testified it was possible that Petitioner's ankle sprain healed between July 25, 2018 (when Petitioner first saw Dr. Patel) and February 10, 2020, when Petitioner first saw Dr. Hamid. (Id. at 38).

Petitioner's Current Condition

Petitioner testified his left ankle is much better. He can walk up and down stairs with no pain, like before his injury. He is not taking any medications for his left ankle, and he does not ice it. Petitioner returned to his regular work duties as a truck driver for Respondent on September 12, 2022. He testified he has no pain now with work, including no pain with climbing on and off the

Moffett machine or climbing in or out of his truck cab. It is now easier to operate the clutch pedal since surgery.

CONCLUSIONS OF LAW

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

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

To obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. A work-related injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. "A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." International Harvester v. Industrial Com., 93 Ill. 2d 59, 63 442 N.E.2d 908 (1982).

The crux of this case is whether the February 9, 2022 MRI findings are causally related to the June 28, 2018 work accident. Respondent's Section 12 examiner, Dr. Petrov, opined that, had the partial tear of the CFL been connected to the 2018 injury, it would have appeared on Petitioner's first two MRIs and there would be inflammatory change of the peroneal tendons and evidence of subluxation tear in the first two MRIs. Dr. Petrov opined that the initial August 24, 2018 MRI and the second October 4, 2019 MRI showed no damage to the peroneal tendon.

However, the Arbitrator finds it significant that Dr. Petrov did not have access to the MRI films and relied on the reports only. As a result, the Arbitrator relies on the MRI readings from Petitioner's treating physicians which differ from Dr. Petrov. Dr. Patel described Petitioner's initial MRI as demonstrating "peroneus brevis insertional tendonitis" and "lateral peroneal tendon inflammation." Dr. Patel opined that the second MRI demonstrated "mild synovitis over the peroneal tendon" and (according to Dr. Hamid) a "longitudinal tear in the peroneus longus tendon and appearance of subluxation of the tendons with an incompetent superior peroneal retinaculum and fibrocartilage rim."

Dr. Hamid thoroughly explained in his deposition testimony that as a result of Petitioner's work injury, his ligaments on the outside of the ankle were stretched, which lead to Petitioner's ankle instability and allowed Petitioner's peroneal tendons to slide over the outside part of the fibula. As a result, a small tear in his peroneus longus tendon developed. Further, Dr. Hamid had the benefit of seeing Petitioner's surgical findings firsthand and noted that Petitioner's pathology was clear. Dr. Petrov, on the other hand, opined that it was unlikely that a peroneal tendon would develop a tear or partial tear due to chronic ankle instability. Dr. Petrov instead attributed the partial tear to Petitioner's age, weight and "active work life." However, 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. The Arbitrator relies on the opinions of Dr. Hamid in finding that Petitioner's work injury was a causative factor in his current condition of ill-being.

The Arbitrator takes into consideration that Petitioner did not seek medical treatment from March 2020 until November 2021 but does not find that this fact defeats Petitioner's claim. Petitioner credibly testified that he had difficulty finding Dr. Hamid when he relocated to Loyola Medicine from Midwest Orthopaedics at Rush. Further, this timeframe falls within the COVID 19 pandemic. There is no evidence of any intervening event and Petitioner's ability to continue full duty work during this time does not discredit his reports of ongoing discomfort.

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:

Although Dr. Petrov opined in his IME report that an exploratory surgery might be a consideration after the PRP injection (which was consistent with Dr. Patel's treatment plan), at his deposition, he opined that Petitioner should have never undergone surgery. Dr. Hamid performed tenolysis of peroneals, repair of dislocating peroneals without fibular osteotomy, rerouting of peroneal tendons beneath CFL, and partial calcanectomy. Dr. Petrov opined that there was no need for any repair of the fibula to alter the shape of the groove because the peroneal tendons were in the groove. The Arbitrator relies on the opinions and surgical findings of Dr. Hamid whose surgery confirmed a tear in his tendon. Further, the Arbitrator notes that Dr. Hamid's surgery was successful and Petitioner reported a remarkable improvement in pain following the procedures.

Petitioner never underwent the PRP injection initially recommended by Dr. Patel, agreed on by Dr. Hamid, and ultimately authorized after Dr. Petrov's Section 12 exam. The fact that Petitioner didn't undergo the injection does not discredit the need for surgery. The Arbitrator relies on the opinions of Dr. Hamid who stated that the injection would just have been an additional cost and there was not enough evidence to mandate it.

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 directly for the outstanding medical services submitted into evidence (PX1, 3, 5, 7, 8) 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. Respondent shall be given a credit of $14,829.85 for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Issue K, whether Petitioner is entitled to temporary total disability benefits, the Arbitrator finds as follows:

The Arbitrator relies on the opinions of Dr. Hamid and the medical records to find that Petitioner is entitled to TTD benefits. Petitioner had surgery with Dr. Hamid on March 11, 2022, and Dr. Hamid held Petitioner off work through June 15, 2022, at which point Petitioner was restricted to

desk work only. At the appointment on September 8, 2022, Dr. Hamid gave Petitioner a note to return to full-duty work as of September 12, 2022.

Based on the above, the Arbitrator finds Respondent liable for 26 & 3/7 weeks of TTD benefits (March 11, 2022, through September 11, 2022) at a weekly rate of $830.15, which corresponds to $21,939.68 to be paid directly to Petitioner, less Respondent's credit of $118.59 in TTD payments and $9,393.31 in nonoccupational indemnity disability benefits, for a total of $12,427.78 to be paid directly to Petitioner.

Issue L, the nature and extent of the injury, the Arbitrator finds as follows:

In determining PPD benefits, Section 8.1b(b) of the Act directs the Commission to consider: "(i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records." 820 ILCS 305/8.1b(b); Con-Way Freight, Inc. v. Illinois Workers' Compensation Comm'n, 2016 IL App (1st) 152576WC, ¶ 22, 67 N.E.3d 959. "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b).

Under Section 8.1b(b)(i), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The statute does not require the claimant to submit an impairment rating. It only requires that the Commission consider such a report if in evidence and regardless of which party submitted it. See Continental Tire of the Americas, LLC v. Illinois Workers' Compensation Comm'n, 2015 IL App (5th) 140445WC, ¶ 17, 43 N.E.3d 556. Therefore, the Arbitrator gives no weight to this factor.

Under Section 8.1b(b)(ii), the occupation of the injured employee, the Arbitrator notes that Petitioner worked as a truck driver for Respondent prior to the accident and was able to return to work as a truck driver in a full time, full duty capacity following the accident. He testified that he drives a combination of trucks with automatic transmission and truck with old clutches that required his left foot to operate. Petitioner testified that it's easier to operate the clutch pedal since surgery. He further testified that he is able to climb on and off the Moffett machine or in or out of the truck cab without difficulty. The Arbitrator therefore gives little weight to this factor to the benefit of Petitioner.

Under Section 8.1b(b)(iii), the age of the employee at the time of the injury, the Arbitrator notes that Petitioner was 41 years old at the time of the accident. Petitioner is middle aged with many working years before him. The Arbitrator gives moderate weight to this factor to the benefit of Petitioner.

Under Section 8.1b(b)(iv), the employee's future earning capacity, the Arbitrator notes there was no evidence presented that this injury had affected Petitioner's future earning capacity in any concrete way. At the time of the hearing, Petitioner was still working for Respondent. The Arbitrator gives moderate weight to this factor to the benefit of Respondent.

Under Section 8.1b(b)(v), evidence of disability corroborated by the treating medical records, the Arbitrator gives great weight to this factor to the benefit of Petitioner. Petitioner underwent four procedures during his March 2022 surgery: (1) tenolysis of peroneals; (2) repair of dislocating peroneals without fibular osteotomy; (3) rerouting of peroneal tendons beneath CFL; and (4) partial calcanectomy (excision of peroneal tubercle at level of friction on peroneus longus tendon). As his last date of treatment on September 8, 2022, Dr. Hamid noted Petitioner only had mild pain over the peroneal tendons and his ankle instability had improved. Petitioner testified his left ankle is much better. He is not taking any medications for his left ankle, and he does not ice it.

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 27% loss of use of the left foot, pursuant to §8(e)11 of the Act which corresponds to 45.090 weeks of permanent partial disability benefits at a weekly rate of $747.14.

It is so ordered:

Arbitrator Rachael Sinnen

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC020281
Case Name	INSURANCE COMPLIANCE v. C&C TRACK WORKS
Consolidated Cases	
Proceeding Type	Petition for Penalties
Decision Type	Commission Decision
Commission Decision Number	24IWCC0098
Number of Pages of Decision	7
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Thomas Owen
Respondent Attorney	

DATE FILED: 2/27/2024

/s/Carolyn Doherty, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)
☐ Affirm with changes
☐ Reverse
☐ Modify

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

State of Illinois Department of Insurance, Insurance Compliance Department[1], Petitioner,	)	
v.	)	NO: 19 WC 020281
C & C Track Works, Inc.; Cesar Ramirez Hernandez Individually and as President of C & C Track Works, Inc.; and Angela Coats, Individually and as Secretary of C & C Track Works Inc., Respondent.	)	

DECISION AND OPINION REGARDING INSURANCE COMPLIANCE

Petitioner, the State of Illinois Department of Insurance, Insurance Compliance Department brings this action, by and through the Office of the Illinois Attorney General, against the above captioned Respondents alleging violation of Section 4(a) of the Illinois Workers' Compensation Act for failure to procure mandatory workers' compensation insurance. Petitioner alleges that Respondents knowingly and willfully lacked workers' compensation insurance for 1,127 days. On February 5, 2024, after timely notice to Respondents, a hearing was held before Commissioner Doherty in Chicago, Illinois. Petitioner was represented by the Office of the Attorney General. Respondent did not appear in person or through counsel. A record was taken.

Petitioner seeks the maximum fine allowed under the Act, $500.00 per day for each of the 1,127 days, from July 6, 2011 to November 30, 2011, June 4, 2012 to December 20, 2012, August 15, 2013 to October 24, 2014, and January 30, 2016 to December 26, 2016 when Respondents allegedly did business and failed to provide coverage for its employees. In addition, Petitioner seeks reimbursement for the liability incurred and paid by the Injured Workers' Benefit Fund in claim 16WC015934 in the amount of $48,864.63.

The Commission after considering the record in its entirety and being advised of the applicable law, finds that Respondents knowingly and willfully violated section 4(a) of the Act and section 9100.100 of the Rules Governing Practice before the Illinois Workers'

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

Compensation Commission (Rules) during the claimed periods in question, except for June 8, 2012 to December 1, 2012. As a result, Respondent shall be held liable for non-compliance with the Act and shall pay a penalty in accordance with section 4(d) of the Act. For the following reasons, the Commission assesses a civil penalty against the Respondents under section 4 of the Act in the sum of $475,000 and orders Respondent to reimburse the Injured Workers' Benefit Fund in the amount of $48,864.63, for a total of $523,864.63.

I. Findings of Fact

Notices of a Scheduled Hearing on the Merits in this matter were sent via certified mail. The mailed notices were received by Respondent Cesar Ramirez Hernandez at 408 River Avenue Streator, IL 61364 on January 22, 2024. Mr. Hernandez signed for the certified mail. Px. 1. The notice was for the hearing which was scheduled for and conducted on February 5, 2024.

George Sweeney, a supervisor for the Illinois Department of Insurance, Insurance Compliance Department, testified at the hearing.

Mr. Sweeney identified Petitioner's Exhibit 3 as a Notice of Non-Compliance. The notice states that the Commissions' records indicated that Cesar Ramirez Hernandez and Angelia Coats were not in compliance with the requirements of the section 4 for the period from July 6, 2011 to November 30, 2011, June 4, 2012 to December 20, 2012, August 5, 2013 to October 25, 2014, and January 30, 2016 to December 26, 2016. The notice includes an affidavit indicating service by mail on August 31, 2018. Px 3b.

Mr. Sweeney identified Petitioner's Exhibit 4 as a Request for Informal Conference mailed to Cesar Ramirez Hernandez and Angelia Coat. The notice states that Respondents were not in compliance with the requirements of the section 4 for the period from July 6, 2011 to November 30, 2011, June 4, 2012 to December 20, 2012, August 5, 2013 to October 25, 2014, January 30, 2016 to December 26, 2016. The notice includes an affidavit indicating service by mail on August 31, 2018. Px 4.

Mr. Sweeney identified Petitioner's Exhibit 5 as a Business Entity Search for C & C Track Works, Inc. from the Illinois Secretary of State's Office. The Report indicates that C & C Track Works, Inc. was formed on February 28, 2011 and remains active to date. The Report also indicates that Cesar R. Hernandez is the president and registered agent and Angelia Coats is the secretary of C & C Track Works, Inc. PX 5. In the regular course of the investigation, Petitioner also obtained the Articles of Incorporation and the Annual Reports from the Secretary of State related to C & C Track Works, Inc. The Articles corroborate that Cesar R. Hernandez is the president and registered agent for C & C Track Works, Inc. Px 6.

Petitioner's attorney also identified, and the Commission takes judicial notice of, the Commission's arbitration decision in Espridian Oliver v. Cesar Ramirez Hernandez d/b/a C & C Track Works Inc. and the Illinois State Treasurer as *ex officio* Custodian of the IWBF (16WC015934). In 16WC015934, the arbitrator concluded that the parties were operating under the Act as employee and employer. The arbitrator further concluded that respondent was uninsured on the accident date of January 12, 2016. The arbitrator awarded the petitioner medical

expenses, temporary total disability benefits, permanent partial disability benefits, and additional compensation. Px 2.

Mr. Sweeney further identified Petitioner's Exhibit 7 as IWBF disbursement documents kept in the regular course of business. These documents indicate that the IWBF issued payment to the petitioner in 16WC015934 from the IWBF in the amount of $48,864.63 Px 7.

Mr. Sweeney further testified that Petitioner's Exhibit 8, was a certified finding from the Department of Self-Insurance that Respondents were not self-insured with the State of Illinois during the dates indicated. The document indicated that no certificate of approval to self-insure was issued to C & C Track Works for the period of July 6, 2011 to November 30, 2011, June 4, 2012 to December 20, 2012, August 5, 2013 to October 25, 2014, January 30, 2016 to December 26, 2016. Px 8.

Mr. Sweeney further testified that Petitioner requested insurance information regarding the Respondents from the National Council of Compliance Insurance (NCCI) in Boca Raton, Florida. Px 9. The NCCI certified that it is the agent designated by the Commission for the purpose of collecting proof of insurance coverage information on Illinois employers. The certificate indicates that said records do not show policy information was filed showing proof of workers' compensation insurance for the period from 7/6/11 to 11/30/11; 6/4/12 to 12/20/12; 8/15/13 to 10/25/14; and 1/30/2016 to 12/26/16 for President Cesar Ramirez Hernandez. The certificate further indicates that cancellations were reported to NCCI with cancellations effective dates of 07/11/11, 06/03/2012, 08/04/2013 and records do not show policy information was filed showing proof of workers' compensation insurance for the period from 12/02/12 to 12/20/12, 12/02/2013 to 12/31/2013; and 1/30/16 to 12/26/2016 for C & C Track Works. Px. 9.

Mr. Sweeney further testified that in the regular course of Petitioner's investigation, Petitioner requested information regarding the Respondents from the Illinois Department of Revenue. Petitioner submitted Petitioner's Exhibit 10 comprised of certified records from the Department of Revenue with tax returns. Px 10.

II. **Conclusions of Law**

The Commission first considers whether Respondents are subject to the Act. Pursuant to Section 3 of the Act, certain employers and their employees are automatically subject to the provisions of the Act if they engage in specific businesses, including: "the erection, maintain, removing, remodeling, altering or demolishing of any structure"; "[c]onstruction, excavating or electrical work"; and "any enterprise in which sharp edged cutting tools, grinders or implements are used, including all enterprises which buy, sell or handle junk and salvage, demolish or reconstruct machinery." 820 ILCS 305/3(1),(2),(8) (West 2004).

The Commission finds that Respondents' business falls within sections 3(1), 3(2), and 3(8) of the Act. While there was no direct testimony as to the nature of Respondents' business during the period of non-compliance, the Commission takes judicial notice of the findings by the Arbitrator in this regard as contained in the Decision rendered in ***Espiridian Oliver v. Cesar Ramirez Hernandez d/b/a C &C Track Works Inc., and the Illinois State Treasurer as Ex Officio Custodian of the Injured Workers' Benefit Fund***, **No. 16 WC 15934 August 12, 2018.** Petitioner's testimony therein established that they were employed by C & C Track Works which

was in the business of repairing railroad tracks. Accordingly, the Commission finds that the work Respondents engaged in automatically subjected them to the provisions of the Illinois Workers' Compensation Act.

Pursuant to section 4(a) of the Act, all employers who come within the auspices of the Act are required to provide workers' compensation insurance. See 820 ILCS 305/4(a) (West 2004). Section 9100.90(a) of our Rules similarly provides that any employer subject to section 3 of the Act shall insure payment of compensation required by section 4(a) 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) (1986). Section 9100.90(d)(3)(E) of our Rules similarly provides 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)(D) (1986). Section 9100.90(d)(3)(D) of our Rules provides that "[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) (1986).

The Commission analyzes here the culpability of Respondents and the applicability of Section 4(a). Section 4 of the Act requires that all employers of at least one employee who come within the provisions of Section 3 of the Act, and any other employer who shall elect coverage under Section 2 of the Act, provide workers' compensation insurance for the protection of their employees. 820 ILCS 305/4.

In this case, Petitioner submitted a certified finding from the Department of Self-Insurance that no certificate of approval to self-insure was issued to C & C Track Works for the periods of July 6, 2011 to November 30, 2011, June 4, 2012 to December 20, 2012, August 5, 2013 to October 25, 2014, and January 30, 2016 to December 26, 2016. At hearing, Petitioner sought a fine in part from June 4, 2012 to December 20, 2012. However, the NCCI certification shows that a cancellation was effective on June 3, 2012, there ***was*** policy information filed from June 8, 2012 to December 1, 2012, and there was no policy information showing proof of workers' compensation insurance for the period from December 2, 2012 to December 20, 2012. The Commission otherwise finds that there was no policy information showing proof of workers' compensation insurance for the other claimed periods. Respondents did not attend the hearing and thus presented no evidence indicating that they provided workers' compensation insurance of any kind during these periods. Accordingly, the Commission concludes that Petitioner proved that Respondents failed to comply with the legal obligations imposed by section 4(a) of the Act from July 6, 2011 to November 30, 2011, June 4, 2012 to June 7, 2012, December 2, 2012 to December 20, 2012, August 15, 2013 to October 24, 2014, and January 30, 2016 to December 26, 2016.

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

> "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 2004).

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).

In this case, Petitioner submitted into evidence the Notice of Non-Compliance mailed to Cesar Ramirez Hernandez, individually and d/b/a C & C Track Works, in the form prescribed by our Rules and including an affidavit of service. Petitioner also submitted the notices for the insurance compliance hearing, accompanied by certified mail receipts signed by Mr. Cesar Hernandez himself. The insurance compliance hearing allowed the Commission to introduce evidence and testimony, and afforded Respondents the opportunity to do the same, had any of them chosen to attend personally or through counsel. Accordingly, the Commission concludes that reasonable and proper notice and hearing was provided to Respondents.

On the merits, the Commission has considered 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, *e.g.*, *State of Illinois v. Murphy Container Service*, Ill. Workers'Comp. Comm'n, No. 03 INC 00155, 7 IWCC 1037 (Aug. 2, 2007).

The Commission finds that the period of time during which the Respondents violated the Act by failing to obtain workers' compensation insurance was significant. The Respondents failed to have insurance for 950 days, from July 6, 2011 to November 30, 2011, June 4, 2012 to

June 7, 2012, December 2, 2012 to December 20, 2012, August 15, 2013 to October 24, 2014, January 30, 2016 to December 26, 2016. In Petitioner's Exhibit 11, copies of the Employer's Contribution and Wage Reports established that C & C Track Works employed from at least 4 employees to 16 employees at various times. Px. 11. In the Espiridian Oliver decision, the claimant's testimony established that one of Respondents' employees sustained a work injury. As Respondents failed to have workers' compensation insurance, the Injured Workers' Benefit Fund paid benefits to that petitioner as a result of the injury. Having reviewed the record, the Commission finds no evidence as to Respondent's inability to secure and pay for workers' compensation coverage and no evidence of mitigating circumstances.

The Commission concludes that Respondents knowingly and willfully failed to comply with the Act. Based on the significant period of time that Respondents failed to comply with the Act, the Commission assesses a penalty of $475,000 against Respondents. Pursuant to Section9100.85(a)(1) of the Rules, the Commission is also entitled to obtain reimbursement from Respondents in the amount of $48,864.63, representing the compensation obligations paid by the Injured Workers' Benefit Fund in the *Oliver* case.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondents, C & C Track Works, Inc. and Cesar Ramirez Hernandez, individually and as president and Angelia Coats individually and as an officer, pay to the Illinois Workers' Compensation Commission the sum of $523,864.63 pursuant to Section 4(d) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that payment shall be made according to the following procedure: (1) payment of the penalty shall be made by certified check or money order made payable to the Illinois Workers' Compensation Commission; and (2) payment shall be mailed or presented within thirty (30) days of the final order of the Commission or the order of the court of review after final adjudication to:

Department of Insurance
Attn: Insurance Compliance
122 South Michigan Avenue, 19th floor
Chicago, Illinois 60603

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.

Dated: 2/26/2024

Carolyn M. Doherty

Commissioner Carolyn M. Doherty
045

FEBRUARY 27, 2024

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC012724
Case Name	Amanda Lopez v. Happy Pup Manor
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0099
Number of Pages of Decision	17
Decision Issued By	Carolyn Doherty, Commissioner, Christopher Harris, Commissioner

Petitioner Attorney	William Martay, David Petrich
Respondent Attorney	Robert Harrington

DATE FILED: 2/28/2024

/s/Carolyn Doherty, Commissioner

Signature

DISSENT; /s/Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

AMANDA LOPEZ,

Petitioner,

vs. NO: 22 WC 12724

HAPPY PUP MANOR,

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 temporary total disability, nature and extent, and credit, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 15, 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 $25,400.00. 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.

February 28, 2024
O: 02/15/24
CMD/ma
045

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

/s/ *Marc Parker*
Marc Parker

DISSENT

TTD benefits may be suspended or terminated if the employee refuses work falling within the physical restrictions prescribed by his doctor. *Hartlein v. Illinois Power Co*., 151 Ill. 2d 142, 166, 601 N.E.2d 720, 176 Ill. Dec. 22 (1992). The Respondent notified the Petitioner on June 11, 2021 that a light office role was created for her, and she was asked to have a fitness for duty certification completed by her physician. While she was off work at that time, Dr. Carlile subsequently released Petitioner to sedentary work on August 18, 2021. Mr. Thompson testified that the accommodated position was available to the Petitioner as of August 18, 2021. The position was filled as of September 27, 2021 as Petitioner never responded to the offer. Petitioner confirmed that she did not respond to the e-mail and further testified that she did not inform her doctor about the job offer, did not provide the certification to her doctor, and did not accept the job offer. The evidence establishes that a position within Petitioner's restrictions was available to her between August 18, 2021 and September 27, 2021. Because of this, I find Petitioner failed to prove that she is entitled to TTD benefits during this period. Therefore, I respectfully dissent from the majority.

February 28, 2024

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

O: 02/15/24
CMD/ma
045

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC012724
Case Name	Amanda Lopez v. Happy Pup Manor
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	14
Decision Issued By	Joseph Amarilio, Arbitrator

Petitioner Attorney	David Petrich, William Martay
Respondent Attorney	Robert Harrington

DATE FILED: 9/15/2023

THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 12, 2023 5.30%

/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

Amanda Lopez
Employee/Petitioner
v.
Happy Pup Manor
Employer/Respondent

Case # **22** WC **012724**

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 **July 25, 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 for alleged overpayment for weeks of TTD?
O. ☐ Other _____

FINDINGS

On **May 23, 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 $**34,678.28**; the average weekly wage was $**666.89**.

On the date of accident, Petitioner was **27** 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 $**12,160.56** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**12, 160.56**

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

ORDER

Petitioner is entitled to receive temporary partial disability benefits of $444.59 per week for 24 weeks, commencing 05/24/2021 through 11/07/2021, as provided in Section 8(a) of the Act.

Respondent is entitled to a credit of TTD that was overpaid at the wrong rate in the amount of $1,490.00.

Respondent shall pay Petitioner permanent partial disability benefits of $400.13 per week for 66.8 weeks, because the injuries sustained caused the 40% loss of the right foot, 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*

Signature of Arbitrator

SEPTEMBER 15, 2023

ICArbDec

THE ILLINOIS WORKERS' COMPENSATION COMMISSION
ATTACHMENT TO ARBITRATION DECISION

AMANDA LOPEZ,	)	
	)	
Petitioner	)	
	)	
vs.	)	NO. 22WC012724
	)	
HAPPY PUP MANOR,	)	
	)	
Respondent	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. PRELIMINARY

Ms. Amanda Lopez (Petitioner) by and through her attorneys filed an application for adjustment of claim under the Workers' Compensation Act (Act) (*820 ILCS 305/1 et seq.* (West 2014)) seeking benefits for an injury she sustained on May 23, 2021 while working for Happy Pup Manor (Respondent). At trial, Petitioner was well represented by William H. Martay, Esq. of Sandman, Levy and Petrich. Serena L. Thompson, Esq. of Nyhan, Bambrick, Kinzie & Lowrey, P.C, well represented Respondent.

This matter proceeded to hearing before the Arbitrator in the City of Chicago and County of Cook on the following three (3) disputed issues: (1) Whether Petitioner is entitled to temporary total disability benefits (TTD) for the period of TTD previously paid by Respondent; (2) Whether Respondent is entitled to a credit for an overpayment of TTD due TTD paid based on an incorrect average weekly wage, and, (3) The Nature and Extent of Petitioner's Injury.

Petitioner testified on her own behalf. Mr. Brian Thompson testified on behalf of Respondent. The submitted exhibits and the trial transcript of the testimony were examined by the Arbitrator in reaching this Arbitration Decision. The parties mutually requested a written decision, including findings of fact and conclusions of law. (Arb. X 1)

II. FINDINGS OF FACT

TESTIMONY

Petitioner was hired by Happy Pup Manor in January, 2020 as a kennel worker with the job title "Pup Care Specialist" . Her duties consisted of taking care of the dogs in Respondent's care. Her duties as a Pup Care Specialist included bathing, feeding, supervising play time and cleaning up dog waste. (T 15, RX2) As a Pup Care Specialist, Petitioner from time to time included addressing birthday postcards to clients' dogs. (T.36) In May of 2021, Respondent had a total of six employees, two of which were the two owners, Mr. and Ms. Thompson. (T.34)

Before the workplace accidental injury of May 23, 2021, Petitioner had not injured for her right foot, ankle or leg nor required or received medical care for her right lower extremity. She enjoyed good health. (T. 16).

The parties stipulated that on May 23, 2021, Petitioner was sustained a work-related accident that arose out of and in the course of her employment. (T.16, 26-27) (Arb. X 1) Petitioner testified that on May 23, 2021, while attempting to step over a baby gate, she tripped and fell injuring her right ankle and leg. (T.16, 17, 27) She received emergency care at Advocate of Sherman Hospital where she received morphine, x-rays, and was placed in a cast. Sherman Hospital referred Petitioner to Dr. Kevin Carlile of Ortho Illinois for follow-up treatment. (T.17, PX2)

Dr. Carlile performed surgery at Sherman Hospital to repair her right tibia and fibula fractures. The embedded screws and plates in her leg remain. Sometime after surgery she underwent physical therapy. Petitioner ambulated with crutches for two and a half months. (T.18)

Dr. Carlile released her to return to employment on November 7, 2021. Respondent did not request that she appear for an examination pursuant to Section 12 of Act. Petitioner admitted that she was offered a light duty job but denied knowing that Dr. Carlile had released her for light duty work. She was off work until November 7, 2021. (T. 20).

On November 7, 2021, Dr. Carlile released her to return to work without restrictions as of November 8, 2021. On November 8, 2021, Petitioner tendered her resignation by sending a text message to the Respondent. (T. 21, 42-44, RX6)

Shortly thereafter, Petitioner started working for the uncle of a friend doing computer work; a sedentary position wherein she primarily sits but also does little walking. She is still working at the company today earning about $20.00 per hour. (T. 22) Making more money than with Respondent. (Arb. X 1).

Petitioner testified and the parties stipulated, Respondent paid Petitioner temporary total disability benefits from May 24, 2021 through November 7, 2021. (T.24, Arb.X1, RX1) While receiving benefits, Petitioner confirmed she received email correspondence from Respondent regarding a sedentary light-duty job offer. (T.25, 27, RX4) The email correspondence included a

job description (RX3) and Fitness for Duty Certification (RX5) for her doctor to complete. (T.27-28) However, Petitioner testified she did not accept the job offer, did not inform her doctor of the job offer, and did not provide her doctor with a copy of the Fitness for Duty Certification form. (T.28)

Petitioner is now 29 years old. The plates and screws remain in place. She is under no active medical care for her right foot, ankle, or leg today. She has no new appointments with Dr. Carlile. She has had no new injury to her right foot, ankle or leg. (T. 23) She did not see any other physicians other than Dr. Carlile and the emergency department physicians at Sherman Hospital.

Petitioner currently experiences numbness from time to time and a burning and aching feeling. Prolonged standing and walking cause her ankle to swell, and she sits down for relief. She believes that walks a little bit differently after her accident. Petitioner does not use any device today on her right foot, ankle, or leg. (T. 24-25).

On cross-examination Petitioner testified that she worked as a "Pup Care Specialist" for Respondent and that she was injured on May 23, 2021. She injured the right ankle, leg and foot and underwent surgery on June 1, 2021. Following the surgery, she was offered a light duty position. (T. pp. 26-27) She was sent a copy of a fitness for duty, but she was not sure if it was by email. She never advised her doctor about a light duty job offer. She never accepted the light duty position offer by Respondent. She was released to return to work fully duty in November 2021. She voluntarily resigned her position on November 8, 2021. (T. 28)

Petitioner sent a text message to Respondent that she resigned. She found a better job offer near her home. The work at the new employer was a sedentary position with a computer. The employer was J.C. Embroidery, and she began employment November 11, 2021. (T. 29). She currently continues to have ankle swelling. She does drive to and from work. (T. 30).

On re-direct Petitioner testified she was still on crutches when the light duty offer was made on June 10, 2021. (T. 31)

Respondent called Mr. Brian Thompson. (T. 31) Mr. Thompson and his wife, as co-owners, started the business in February 2016. Their place of business is in Barrington, Illinois. Mr. Thompson is the Chief Financial Officer (CFO). His wife takes care of the dogs, and he takes care of everything else. The Respondent is in the business of boarding and sometime training of various types of doodle dogs. He believes that in May 2021, Respondent had six employees, including himself and his wife. (T.33)

Mr. Thompson knew Petitioner as an employee of Respondent. Mr. Thompson was shown as Respondent Exhibit 2, a job posting that Respondent was advertising in 2020 for which Petitioner applied for and received the job. Petitioner helped around the office from time to time addressing postcards for the birthdays of the boarded dogs. He testified that Petitioner was injured on May 23, 2021, and never returned to work for Respondent. (T.34-36)

On June 11, 2021, Mr. Thompson offered Petitioner a restricted duty work following the accident as an office coordinator. The offer was tendered by email. (T. 36-40, 45, RX3. RX4) Mr. Thompson was shown as Respondent Exhibit 3 the job duty restriction for the light duty job offer. (T. 37) The office coordinator would be a sedentary job. (T. 38) Mr. Thompson was shown as Respondent Exhibit 4, the offer for the temporary position of office coordinator. (T. 39) The job was offered to Petitioner on June 11, 2021, but Petitioner never responded. Mr. Thompson was shown as Respondent Exhibit 5, a job description, fitness for duty certification. (T. 40) Mr. Thompson testified that he consulted with his HR service about the fitness for duty certification. (T. 41) He sent a follow-up email to Petitioner on June 15th. Petitioner did not respondent to either email. Petitioner did not contact Respondent about a sedentary work release of August 19, 2021. (T. 42) He next heard from Petitioner when she resigned via text message sent to his wife on November 8, 2021. The witness was shown as Respondent Exhibit 6, the text message resignation. Petitioner voluntarily resigned. (T. 44)

On cross-examination Mr. Thompson testified Petitioner was offered a light duty job on June 11, 2021. No doctor had released her for any type of employment before June 11, 2021. The insurance carrier never had Petitioner examined for a Section 12 medical examination before June 11, 2021. The light duty job offer came directly from Mr. Thompson, but no doctor had released her. He received a certification from HR, but no doctor and HR is not a doctor. (T. 45) The witness testified no doctor had released her for any type of employment before June 11, 2021. He acknowledged that Petitioner could have been living in Chicago with her father and was on crutches in early in June, 2021. (R46) (T. 47) Petitioner was on crutches for two and a half months after surgery and this witness could not answer if it would be difficult to get from Chicago to Barrington if she was living in Chicago. The witness was not sure if Petitioner was even released to drive. (T. 48) The Arbitrator noted that the right foot is used to press the gas pedal and apply the brakes. (T. 49)

Petitioner testified on re-direct examination that she had surgery to her right foot, ankle and leg on June 1, 2021. (T/ 50) She was on crutches, and after surgery she moved back with her father to Chicago on North Meade. It is about 45 minutes from Chicago to Barrington. She was not able to drive. She would have no way of getting to Barrington from Chicago unless she paid $50.00 Uber each way. No doctor released her for any type of work in June, 2021. (T. 51)

The parties introduced various exhibits. Petitioner introduced 38 pages of records from Ortho Illinois as Petitioner Exhibit 1 and as Exhibit 2, the medical records from Advocate Aurora Health—Sherman Hospital for medical care and treatment. Both exhibits were admitted in evidence. (T. pp. 53, 54) Respondent offered in evidence the TTD payment ledger as Exhibit 1; as Exhibit 2, pup care specialist job description; as Exhibit 3, office coordinator job description; as Exhibit 4, email correspondence for June light duty job offers; as Exhibit 5, fitness for duty certification; and as Exhibit 6 Petitioner's resignation text message. (T. 56-60) All exhibits were admitted.

The reasonableness and necessity of medical treatment was not contested by Respondent as that nature of the injury was clear. And, Petitioner did not contest at trial, Respondent's failure to

authorize prescribed physical therapy. Petitioner introduced the Sherman Hospital records of pertaining to the June 1, 2021 surgery (PX1 and the records of OrthoIllinois. PX2)

MEDICAL EVIDENCE

On May 23, 2023, Petitioner received emergency care for her work injury at Aurora Health - Sherman Hospital. (PX2, page 34) X-rays taken. She was placed in a right short leg splint and referred by the emergency department to OrthoIllinois—Dr. Kevin Carlile. (PX1, 5, PX 2, 34)

The May 26, 201 initial visit progress notes of Dr. Kevin Carlile note that on May 23, 2021, Petitioner tripped over an animal gate and fell down while at work. She complained of medial and lateral ankle pain. Pain was recorded at rest 6/10; with activity 8/10. Dr. Carlile recorded that Petitioner was 4 feet 8 inches tall and weighed 98 pounds. Dr. Carlile read the May 23rd X-rays of the right ankle taken at Sherman Hospital. The x-rays revealed a trimalleolar ankle fracture with mortise in good alignment, a small posterior malleolus fracture, and a spiral Weber B distal fibula fracture. Dr. Carlile noted that he reviewed the x-rays with Petitioner and her family and recommended surgery consisting of an open reduction and internal fixation (ORIF), Petitioner agreed to proceed with surgery. (PX2, 33- 34)

On June 1, 2021, Dr. Carlile performed an open reduction and internal fixation of the displaced right trimalleolar ankle fracture (medial, lateral and posterior malleoli fixation) and applied a right short leg splint. (PX1, 10). The surgical report notes that surgery revealed a "trimalleolar fracture with Weber B spiral distal fibula, moderately large posterior malleolus fracture and small anterior colliculus medial malleolus fracture; stable distal tib-fib joint after malleoli fixation." (PX1 p.10). The surgical report and supporting records (PX2, 22-23 and 47-52) record that 2 plates, 9 screws and wires were implanted during the surgery. (PX 2, 9). These plates, screws and wires still remain in place in Petitioner's right ankle.

On July 16, 2021, Petitioner was seen for post-surgery follow up. Physical examination revealed Petitioner using her prescribed CAM boot, which was removed for the examination. Appropriate postoperative swelling of the ankle and foot was noted. Dr. Carlile's assessment was displaced trimalleolar fracture right lower leg, subsequent encounter for closed fracture with routine healing.

Dr. Carlile noted that he reviewed the results of the X-rays and current situation with Petitioner and her present family. Dr. Carlile noted that Petitioner was instructed continue use of the CAM boot for activities only and to remove the CAM boot at rest. In three weeks, she may discontinue the boot and transition to normal shoe gear. She was given a prescription for physical therapy. She was authorized off work and Dr. Carlile noted that a work restriction form was completed for submission to the workers' compensation office. (PX2, 26)

On July 19, 2021, Petitioner started physical therapy at Athletico upon referral from Dr. Carlile. (T.18, PX1, PX2, p.21) On October 8,2021, Dr. Carlile recorded that the workers' compensation adjuster had not approved more physical/occupational therapy visits and, thus, her current

therapy consists of a Home Exercise Program. (PX 2, 18) The Arbitrator notes that no medical evidence was introduced to support the adjuster's cession of formal physical therapy.

On August 18, 2021, Petitioner was seen by Dr. Carlile for postoperative follow up. Petitioner reported pain level at rest 2/10 and with activity at 3/10. She was receiving the prescribed physical therapy at Athletico two times a week. Examination revealed postoperative swelling of the ankle and foot. She is wearing regular shoe. She is still crutch dependent. Dr. Carlile prescribed additional physical therapy for 4-6 weeks in order to improve ankle range of motion and strengthening as well as gait training. She was encouraged to continue progressive ankle and foot range of motion as tolerated. Dr. Carlile change Petitioner's off work authorization to releasing her to return to work sedentary duty only. Dr. Carlile noted that he completed a work restriction s form for submission the workers' compensation adjuster. (PX2, 23-23).

On September 8, 2021, Petitioner was seen by Dr. Carlile. He noted that Petitioner was receiving physical therapy twice a week at Athletico. He prescribed additional physical therapy to improve weight bearing and range of motion. He recommended that Petitioner purchase medial arch support inserts for her shoes. He noted that she was not working due to her injury but could perform sedentary work if available. Dr. Carlile noted that he completed a work restriction form for submission to the adjuster. (RX2, 21-2).

On October 8, 2021, Petitioner was seen by Dr. Carlile. He noted that she was doing about the same in comparison to the last visit. Her pain level was 3/10 at rest and 4/10 with activity. The workers' comp adjuster had not approved the physical therapy previously prescribed. She still off work due to her condition. Examination reveled that still has some minimal swelling and her range of motion was moderate. He noted that she was ambulating independently without antalgia, that is without limping. Although physical therapy had not been authorized, Dr. Carlile continued to prescribe physical therapy to improve range of motion and strengthening as tolerated for 2-3 weeks for 4-6 weeks. He noted that she is not working due to her injury but could perform sedentary work if available. He released her to return to work without restrictions as of November 8, 2021. Dr. Carlile noted that he completed a work restriction form for submission to the workers' compensation office. (PX2 14, 18).

On August 18, 2021, Dr. Carlile released Petitioner to sedentary work. (PX1) On September 8, 2021 and October 8, 2021, Petitioner returned for treatment with Dr. Carlile, at which time Dr. Carlile again released Petitioner to "continue sedentary duty if available." (PX1)

As of December 1, 2021, Dr. Carlile noted Petitioner "may continue working without restrictions." Also, "the patient will return to see on an as needed basis or if new problems arise. "Dr. Carlile noted that work restrictions form was completed for submission to the workers' compensation office. Dr. Carlile anticipated that Petitioner would reach maximum medical improvement in 4 months. Dr Carlile recommended continued Home Exercise Program and stressed the need for continued swelling control. (Pet. Ex 1, 12-13).

III. CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below. Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. *820 ILCS 305/1(b)3(d)*. To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of his claim *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980) 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).

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 Arbitrator, as the trier of fact in this case, has the responsibility to observe the witnesses testify, judge their credibility, and determine how much weight to afford their testimony and the other evidence presented. *Walker v. Chicago Housing Authority*, 2015 IL App (1st) 133788, ¶ 47. Credibility is the quality of a witness which renders his evidence worthy of belief. It is the province of the Commission "to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence." *Hosteny v. Illinois Workers' Compensation Comm'n,* 397 Ill.App.3d 665, 674 (2009).

CREDIBITY FINDING: In the case at bar, the Arbitrator observed Petitioner during the hearing and finds her to be a credible witness. The Arbitrator compared Petitioner's testimony with the totality of the evidence submitted and did not find any material contradictions that would deem the witness unreliable. The Arbitrator finds Petitioner's testimony to be straight forward, truthful, and consistent with the record as a whole.

The Arbitrator finds Mr. Brian Thompson testimony under oath to be credible and consistent with the record as a whole. The Arbitrator, however, finds Mr. Thompson's June email job offers, based on the ill-timed recommendation of Respondent's HR service, to be have been ill-advised and unreasonable in light of the fact that was in a CAM boot, on crutches and was not a authorized physical therapy until July 19, 2012. Furthermore, the Arbitrator finds that the statements made by Mr. Thompson to the claims adjuster were based on unsupported hearsay information. The allegations attacking Petitioner's character which Mr. Thompson conveyed to the adjuster were neither corroborated by the record. Rather, the Arbitrator finds that the allegations were inconsistent with the record. The Arbitrator notes that the allegations were apparently ignored by the claims adjuster who continued paying TTD even after receiving Mr. Thompson's accusations. The Arbitrator also notes that the workers' compensation carrier continued paying TTD despite receiving three light duty work status reports directly from the treating surgeon. And, the workers' compensation carrier did not tender a written nor oral job

offer in August, did not do so in September and did not do so in October of 2021.

WITH RESPECT TO ISSUE (K), TEMPORARY TOTAL DISABILITY AND BENEFITS AND WITH RESPECT TO ISSUE (O), CREDIT, THE ARBITRATOR FINDS AS FOLLOWS:

The parties stipulated that Petitioner's average weekly wage (AWW) was $666.89. Petitioner claimed be entitled to TTD from May 24, 2021 through November 7, 2021. (ArbX1). At trial, the parties also agreed that Petitioner was paid TTD for this period. Moreover, at trial the parties agreed that Respondent is entitled to a credit of $1,490.40. The parties agreed that Petitioner was overpaid TTD based on payments made using an incorrect average weekly wage for the period of May 24, 2021 through November 7, 2021.

However, at trial, Respondent asserted that Petitioner was only entitled to TTD from May 24, 2021 through June 10, 2021. Respondent claims that Petitioner was offered a light duty job and that she not only did not accept the position but failed to reply and, thus it substantially overpaid TTD. The co-owner of Respondent testified as to the light duty job offer on direct examination. However, on cross examination, Mr. Thompson admitted that the light duty job offer was not substantiated by any treating doctor. In fact, Respondent produced no medical evidence to justify a light duty job offer in June of 2021. In fact, at the time of the time of the June 10th job offer, the medical records reflect that Petitioner was in a CAM boot, on crutches and was not a authorized physical therapy until July 19, 2012.

Moreover, Petitioner testified as to her extensive surgical care which was performed on her right foot, ankle and leg on June 1, 2021, and she was on crutches for months after her surgery. Also, Petitioner was living in Chicago with her father after surgery, and it would have cost her over $50.00 each way by Uber to go to Barrington, Illinois where Respondent was located. Further, no doctor released Petitioner for light duty work in early June, 2021. No evidence was introduced that Respondent offered to provide transportation. Respondent's belief that she was living near Barrington is not supported by the evidence. The medical records corroborate Petitioner's testimony that Petitioner moved in with father at his Chicago residence after the accident. Also, Respondent's conduct is consistent that she was not living near by as not offer of transportation was made even though the claims adjuster received sedentary work releases in August, September and October.

Respondent offered various Exhibits (Respondent 2, 3 and 4) about a light duty job, yet proffered no medical evidence whatsoever to justify a light duty return to work on June10, 2021. The Arbitrator notes that Petitioner was not allowed to commence a physical therapy treatment until July 19, 2021, upon referral from Dr. Carlile at Athletico. (T.18, PX1, PX2, p.21) On October 8,2021 , Dr. Carlile recorded the workers' compensation adjuster had not approved more physical/occupational therapy visits and, thus, her current therapy consists of a Home Exercise Program. (PX 2, p. 18)

The Arbitrator considered all the as offered by Respondent concerning a light duty job offer on June 10, 2021 but finds the job offer 9 days after major surgery was not a reasonable job offer. Additionally, in his progress note Dr. Carlile specifically states that the claims adjuster was informed as to Petitioner's work status, but he does not state that he discussed work status with Petitioner. Dr. Carlile does note in his progress notes that Petitioner was not working after he informed the claims adjuster that Petitioner could return to sedentary work.

Although payment of benefits is not an admission of liability, the Arbitrator is mindful that the claims adjuster continued paying TTD after receiving multiple light duty work status reports directly from the treating surgeon. The claims adjuster did so without tendering a written or oral job offer in August, September nor in October of 2021. The continuing payment of TTD and the failure to tender a writing job offer after receiving three light duty work status notes does not appear to be due to neglect, oversight or inaction since TTD was promptly terminated when Petitioner was released to return to work without restrictions.

The Arbitrator notes that a first blush, Petitioner testimony that she was not aware of being released to return to work with restrictions is inconsistent with the medical records. However, upon careful review of the records, it becomes evident that Dr Carlile was meticulous in recording with whom he was communicating. He specifically stated when he spoke to the Petitioner and her family who were present and when he just spoke to Petitioner. For example, Dr. Carlile specifically noted in his progress notes when he instructed Petitioner to be non-weight bearing or when and how to wean herself off the CAM boot. In the multiple work status reports, Dr. Carlile specifically stated that he provided a copy of the work status report to the workers' compensation office. He never noted in his progress notes that he provided one to the Petitioner or informed Petitioner about her work status. This inference is reasonable. It is consistent with Petitioner's testimony and consistent with the conduct of the workers' compensation carrier's conduct of not offering light duty work and not terminating TTD until she was released to return to work without restrictions.

It is undisputed that after tendering a light duty job offer by email only 9 days after major surgery even though Petitioner had not been released to work, Respondent did not tender any light duty job offers in August, September or October. On August 18, 2021, September 8, 2021 and October 8, 2021, Petitioner returned for treatment with Dr. Carlile, at which time Dr. Carlile again released Petitioner to "continue sedentary duty if available." (PX1) Respondent's failure to do so is consistent with Petitioner testimony and the evidence as a whole.

Petitioner has proven by a preponderance of the evidence that she was disabled from employment by her treating surgical doctor, and Respondent paid TTD as required. The Arbitrator is not persuaded by Respondent's allegation that TTD should have been terminated as of June 10, 2021/. It is not being supported by the credible evidence and, thus, is denied. Petitioner's entitlement to TTD for the period paid is supported by the Illinois Supreme Court Decision in *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Commission*, 236 Ill.2d 132, (2010) as accommodated work was not renewed after receiving sedentary work releases prior to Petitioner having reached maximum medical improvement.

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

In determining the level of permanent partial disability benefits for accidental injuries occurring on or after September 1, 2011, Sectio 8.1b(b) of the Act directs the Commission to consider: "(i) the reported level of impairment pursuant to subsection (a; (ii) of 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) 15275WC, ¶ 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 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. The Section requires the Commission consider such report if in evidence and regardless of which party submitted it. *Continental Tire of the Americas, LLC. v. Illinois Workers' Comm'n*, 2015 IL App (5th) 140445WC, Therefore, the Arbitrator gives no weight to this factor.

With regard to Section 8.1b(ii), the occupation of the injured employee, the Arbitrator has considered this factor and notes that Petitioner was employed at a day kennel to care for dogs. Her duties as a dog kennel worker required lifting dogs, standing, walking and involved some menial office work. Petitioner was released to return to work without restrictions by her treating surgeon. The Arbitrator is also mindful that upon Petitioner's return to employment she elected to work for a different employer. The position provided more money and involved sedentary office work - computer oriented job which requires less walking, less standing and is less physical. The Arbitrator gives little weight to no to this factor.

With regard to Section 8.1b(iii), the age of the employee at the time of the injury, the Arbitrator has considered this factor and notes that the Petitioner was 27 years old at the time of the accident and is now 29 years old. Petitioner has long remaining work life. At the time of the accident, No evidence was presented as to how Petitioner's age affected her disability. However, the Arbitrator notes that Petitioner is a young woman who sustained a significant injury at the dawn of her work life. She is expected to work and live with her disability for a long time. Accordingly, the Arbitrator finds that her age is a factor that increases Petitioner's disability. In support of this finding, the Arbitrator relies on the holding *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 more weight to this factor in determining disability.

With regard to Section 8.1b(iv), the employee's future earning capacity, the Arbitrator has considered this factor and notes that there was no evidence of an impact on Petitioner's ability to earn the same wage. In fact, upon her return to employment, she obtained a position with a new

employer for more money. The Arbitrator give no weight to this factor.

With regard to Section 8.1b(v), evidence of disability, the Arbitrator notes that Petitioner sustained a serious injury and underwent extensive right foot, ankle and leg surgery; surgery that involved imbedding wires, 9 screws and 2 plates, still in place, and thereafter physical therapy. Petitioner's current complaints of ill-being are credible and corroborated by the medical records. (PX 1, PX 2)

Petitioner suffered, due to her fall at work, a displaced right tri-malleolar ankle fracture which required open reduction and internal fixation (medial, lateral and posterior malleoli fixation) for which wires, 9 screws and 2 plates were imbedded in her ankle and leg. The imbedded hardware has not beer remove. The Arbitrator gives significant weight to this factor in determining disability.

Based on the above factors, and the record as a whole, the Arbitrator finds Petitioner sustained a permanent partial disability to the extent of 40% loss of use of her right foot, or 66.8 weeks at the weekly rate of $400.13, all of which has accrued.

IV. CONCLUSION

1. Petitioner has proven by a preponderance of the evidence that she is entitled to TTD for the period of May 24, 2021 through November 7, 2021. All TTD awarded and accrued has been paid.

2. Petitioner has proven by a preponderance of the evidence that she sustained a permanent partial disability to the extent of 40% loss of use of her right foot which is now due and payable.

3. Respondent is entitled to a credit of $1,490.40 for the overpayment of TTD.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC019041
Case Name	Jill Tippett v. State of Illinois
Consolidated Cases	18WC019042;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0100
Number of Pages of Decision	14
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	David Hunt
Respondent Attorney	Kayla Koyne

DATE FILED: 2/29/2024

/s/Marc Parker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JILL TIPPETT,

Petitioner,

vs. NO: 18 WC 19041

STATE OF ILLINOIS,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 9, 2022 is hereby affirmed and adopted.

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner failed to prove an accident arising out of and in the course of her employment with Respondent on December 21, 2016.

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.

February 29, 2024

/s/ *Marc Parker*

MP/wde

O: 1/10/24

/s/ *Stephen Mathis*

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/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC019041
Case Name	TIPPETT, JILL v. STATE OF ILLINOIS
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	11
Decision Issued By	Kurt Carlson, Arbitrator

Petitioner Attorney	David Hunt
Respondent Attorney	Joseph L. Moore

DATE FILED: 12/9/2022

THE INTEREST RATE FOR THE WEEK OF DECEMBER 6, 2022 4.57%

/s/ Kurt Carlson, Arbitrator
Signature

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

December 9, 2022

/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

JILL TIPPETT
Employee/Petitioner

v.

STATE OF ILLINOIS
Employer/Respondent

Case # **18** WC **019041**

Consolidated case

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Kurt Carlson, Arbitrator of the Commission, in the city of **Peoria**, on **09-30-22**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **12-21-16**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $ **91,000.00**; the average weekly wage was $ **1,750.00**.

On the date of accident, Petitioner was **56** years of age, ***married*** with **0** dependent children.

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

Respondent ***has*** 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 $ **ALL BENEFITS PAID**.

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

ORDER

Petitioner has failed to meet her burden of proving by a preponderance of the evidence that her condition of bilateral thoracic outlet syndrome was caused or otherwise permanently aggravated, accelerated, or exacerbated by her work activities with Respondent.

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 9, 2022

Kurt A. Carlson

Kurt A. Carlson

ATTACHMENT TO ARBITRATOR'S DECISION

Jill Tippett v. State of Illinois

IWCC No.: 18 WC 019041, Consolidated with 18 WC 019042

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent? and **F. Is Petitioner's current condition of ill-being causally related to the injury?;** the Arbitrator notes as follows:

The Petitioner, Jill Tippett ("Tippett") filed two applications for adjustment of claim with The Illinois Workers' Compensation Commission alleging that her neurological thoracic outlet syndrome ("TOS") was caused by "repetitive trauma" at work. (ArbX #4 & ArbX #5) Mrs. Tippett has been employed by The State of Illinois as a Court Reporter for over 40 years and stated that as part of her job duties she would be required to sit for long periods of time in a chair with her arms out in front of her to create transcripts of court proceedings. The Petitioner testified that she began to experience pain, tightness, and weakness in both her upper extremities throughout the course of her employment. She stated that she had difficulty grasping things, as well as occasional headaches.

Prior Workers' Compensation Claims

The Illinois Workers Compensation Commission database (CompFile) reflects that Petitioner settled two claims with the State of Illinois on January 13, 2020. (11 WC 009824 & 10 WC 038504). The language of the contract describes the part of the body affected at "bilateral upper extremities," but contract terms only include injuries to Petitioner's bilateral thumbs (trigger thumb) and hands (carpal tunnel syndrome) and no shoulder or arm injuries. It includes three dates of loss (10-05-07), (10-10-07) and (02-26-09).

The above has little to do with present claim except to know that during the time the above prior claims were litigated, the Petitioner underwent a Section 12 examination with Dr. David Fletcher,

at Respondent's request, on December 21, 2016. Dr. Fletcher wrote an incidental diagnostic finding that the Petitioner might be suffering from thoracic outlet syndrome or TOS. Although he stated it was not work-related, this incidental diagnostic finding is the subject matter of Tippett's present claims.

Date of Accident #1 – 18 WC 019041

Petitioner has adopted the above date, December 21, 2016, as a possible date of loss for her TOS since this was the date of Dr. Fletcher's previously mentioned Section 12 examination; when he first opined that Petitioner may be suffering from thoracic outlet syndrome or TOS. It is claim number 18 WC 019041.

Continued medical treatment for TOS by Tippett

The Petitioner saw Dr. Trudeau on February 28, 2017. Based upon his examination and testing, Dr. Trudeau agreed that Petitioner most likely had neurogenic thoracic outlet syndrome. (PX #2 p.10)

Currently, the official Mayo Clinic website defines Thoracic Outlet Syndrome (TOS) as "a group of disorders that occur when blood vessels or nerves in the space between your collarbone and your first rib (thoracic outlet) are compressed. Common causes include physical trauma, repetitive injuries from job – or sports related activities, certain anatomical defects (such as having an extra rib) and pregnancy. Sometimes doctors don't know the cause of thoracic outlet syndrome."

Similarly, a Johns Hopkins Cardiovascular Report dated in the Summer of 2014 states, "Anyone whose activities involve regular shoulder flexion and abduction and an elbow perched at shoulder height or higher is at risk for TOS. Other causes may be physical trauma, anatomical anomalies like a cervical rib, scalene muscle anomalies, tumors and even poor posture." Finally, "The vast majority of cases are injury-related and involve pressure from a scalene muscle, a supernumerary cervical rib or both on nerve roots of the brachial plexus."

Continued Medical Treatment for Tippett

Based on Dr. Trudeau's diagnosis, the Petitioner's family doctor, Dr. Kenneth Krock, referred the Mrs. Tippett to Dr. Robert Thompson, a board-certified vascular surgeon, in St Louis. (PX #3)

The Petitioner first sought treatment from Dr. Thompson on December 13, 2017. Based upon his review of testing and his physical examination of the Petitioner, Dr. Thompson felt that the Petitioner strongly met criteria for a clinical diagnosis of neurogenic thoracic outlet syndrome affecting both upper extremities and prescribed physical therapy. (PX #5, p. 10)

Date of Accident #2 – 18 WC 019042

Petitioner has offered an alternate accident date, December 13, 2017, for the same medical condition (TOS) as claim number 18 WC 19041 since this was the date that Dr. Thompson confirmed the diagnosis of TOS stated that it was related to her work (typing) and overhead activity. (PX #4) However, please note that physical therapy records also state that "she has been dealing with this for a number of years." And "Sept 2014 was her initial start of physical therapy" and the injury onset date was recorded at times as December 19, 2014. (PX #4) This date does not match with any of the Petitioner's current or prior workers' compensation claims and is not a typographical error. Of some collateral note is that Petitioner's symptoms were greater on the left, but she is right-hand dominant. (PX #4) Finally, the Petitioner stated that job activities required prolonged upper extremity use, including prolonged sitting, overhead activities, and reaching. (PX #4)

Dr. Thompson initially tried to treat the Petitioner's condition conservatively with targeted physical therapy. Those records show that Tippett interrupted her physical therapy to take a vacation. There is no record of injections and Petitioner was never taken off work. Dr. Thompson's records show that Petitioner continued to have flare ups with overhead activities. (PX #4) When these measures failed to alleviate the Petitioner's symptoms, Dr. Thompson performed a surgery on May 5, 2018. (PX#5, p. 14-

17) During this procedure, Dr. Thompson removed the Petitioner's left anterior scalene muscle, removed the left middle scalene muscle, removed any scar tissue from around the brachial plexus nerves, and removed the Petitioner's first cervical rib. Finally, the Petitioner's pectoralis muscle was divided in two to allow greater room for the nerves. (PX #5, pg 17-19) Dr. Thompson testified that this was done on the Petitioner's left side because she had indicated that her symptoms were greater on the left side. No corresponding surgery was performed on the right side. (PX #5, pg 19-20)

Mrs. Tippett testified at Arbitration that she returned to work as a court reporter for the Respondent on April 1, 2019. (PX #5, p. 20-23)

Dr. Thompson continued to treat the Petitioner postoperatively with therapy and a muscle relaxant (Robaxin). He testified that the Petitioner continued to do well and that her symptoms improved. Dr. Thompson testified that he was able to increase her weight limit restriction from 15 to 20 pounds and stated that she would probably require future physical therapy visits on a permanent basis. (PX #5, pg 23-27)

At the deposition, when Dr. Thompson was asked about neurogenic TOS causation, he responded that it can be from (1) variations in anatomy and/or (2) some form of injury. (PX #5 p.28)

Regarding (1) variations in anatomy: some people have an extra rib in the neck, a cervical rib that compresses the nerve. Others have muscle anomalies or extra scalene muscles, fibrous bands. "In fact, the anatomy in this area is highly variable. The majority of us do have what we would consider variations in anatomy." (PX #5 p.28) He swore on oath that Petitioner did not have a cervical rib, but did have an extra scalene muscle, a small extra scalene muscle, and some fibrous bands." (PX #5 p.29)

The Arbitrator notes that the operative report dated June 5, 2018 indicates that Petitioner's left first rib was removed by Dr. Thompson during surgery. (PX #4) It is unclear if this was a supernumerary

rib or not. The Arbitrator wonders if the 1st cervical rib is routinely removed as a prophylactic measure guarding against symptom recurrence.

In any event, Dr. Thompson also testified that TOS can be caused by a specific trauma or that it can also be from repetitive strain activity that is associated with poor posture and other alterations that affect that anatomy. He stated that assembly line work is a good example of repetitive strain injury. Prolonged typing at a keyboard can also be one of those types of injuries. (PX #5, pg 28-29) When asked what role Mrs. Tippett's posture played in the development of neurogenic thoracic outlet syndrome, he responded, "That can be a high risk type of activity if that's something you do all day for a long period of time. The head posture, the shoulder girdle posture, even the long concentration of working on a keyboard. Those are things that are well recognized to be factors involved potentially in the development of thoracic outlet syndrome." (PX #5, pg 30) Dr. Thompson was then asked if he had an opinion as to whether or not the Petitioner's job duties as a court reporter led to the development of her thoracic outlet syndrome to which he replied, "Yes, I think that was probably the principle factor that I could identify as the cause for her developing this." (PX #5, p. 30)

Dr. David Fletcher - Respondent's Section 12 examiner

In contrast, Respondent's IME physician, Dr. Fletcher testified that he did not believe the Petitioner's work as a court reporter was causative for the development of her thoracic outlet syndrome. (RX #3, pg 14) He opined that "TOS is can be cumulative when it involves a lot of repetitive overhead activities," but repetitive overhead activities are not part of a court reporter's employment. (RX #3 p.13) While the Petitioner's forward posturing may have made the condition more symptomatic, it was not the cause. (RX #3, pg 14, 23) Possible causes of neuropathic TOS would include (1) acute trauma (2) highly repetitive overhead activity (3) a mass or growth in the brachial plexus that causes a compression. (4) idiosyncratic causes.

Regarding (3) a mass or growth: this could be an extra rib or other anatomical variation. (RX #3 p.23)

Finally, Dr. Fletcher testified that the Petitioner having to look downward to verify what she was typing, potentially could aggravate a thoracic outlet syndrome, but was not the cause. (RX #3, p.25)

Based upon the totality of the evidence presented at trial, the Arbitrator finds that Petitioner failed to prove that her diagnosis of thoracic outlet syndrome was caused by her work activities as a court reporter with The State of Illinois for the following six reasons.

First, the nature and extent of Petitioner's work activities was not well-defined at trial. For example, it was not clear to the trier of fact how often Petitioner performed stenographic duties during an average work-day or week. It could be highly variable. Second, it was not well explained exactly how repetitive hand activity like keyboarding can cause a nerve compression in the neck and collarbone area. Instead, Dr. Thompson shifted the nexus of causal connection by describing Petitioner's poor posture as a "high risk" activity although he did not note her work posture when he made his diagnosis nor is it part of the diagnostic criteria for neurogenic TOS listed in treatment note on December 13, 2017 (PX #4). Third, Petitioner's work posture while performing her stenographic duties was not demonstrated at trial. Ostensibly, Petitioner would carry her poor posture home or anywhere else she went, strongly suggesting it to be idiopathic in nature. Fourth, if Petitioner does have poor posture, there is no proof that it was caused by her work activities. Fifth, at the December 13, 2017 medical exam, Dr. Thompson noted that Petitioner's symptoms were reproducible by extending the arm overhead, but there is no credible evidence that Petitioner's work activities include highly repetitive overhead activity or reaching. In fact, these claims seem grossly exaggerated to the trier of fact, especially when placed in contrast to assembly line workers with aggressive daily production requirements that requiring constant overhead lifting, pushing, and carrying. Moreover, if this were true in Petitioner's case, wouldn't it be likely that

her TOS symptoms would be greater on the right than the left, as Tippett is right-handed? Dr. Thompson has never prescribed right-sided surgery for Petitioner's bilateral condition.

The sixth and perhaps most compelling fact in the present case is that Dr. Thompson found a congenital abnormality in the form of an extra scalene muscle during surgery and removed it, but stated that it predisposed her TOS condition, but did not cause it. (PX #3 p.29) This causation slight-of-hand is in direct contradiction to other known causes of TOS which include anatomical anomalies like an extra cervical rib or an extra scalene muscle. In the present case, Petitioner's extra scalene muscle was the agent of nerve compression, and not any work-related trauma inducing inflammation and swelling. There was no traumatic accident at work.

In conclusion, after reviewing the record, it seems a little surprising that Dr. David Fletcher's analysis is the most compelling. Petitioner's work duties as a court reporter may have made her more symptomatic at times, but they were not the cause of her TOS. The Petitioner's own testimony corroborates Dr. Fletcher's opinion in that before the surgery, her TOS pain "would come and go" and "sometimes if I had my arms up, it would cause pain and tightness." She stated that housework and driving caused her symptoms to increase as well. (PX #4) Petitioner lost no time from work until after her TOS surgery and likewise did not file her applications for adjustment of claim until afterwards. She took a vacation during her initial, preoperative, physical therapy. (PX #4) In summary, the weight of the evidence shows that Petitioner had a pre-existing medical condition that was intermittently aggravated by work conditions, but not caused by them. There is no medical opinion stating "permanent aggravation, exacerbation or acceleration" in the record and the facts in this case are not strong enough to infer one.

(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 notes as follows:

Having found no causal connection in the present case, Respondent is not liable for any medical services or costs associated with her treatment for Petitioner's Thoracic Outlet Syndrome.

(K) What temporary benefits are in dispute? The arbitrator notes as follows:

Likewise, Respondent has no liability for lost time benefits.

(L) What is the nature and extent of the injury? The arbitrator notes as follows:

The Petitioner testified that while she has returned to her normal job position as a Court Reporter but now has permanent restrictions:

The Arbitrator notes that Petitioner's occupation may have never required her to lift, carry, push or pull 20 lbs. with any kind of remarkable frequency. Petitioner stated that she's performing her job as ever, but still notices TOS symptoms when she's "sitting a long time" and "sometimes nothing brings it on." Her attorney had to lead her into testifying that the stenographic machine aggravated her current symptoms.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC019042
Case Name	Jill Tippett v. State of Illinois
Consolidated Cases	18WC019041;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
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Number of Pages of Decision	14
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	David Hunt
Respondent Attorney	Kayla Koyne

DATE FILED: 2/29/2024

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JILL TIPPETT,

Petitioner,

vs. NO: 18 WC 19042

STATE OF ILLINOIS,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary disability, and permanent disability, and being advised of the facts and law, reverses the Decision of the Arbitrator. The Commission finds Petitioner did sustain an accidental injury arising out of and occurring in the course of her employment with Respondent on December 13, 2017.

FINDINGS OF FACT

I. Prologue

Initially, the Commission seeks to correct a scrivener's error contained in the Findings section of the Decision of the Arbitrator. In said section, the Arbitrator mistakenly listed the date of accident as December 21, 2016. This is a clerical error. The Commission thus changes the accident date herein to the correct date of December 13, 2017.

II. Background and Accident

At the time of hearing, Petitioner had been employed as an official Court Reporter for Respondent for nearly 42 years. Petitioner testified she had no prior thoracic outlet issues.

However, in 2007 she did have a workers' compensation claim for bilateral carpal tunnel syndrome and trigger thumb.

While transcribing in the fall of 2016, Petitioner began noticing weakness in her shoulder and arm, as well as fatigue and pain when she raised her arms, left worse than right.

III. Medical Treatment

On February 28, 2017, Petitioner treated with Dr. Edward A. Trudeau. A report from this treatment was drafted March 3, 2017. Upon physical evaluation, Dr. Trudeau found weakness of right elbow flexion, weakness in ulnar-innervated intrinsics on the right side, bilateral weakness of abductor pollicis brevis (which could relate to discomfort in the 1st carpometacarpal joint on either side), discomfort to palpation in the cervical and shoulder girdle region, as well as in the wrists bilaterally, and reduction of right biceps and brachioradialis deep tendon reflex. He opined that the most significant contributing factors of Petitioner's symptoms related to her bilateral carpometacarpal joint osteoarthritis and the likely thoracic outlet syndrome on either side, as well as the bilateral wrist and finger tenosynovitis. PX 2, p.10. A nerve conduction study revealed C6 radiculopathy which was either old or chronic. PX 2, p.9. He opined that conservative and surgical treatment measures could be considered, but made no mention of Petitioner being restricted from work due to her thoracic outlet syndrome at this time. PX 2.

On March 16, 2017, Petitioner followed up with Dr. Kenneth R. Krock for her chronic left arm, wrist, neck, and shoulder pain. Petitioner complained of pain with movement of the shoulder and with internal and external rotation, abduction. She was diagnosed with thoracic outlet syndrome and left wrist pain. Dr. Krock referred Petitioner to a specialist, Dr. Robert W. Thompson, as Dr. Krock did not feel qualified to diagnose thoracic outlet syndrome. PX 3.

On December 13, 2017, Petitioner presented to Dr. Thompson for bilateral left greater than right, upper extremity symptoms and the possibility of neurogenic thoracic outlet syndrome. Petitioner indicated she had had neck and upper back pain, neck tightness, and weakness in her arms for many years. She associated her symptoms with long periods of typing and overhead arm activity. She indicated symptoms had gradually worsened over the years, and she now complained of pain in her upper back and neck radiating to her arms and hands. She also complained of arm weakness. Dr. Thompson noted a previous cervical spine imaging in 2015 revealed degenerative disc disease, and C6 radiculopathy was found on an electrodiagnostic study. PX 4, p.7.

Physical examination revealed normal range of motion and arterial perfusion in both arms, no signs of venous congestion, normal hand grip strength, negative Tinel's, but tenderness in the posterior cervical spine. Both upper extremities produced symptoms when placed overhead. There was tenderness to palpation bilaterally in the shoulder, trapezius muscle, or sternocleidomastoid muscles, tenderness in the upper back, supraclavicular spaces, and infraclavicular subcoracoid spaces. Dr. Thompson diagnosed work-related bilateral thoracic outlet syndrome. PX 4, p.10-11. He noted there were 14 clinical diagnostic criteria for neurogenic thoracic outlet syndrome diagnosis, opining that Petitioner met 8 out of 14 criteria in 5 out of 5 categories. *See* PX 4, p.12-13 of 55. During his deposition, Dr. Thompson testified that Petitioner's full range of motion ruled out significant shoulder immobilization, and that the other normal findings excluded other

conditions. The fact that Petitioner's symptoms increased with arm elevation, along with her tenderness at the front base of her neck near the clavicles led to Dr. Thompson's diagnosis. He recommended conservative treatment, including a left anterior scalene and pectoralis minor muscle block, a cervical spine MR, restrictions on right and left arm activity, and no working at a keyboard longer than 30 minutes at a time. PX 4, p.10-11.

On January 24, 2018, the cervical spine MRI revealed cervical degenerative spondylosis from C2-C7 and C5-C6 posterior subluxation. PX 4. During his deposition, Dr. Thompson testified this MRI result was similar to the 2015 version.

On February 8, 2018, Petitioner followed up with Dr. Thompson, who opined the cervical spine MR results of mild degenerative changes did not explain Petitioner's symptoms. In his deposition, Dr. Thompson testified there is no anatomical effect between cervical spine degenerative disease and thoracic outlet syndrome. *Deposition Dr. Thompson, p.38*. Dr. Thompson noted that the recommended muscle block worked as expected, as it resulted in temporary but substantial improvement and was thus considered positive. He testified this further supported his diagnosis. *Deposition Dr. Thompson, p.16*.

On April 26, 2018, Petitioner reported no further improvement and was still highly symptomatic, as work aggravated her symptoms. Dr. Thompson recommended surgery in the form of a left supraclavicular decompression with scalenectomy, first rib resection, and brachial plexus neurolysis, along with bilateral pectoralis minor tenotomy. PX 4.

The surgery was performed on June 5, 2018, and consisted of a left supraclavicular thoracic outlet decompression, including anterior and middle scalenectomy, brachial plexus neurolysis, resection of the first rib, and bilateral pectoralis minor tenotomy. Postoperative diagnosis was bilateral neurogenic thoracic outlet syndrome PX 4.

After surgery, Petitioner continued treating with Dr. Thompson, indicating continuous improved pain control and improved use of her upper extremity. However, she still had complaints of tightness, muscle spasm, and tenderness in the neck area, as well as pain, weakness, numbness, and tingling in the left arm and hand. She was prescribed medication and physical therapy and was kept off work. PX 4.

On March 21, 2019, Petitioner indicated major improvement with decreased symptoms and increased activity. She had good pain control, rarely had numbness and tingling, no tightness or spasm in her lower neck, and full upper extremity ROM with smooth mechanics. Dr. Thompson released Petitioner to return to restricted duty work beginning April 1, 2019. She was restricted to typing 30 minutes at a time, 2 hours in the a.m. and 2 hours in the p.m. She could then increase activity as tolerated. PX 4. Petitioner testified she has worked ever since. She also credibly testified that upon discharge, she was requested to stay at a nearby hotel for three days while she still had a drain tube inserted. She chose the Parkway Hotel across the street from the hospital, which had a discounted rate for hospital patients. She paid for these nights out of pocket. Dr. Thompson also referred Petitioner to the Rehabilitation Institute of St. Louis and the Advanced Rehab and Sports Medicine for physical therapy, and massage therapy from Danielle Waughtel, which Petitioner pays out of pocket.

On February 25, 2021, Petitioner followed up with Dr. Thompson indicating steady progress, although she had recently had a flare up of symptoms related to increased activity. Petitioner still had some left-sided tenderness and skin numbness in the supraclavicular and periclavicular infraclavicular areas. Dr. Thompson opined Petitioner's present symptoms were to be expected. Medications were continued but physical therapy was terminated. Petitioner was given home exercises and was restricted to lifting 15-20 pounds, but was continued on full time work. PX 4.

On December 16, 2021, Petitioner indicated good progress with home exercises. She complained of right biceps/triceps tightness when lifting, but continued to benefit from massage therapy. Her left upper extremity symptoms remained as well. Petitioner was restricted to 15 pounds lifting and released to full time work. PX 4.

IV. Respondent's §12 Examiner

On December 21, 2016, Petitioner underwent a §12 examination at Respondent's request with Dr. David J. Fletcher. This examination was related to her carpal tunnel and trigger thumb injury case. The employer was making sure Petitioner's thumb problems had concluded. However, it was during this examination that Petitioner first heard the term "thoracic outlet syndrome." Petitioner complained of bilateral upper extremity issues due to cumulative trauma work activities as a Court Reporter. She complained of bilateral thumb and wrist pain. Adson's maneuver test[1] was positive for brachioplexus impingement. It was noted that this can be related to poor posture (forward head and rounded shoulders). RX 4, p.16. Petitioner had some features of thoracic outlet syndrome with forward neck postures, and it was noted she may benefit from postural exercises to correct her forward head slumping. RX 4, p.5. Neck and shoulder examinations revealed no spasms, tenderness, or swelling. RX 4, p.13. She was diagnosed with bilateral CMC joint arthritis (left greater than right), non-work-related cervical degenerative spondylosis, worse at C5-6, and possible thoracic outlet syndrome. RX 4, p.8. She was allowed to continue working. RX 4, p.7.

On January 29, 2018, Respondent's §12 examiner, Dr. Fletcher, again examined Petitioner in relation to her unrelated prior carpal tunnel claim after Petitioner treated with hand surgeon, Dr. Michael Neumeister. The diagnosis was the same as the Dr. Fletcher's initial §12 examination. Dr. Fletcher did note Petitioner had a forward bent posture appearance. RX 5.

V. Deposition Testimony

Dr. Robert W. Thompson-Petitioner's treating physician

Dr. Thompson is a board-certified vascular surgeon with a subspecialty in thoracic outlet syndrome. He testified via deposition on April 8, 2021. For the past five or six years all of his clinical practice had been related to thoracic outlet syndrome. Dr. Thompson testified consistent with his medical records and diagnosis of neurogenic thoracic outlet syndrome, adding that the symptoms indicated by Petitioner are not typically related to cervical, carpal, or cubital tunnel

[1] A test for thoracic outlet syndrome.

issues. Dr. Thompson noted that an MRI exam does not show thoracic outlet syndrome, and that typically, neither does a nerve conduction study. He reiterated Petitioner met 8 out of 14 clinical diagnostic criteria for neurogenic thoracic outlet syndrome in 5 out of 5 categories, making it a strong diagnosis.

Dr. Thompson testified thoracic outlet syndrome is an umbrella term used to describe three different conditions which cause symptoms from the base of the neck, under the collarbone to the front of the shoulder. It also effects the artery, vein, and brachial plexus nerves that supply the arm. Compression of these structures causes symptoms, which differ based on which structure is compressed. Neurogenic thoracic outlet syndrome is caused by compression of the brachial plexus nerve. The brachial plexus is a bundle of nerves passing from the spine through the thoracic outlet, through the anterior and middle scalene muscles, and down the arm to the hand. If these nerves are compressed they cause symptoms from the neck to the down to the arm or hand.

Petitioner required the June 5, 2018 surgery, followed by several years of progressive follow up care with Dr. Thompson. Dr. Thompson opined that by February 25, 2021, Petitioner's lingering mild residual symptoms would probably be long term, including lifting restrictions. He initially opined Petitioner had likely reached MMI as of this visit, but later testified he would wait until Petitioner's next visit to make that declaration. *Deposition Dr. Thompson, p. 41*.

Dr. Thompson opined that thoracic outlet syndrome is caused by a combination of 1) variations in the anatomy which predisposes a person to nerve compression, and 2) some form of injury resulting in changes in the scalene or "pec minor" muscles leading to chronic tightness, fibrosis, and muscle spasm, which puts pressure on the adjacent nerves. He added it is rare for an anatomical variation alone to cause the syndrome. Typically, it takes this in conjunction with some injury. In Petitioner's case, she met the first causal prong by being anatomically predisposed, as she had an extra scalene muscle and some fibrous bands. Dr. Thompson also noted an acute injury can cause the syndrome. One example is a strain activity associated with poor posture, such as assembly line work or prolonged typing on a keyboard. *Deposition Dr. Thompson, p. 29*. The head and shoulder girdle posture and long concentration working on a keyboard are factors in the development of thoracic outlet syndrome. Dr. Thompson opined Petitioner's work duty as a Court Reporter was the principal factor in the development of this syndrome. This satisfies the second causal prong for the development of thoracic outlet syndrome.

Dr. Thompson testified to his disagreement with any opinion finding obesity to be a risk factor for thoracic outlet syndrome due to lack of supporting evidence. He would contest any literature suggesting otherwise. He also denied that Petitioner's age or gender was a particular risk factor.

Further, while Dr. Thompson testified there is no anatomical effect between cervical spine degenerative disease and thoracic outlet syndrome, he did acknowledge there can be some overlap in pain-related symptoms between the two conditions, located in the neck area with numbness and tingling down to the hands. Nevertheless, Dr. Thompson dismissed cervical radiculopathy as the cause of Petitioner's symptoms because there was only one cervical level[2] with any significant

[2] C5-6.

findings. He opined Petitioner's symptoms were too broad to be attributed to a single nerve root. Further, localized tenderness of the brachial plexus is not at all related to the cervical spine, but is highly characteristic of neurogenic thoracic outlet syndrome. He also reiterated Petitioner's positive response to the left anterior scalene and pectoralis minor muscle block, serving as additional evidence of the syndrome. If Petitioner's issues were cervical in nature, Dr. Thompson would not have expected her symptoms to improve as they did, as no cervical surgery had been performed.

Dr. David J. Fletcher-Respondent's §12 Examiner

Dr. Fletcher is board-certified in occupational medicine and preventative medicine and public health. He testified consistent with his medical records via deposition on May 14, 2021. Regarding the January 29, 2018 examination, Dr. Fletcher noted Petitioner had no shoulder or neck issues, and that her biggest issue was tenderness over the CMC joint. However, he did note possible features of thoracic outlet syndrome.

Dr. Fletcher opined Petitioner's thoracic outlet syndrome was not work-related, testifying that this syndrome is not something commonly seen with Court Reporters. He stated it can be caused by cumulative trauma related to excessive overhead activity, which he did not believe was a part of Petitioner's duties. Dr. Fletcher did not believe there is enough current evidence to characterize obesity as a risk factor for the syndrome.

Dr. Fletcher did not believe repetitive typing or posture was causative of thoracic outlet syndrome, although he did believe forward posturing could make the condition symptomatic. Dr. Fletcher described thoracic outlet syndrome as nerve entrapment and vascular entrapment between the neck and armpit. The scalene muscles (side of the neck) can get trapped and inflamed and compress the brachial plexus, causing coolness in a limb, and numbness and tingling in the fourth and fifth digits.

Dr. Fletcher testified that cervical degenerative spondylosis at C5-6 has no effect on thoracic outlet syndrome. He opined it would be unusual for a patient to undergo thoracic outlet syndrome surgery and not reach maximum medical improvement by one-and-half years later, barring complications. However, he did acknowledge that scalenectomies require a more recovery time, and also acknowledged this procedure can lead to more complications. *Deposition Dr. Fletcher, p.31-32*.

Dr. Fletcher opined that an EMG can show compression on the brachial trunks, but that a negative EMG does not rule out thoracic outlet syndrome. Neurogenic thoracic outlet syndrome is basically pain in the C7-8 distribution; neurological complaints. He testified causes include acute trauma with repetitive overhead work, repetitive force with awkward positions, or a mass or growth in the brachial plexus that causes compression. He also agreed with Dr. Thompson that an anatomical issue can also make a person more prone to compression. Dr. Fletcher reiterated Petitioner had a forward head position, similar to looking down and typing, and admitted that court reporting required looking down constantly to make sure they are typing what has been said. He acknowledged this could potentially aggravate thoracic outlet syndrome. *Deposition Dr. Fletcher, p.23-25*.

CONLUSIONS OF LAW

To begin, the Commission notes this case was consolidated for hearing with case number 18 WC 19041. Both cases involve an alleged repetitive trauma injury to Petitioner's neck while employed with Respondent. 18 WC 19041 involves an accident date of December 21, 2016 and 18 WC 19042 involves an accident date of December 13, 2017. The core issue at trial was whether Petitioner met her burden of proof for a repetitive trauma accident for either accident date. The Arbitrator found Petitioner's work duties did not cause her thoracic outlet syndrome, and that no permanent aggravation, exacerbation, or acceleration of the syndrome was caused by her work duties. Having reviewed the record in its entirety, the Commission views the evidence differently than the Arbitrator with respect to the December 13, 2017 accident date (18 WC 19042). We find that Petitioner has met her burden of proof regarding a repetitive trauma accident on December 13, 2017. We reverse for the reasons set forth below.

A. Accident/Causation

An employee who alleges repetitive trauma injuries is held to the same standard of proof as the employee alleging injury from specific trauma. *Peoria County Belwood Nursing Home. v. Industrial Commission*, 115 Ill. 2d 524, 530 (1987). In a repetitive trauma claim, the date of injury is the date on which the injury manifests. The "manifestation date" is "the date on which both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person. *See White v. Illinois Workers' Compensation Commission*, 374 Ill. App. 3d 907, 912 (4th Dist. 2007), citing *Peoria County Belwood Nursing Home. v. Industrial Commission*, 115 Ill. 2d 524, 531 (1987).

Our supreme court in *Peoria County Belwood Nursing Home* (*Belwood*) found Professor Larson's workers' compensation treatise to be instructive:

> The practical problem of fixing a specific date for the accident has generally been handled by saying simply that the date of accident is the date on which disability manifests itself. Thus, in [*Ptak v. General Electric Co.*, 13 N.J. Super. 294, 80 A.2d 337 (1951)], the date of a gradually acquired [back] strain was deemed to be the first moment the pain made it impossible to continue work, and in [*Di Maria v. Curtiss-Wright Corp.*, 23 N.J. Misc. 374, 44 A.2d 688 (1945)], the date of accident for gradual loss of use of the hands was held to be the date on which this development finally prevented claimant from performing his work. However, for certain purposes the date of accident may be identified with the onset of pain occasioning medical attention, although the effect of the pain may have been merely to cause difficulty in working and not complete inability to work.

3 L. Larson, Larson's Workers' Compensation Law § 50.05, at 50-11-50-12 (2005).

In adopting Professor Larson's rule, the supreme court established that the date of an accidental injury in a repetitive-trauma compensation case is the date on which the injury "manifests itself." *Belwood*, 115 Ill. 2d at 530. Again, "manifests itself" means the date on which

both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person. *Belwood*, 115 Ill. 2d at 531.

Here, the record shows that although Petitioner underwent a §12 examination at Respondent's request on December 21, 2016, said examination was for an unrelated carpal tunnel condition. Further, although thoracic outlet syndrome was mentioned at that time, no formal diagnosis was made, and Petitioner was allowed to continue working. Likewise, after treating with Dr. Edward Trudeau on February 28, 2017, although thoracic outlet syndrome was deemed a likely diagnosis, there was no mention at that time of Petitioner being taken off of work or having restrictions placed on her due to the condition.

The Commission finds that the preponderance of evidence supports a manifestation date of December 13, 2017. On that date, Petitioner treated with Dr. Thompson and associated her own symptoms, in part, with long periods of time typing. After examining Petitioner and opining that she met 8 out of 14 criteria in 5 out of 5 categories for neurogenic thoracic outlet syndrome, Dr. Thompson diagnosed Petitioner with thoracic outlet syndrome, opined the syndrome was work-related, recommended physical therapy, a muscle block injection, a cervical spine MR, placed restrictions on Petitioner's right and left arm activity, and restricted her keyboarding to no longer than 30 minutes at a time. Petitioner required medical treatment on this date, was diagnosed with work-related thoracic outlet syndrome, and was placed on restricted duty at that time. Based on the foregoing, the Commission finds that on this date, both the fact of the injury and the causal relationship of the injury to Petitioner's employment would have become plainly apparent to a reasonable person.

Regarding the thoracic outlet syndrome condition itself, the Commission initially notes the conflicting indicia concerning whether Petitioner's condition was *caused* by her work activities. Petitioner's testimony indicates she had no symptoms until the fall of 2016, and that she had no prior thoracic outlet issues. Moreover, treating physician Dr. Thompson opined Petitioner's work duties as a Court Reporter were the principal factor in the development of the condition. In contrast, §12 examiner Dr. Fletcher opined that the duties of a Court Reporter are not causative of thoracic outlet syndrome, but could make the condition symptomatic—an indication that Petitioner's thoracic outlet syndrome pre-existed the accident.

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

> That is, if a claimant is in a certain condition, an accident occurs, and following the accident, the claimant's condition has deteriorated, it is plainly inferable that the intervening accident caused the deterioration. The salient factor is not the precise

previous condition; it is the resulting deterioration from whatever the previous condition had been. *Schroeder, at P26*.

Here, assuming arguendo Petitioner had a pre-existing thoracic outlet syndrome condition prior to the fall of 2016, the evidence supports a finding that it was asymptomatic, as Petitioner offered credible testimony that she had no prior thoracic outlet issues. The Commission finds that although Petitioner indicated her symptoms had been ongoing for years during her visit with Dr. Thompson on December 13, 2017, the preponderance of evidence supports a finding that these symptoms were due to Petitioner's unrelated cervical radiculopathy. However, once her symptomatology increased, it was likely due to the aggravation of her thoracic outlet syndrome. This is supported by Dr. Thompson's testimony that there can be some overlap in pain-related symptoms between cervical spine degenerative disease and thoracic outlet syndrome in the neck area, with numbness and tingling to the hands. Dr. Thompson's opinion was bolstered by §12 examiner, Dr. Fletcher, who opined that neurogenic thoracic outlet syndrome basically causes cervical complaints in the cervical spine at the C7-8 distribution. The preponderance of evidence supports a finding that Petitioner's symptoms as of December 13, 2017 were related to her thoracic outlet syndrome, as Petitioner complained of increased symptoms, and met 8 out of 14 criteria in 5 out of 5 categories for a diagnosis of thoracic outlet syndrome during this visit. Dr. Thompson categorized this finding as a "strong diagnosis" in his deposition, adding that Petitioner's symptoms were too broad to be attributed to the cervical radiculopathy emanating from the singular C5-6 nerve root (the only nerve root with any significant findings in her nerve conduction study and January 24, 2018 MRI).

Further, in the fall of 2016, Petitioner was working full duty with no restrictions. Yet on December 13, 2017, Petitioner complained of increased symptoms and tested positively for a strong diagnosis of thoracic outlet syndrome, prompting Dr. Thompson to opine that her condition was work-related. The progression and increase of symptoms included tenderness at the front base of her neck near her clavicles, which was *not* noted during her December 21, 2016 examination with Dr. Fletcher. Dr. Thompson opined that this tenderness was one of the main factors leading to his diagnosis. Petitioner was prescribed physical therapy, a left anterior scalene and pectoralis minor muscle block, a cervical spine MR, had restrictions placed on her bilateral arm activity, and was limited to working at a keyboard no longer than 30 minutes at a time. The muscle block injection also rendered a positive response, which Dr. Thompson testified further supported his diagnosis.

Next, we find the opinions of §12 examiner Dr. Fletcher actually serve to strengthen our causation finding. Although Dr. Fletcher opined Petitioner's thoracic outlet syndrome was not work-related because it was not *caused* by her work duties, he did acknowledge that forward posturing could make the condition symptomatic. Dr. Fletcher acknowledged Petitioner had a forward head position, similar to looking down and typing, and admitted that the job of Court Reporter requires constant looking down. He admitted that this could potentially aggravate thoracic outlet syndrome. Dr. Fletcher also agreed with treating physician Dr. Thompson's opinion that an anatomical issue can make a person more prone to compression. Combined with his admission that Court Reporter duties could aggravated thoracic outlet syndrome, Dr. Fletcher's testimony correlates with the opinions of Dr. Thompson. Dr. Thompson testified that neurogenic thoracic outlet syndrome is caused by compression of the brachial plexus nerve, which causes

symptoms from the neck down to the hand. Dr. Thompson opined that thoracic outlet syndrome is caused by a combination of 1) variations in the anatomy which predisposes a person to nerve compression, and 2) some form of injury. Dr. Thompson noted Petitioner was so predisposed, as she had an extra scalene muscle and some fibrous bands.

Accordingly, since both physicians agree that Petitioner's duties as a Court Reporter at minimum aggravated her thoracic outlet syndrome condition, and Petitioner was predisposed to nerve compression, the Commission rules that the preponderance of evidence supports a finding that Petitioner suffered from thoracic outlet syndrome which was aggravated by her duties as a Court Reporter, causing her condition to deteriorate to the point where surgery was required on June 5, 2018. There is no indication Petitioner had been recommended for thoracic outlet syndrome surgery prior to the instant accident. Based on the totality of evidence, the Commission reverses the Arbitrator's denial of accident/causal connection, and finds that Petitioner's pre-existing thoracic outlet syndrome was aggravated by the instant repetitive trauma accident, and that her current condition of ill-being is causally related to said accident.

As the Arbitrator found no accident/causal connection in this claim, all remaining issues were rendered moot. However, in accordance with our reversal of accident/causal connection herein, we also rule on the remaining issues.

B. Medical Expenses

The record reflects the bills contained in Petitioner's Exhibit #8 are reasonable and necessary. Medical records and Petitioner's unrebutted testimony support a finding that the medical care was reasonable and necessary to diagnose, relieve, or cure the effects of Petitioner's thoracic outlet syndrome. *See Absolute Cleaning/SVMBL v. Illinois Workers' Compensation Commission*, 409 Ill. App. 3d 463, 470 (2011). We order Respondent to pay these bills pursuant to §8(a) and §8.2 of Act.

C. Associated Expenses

We also find that the expenses incurred by Petitioner while staying at the Parkway Hotel after being discharged from care are incidental to her reasonable and necessary medical care, and are thus also awarded to Petitioner.

D. Temporary Disability

The Commission also awards temporary total disability benefits based on our reversal of accident/causation. In accordance, we award benefits from June 5, 2018 through March 31, 2019 (42 & 6/7ths weeks), the period Petitioner did not work and was unable to work, on the order of Dr. Thompson. *See Sharwarko v. Illinois Workers' Compensation Commission*, 2015 IL App. (1st) 131733WC.

E. Nature and Extent

In further accordance with our reversal, we determine the nature and extent of Petitioner's injury per the Act. The five factors upon which the Commission must base its determination of the nature and extent of Petitioner's injury are enumerated in §8.1b(b) of the Act.

Regarding (i) the level of impairment, neither party offered an AMA impairment rating related to Petitioner's thoracic outlet syndrome, thus the Commission gives no weight to this factor.

Regarding (ii) the claimant's occupation was a Court Reporter. Although, she was eventually released after surgery to full duty, she was still prescribed medications, home exercises, and massage therapy, along with 20-pound lifting restrictions. Moreover, although her duties as a Court Reporter were sedentary, she still had occasional pain in the neck, clavicle, and shoulder area. Moderate weight is given to this factor.

Regarding (iii) Age, Petitioner was 57 years old at the time of the December 13, 2017 manifestation date. She testified that she planned to retire within the next five years after the hearing. Thus, Petitioner has a minimal portion of her work-life expectancy remaining, during which she will have to deal with the residual complaints of tightness in her thoracic outlet, along with pain and weakness. Substantial weight is given to this factor.

Regarding (iv) Future earning capacity, there is no evidence in the record that Petitioner's future earnings capacity had been altered by her injury. No weight is given to this factor.

Regarding (v) Evidence of disability corroborated by medical records, Petitioner testified that since returning to work, she still has tightness in her thoracic outlet, along with pain and weakness. She continues to be prescribed a muscle relaxer, and Dr. Krock continues to prescribe Tramadol for pain. Although she has some right-sided issues, most of her symptoms are relegated to her left collar bone area, which is more cumbersome. She notices these symptoms when she sits for too long, such as riding in a car, has been in court a lot, or is working on transcripts a lot. She takes a lot of breaks to curtail her issues, but testified that sometimes they arise while doing nothing. She continues performing at-home stretches and exercises prescribed by physical therapy. She testified the medications, physical therapy, and massages allow her to work.

Petitioner has more flareups when working on transcripts than she does court reporting. Believing this to be due to her hand/arm positioning, she purchased a stand-up desk, which she testified helps a little. In her personal life, Petitioner is much more sedentary now. She limits overhead activity such as changing shower curtains, painting, and holding a child or dog in order to avoid flare ups.

Petitioner's ongoing complaints testified to at hearing correlate to her July 27, 2022 follow up with Dr. Thompson. During that visit, Petitioner indicated she was doing well and was avoiding certain activities known to cause flare-ups. However, she still had occasional pain in the neck, clavicle, and shoulder area. At that time, her medications, home exercises, and massage therapy

were continued, and she was restricted to 20 pounds lifting. Substantial weight is given to this factor.

Based on the above, the Commission awards permanent partial disability benefits of a 12.5% loss of a person as a whole.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 9, 2022 is hereby reversed.

IT IS FURTHER ORDERED BY THE COMMISSION that the listed date of accident for the instant claim be changed to the correct date of December 13, 2017.

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner sustained an accidental repetitive trauma injury arising out of and occurring in the course of her employment with Respondent on December 13, 2017.

IT IS FURTHER FOUND BY THE COMMISSION that Petitioner's current thoracic outlet syndrome condition is causally related to said accidental injury.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to the Petitioner medical expenses outlined in Petitioner's Exhibit #8, as provided in §8(a) and subject to §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner all out-of-pocket expenses incurred by Petitioner, pursuant to §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent reimburse to Petitioner the sum of $654.18 for expenses she incurred incidental to her medical treatment.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,166.67 per week for a period of 42 & 6/7ths weeks, representing June 5, 2018 through March 31, 2019, 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 $790.64 (Max rate) per week for a period of 62.5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused a 12.5% loss of use of the person as a whole.

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

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

February 29, 2024

/s/*Marc Parker*

MP/wde

O: 1/10/24

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/s/*Stephen Mathis*

/s/*Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC007921
Case Name	Antonio Rice v. All Masonry Construction Co
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0102
Number of Pages of Decision	17
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Alexander Pino
Respondent Attorney	Brad Antonacci

DATE FILED: 2/29/2024

/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 down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Antonio Rice,

Petitioner,

vs. No. 19 WC 7921

All Masonry Construction Co., 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 accident, causal connection, medical expenses, temporary disability, and permanent disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below, and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Petitioner, a 53-year old laborer, testified that on March 11, 2019 around 11:00 a.m., he lifted a 100 lb. pipe in the boiler room and heard a pop in his low back. He put the pipe down, sat for a while, and then reported the incident to his supervisor, Jeff Doose. Petitioner did not perform any work after that. Petitioner's co-worker, Sylvia Mack, testified that she was working with Petitioner in the boiler room, and although she did not see him pick up a pipe, she "heard him holler". When she turned around, she saw Petitioner drop a large pipe. Around 12:30 p.m. that day, Petitioner was summoned to the office by Mr. Doose, who gave a check and informed him he was being laid off due to lack of work.

The following day, Petitioner went to the emergency room of Rush Medical Center complaining of non-radiating low back pain. Lumbar x-rays revealed degenerative changes with no osseous abnormalities. Petitioner underwent physical therapy and work hardening through May 24, 2019. He was released without restrictions and returned to work as a laborer for a different

company. At arbitration, Petitioner testified he had received lumbar injections four months earlier, which he believed helped because he no longer had pain.

The Arbitrator found Petitioner proved accident and causal connection, and awarded him his medical expenses, 10-4/7 weeks of TTD, and 62.5 weeks of permanent partial disability under §8(d)2, representing a 12.5% loss of person as a whole. While the Commission affirms and adopts the Arbitrator's findings and awards regarding the issues of accident, causal connection, medical expenses and temporary total disability, the Commission views the evidence regarding the issue of permanent partial disability differently than the Arbitrator and modifies that award.

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 from a physician; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b). The Commission considers these factors as follows:

(i) **Disability impairment rating:** *no relevance or weight,* because no AMA impairment rating was offered into evidence.

(ii) **Employee's occupation:** *some relevance and weight,* because Petitioner was able to return to work in his former occupation as a laborer elsewhere, performing the same job duties as before his accident.

(iii) **Employee's age:** *some relevance and weight,* because at age 53, Petitioner still has many years left in the work force.

(iv) **Future earning capacity:** *some relevance and weight,* because there is no evidence that Petitioner suffered any reduction in his earning capacity, and he is gainfully employed in his former occupation.

(v) **Evidence of disability corroborated by the treating records:** *significant relevance and weight,* because Petitioner testified his low back was "fine" and pain free. The treatment Petitioner received for his low back was conservative, of short duration, and successful in reducing his symptoms. The most recent records of ATI Physical Therapy, from April and May 2019, documented Petitioner's report of being 100% better and having full strength. In those records, Petitioner also reported he was no longer taking pain medications and could lift heavy weights without increasing his pain.

Based upon our consideration of the above factors, we find the injuries Petitioner sustained as a result of his March 11, 2019 accident caused a 5% disability of the person as a whole under §8(d)2. All else in the Arbitration Decision is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 30, 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 the sum of $813.37 per week for a period of 25 weeks, as provided in §8(d)2 of the Act, because the injuries sustained caused a 5% disability of the person as a whole.

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

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

Bond for removal of this case to the Circuit Court by Respondent is hereby fixed at the sum of $55,800.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

February 29, 2024

MP/mcp
o-02/15/24
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/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

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Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Raychel Wesley, Arbitrator

Petitioner Attorney	Alexander Pino
Respondent Attorney	Brad Antonacci

DATE FILED: 5/30/2023

/s/ Raychel Wesley, Arbitrator

Signature

THE INTEREST RATE FOR THE WEEK OF MAY 23, 2023 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

Antonio Rice Case # 19 WC 07921
Employee/Petitioner

v.

All Masonry Construction Co.
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Raychel Wesley**, Arbitrator of the Commission, in the city of **Chicago**, on **April 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?
☐ Other

FINDINGS

On **March 11, 2019**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$88,857,60**; the average weekly wage was $**1,708.80**.

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

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

ORDER

Arbitrator finds that Petitioner's current condition of ill being is causally connected to the accident of March 11, 2019.

With regards to Rush University Medical Center; the Arbitrator orders Respondent to pay Petitioner directly for the date of service of March 12, 2019, pursuant to the Fee Schedule. The amount of this bill was unavailable at trial but an itemization was produced which was labeled "not a bill". The Arbitrator admitted this into evidence as a basis for obtaining the bill from Petitioner, who testified that it has been sent to collections for nonpayment.

With regards to Modern Pain Consultants; the Arbitrator orders Respondent to pay Petitioner directly for the date of service of March 16, 2019 and March 30, 2019, pursuant to the Fee Schedule. Those bills have an outstanding balance of $823.00. Any amount due regarding this bill which has previously been paid by Petitioner should be reimbursed directly to him.

With regards to ATI Physical Therapy; the Arbitrator orders Respondent to pay Petitioner directly for the dates of service of March 28, 2019 through May 2, 2019, and May 6, 2019 through May 24, 2019, pursuant to the Fee Schedule. Those bills have an outstanding balance of $16,595.21.

With regards to Elite Care RX; the Arbitrator orders Respondent to pay Petitioner directly for the date of service of March 18, 2019 pursuant to the Fee Schedule. That bill has an outstanding balance of $2,970.04.

Arbitrator orders the Respondent to pay Petitioner TTD from March 11, 2019 through May 24, 2019 or 10 and 4/7 weeks.

Arbitrator awards the equivalent of 12.5% loss of a man as a whole or 62.5 weeks.

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

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

/s/ Raychel A. Wesley

Signature of Arbitrator

May 30, 2023

ARBITRATION DECISION ATTACHMENT

Antonio Rice v. ALL Masonry Construction Co.

19 WC 007921

FINDINGS OF FACT

March 11, 2019

On March 11, 2019, Petitioner was employed by Respondent as a general construction laborer, performing general labor including cleanup and sweeping (T. 13). On that date, Petitioner testified he was assigned to work in the downstairs boiler room at a construction site (T. 13-14). Petitioner testified he was assigned to move large pipes from one end of the room to another section (T. 14). Petitioner testified he asked the foreman superintendent, Jeff Doose (hereinafter Doose), for assistance, but none was provided (T. 15-16). The Arbitrator notes that another laborer employee of Respondent, Sylvia Mack, was also working in the same room, as noted below. Doose testified he never told Petitioner to lift plumbing pipes in the boiler room by himself (T. 85).

Petitioner testified that around 11:00 a.m., on March 11, 2019, he lifted a pipe, his knees buckled, he heard something "pop" in his lower back, and he experienced lower back pain (T. 17-18). Sylvia Mack, a former laborer of Respondent, testified that she was cleaning out a mechanical room/boiler room (T. 66-67). She testified around 11:00 a.m., she heard Petitioner holler. She saw pipes around Petitioner but did not witness him lifting a pipe, she only saw a pipe dropping (T. 68-69, 73). Petitioner told her he would be alright (T. 68).

Doose testified that he laid Petitioner off due to a lack of work on March 11, 2019, sometime between 12:00 p.m. to 1:00 p.m. while both individuals were in the contractor's office on the jobsite (T. 78). Both Tim McCracken (hereinafter McCracken) and Tobias Respass (hereinafter Respass) were present (T. 78). Doose testified that when he advised Petitioner he was being laid off, Petitioner became very confrontational (T. 79), made threats and accusations. (T. 79). Doose testified that another employee, McCracken, also told Petitioner to leave the jobsite (T. 80). Petitioner was escorted off the property by the head laborer, Joaquin (T. 80).

Doose testified that at no point during that conversation, and at no point on March 11, 2019, did Petitioner advise him that he had sustained a work injury (T. 81). Doose was one of the people Petitioner was to report work accidents to (T. 81).

Respass testified he has been employed by Respondent since August 2018 (T. 103). He was a carpenter for Respondent on March 11, 2019. On that date, he testified he was working on the roof of the construction project with other carpenters, and they were demo-ing old skylights (T. 106). He testified that Petitioner was working on the roof as well, performing clean-up activities until around lunchtime, with some breaks (T. 106-107). After lunchtime, he told Petitioner and another laborer, Joqauin to return to the roof to remove debris (T.107-108). He testified that Petitioner refused to do so and Respass indicated he would speak with Doose about this because this was the only work available (T. 108).

Respass testified that he advised Doose that Petitioner was refusing to go back on the roof. Doose told him to have Petitioner clean up for the time being, and he would deal with it (T. 109). Later in the construction office, Respass testified that he witnessed Petitioner and Doose talking. He testified that Petitioner was upset because he had been told he was being laid off, indicating he was going to call his alderman (T. 110). Petitioner was told to leave and he eventually left the jobsite (T. 112). Respass testified that at no point during any conversation he had with Petitioner on March 11, 2019, did Petitioner indicate he had sustained a work injury (T. 112).

From the transcript:

> Q. And Jeff Doose at that time advised you that you were being laid off due to a lack of work to be performed on the jobsite, correct?
>
> A. Well, after I told him what was going on with my injury downstairs. So this was around 11:00, and then he called me upstairs around, I guess, what time you said, and brought that to my knowledge. Yeah.
>
> Q. But at the time, around 12:30, this conversation you had with Jeff, he advised you you were being laid off due to a lack of work to be performed on the jobsite, correct?
>
> A. I had a conversation before that.
>
> Q. I'm not asking about that conversation.
>
> A. Oh, okay.
>
> T. 29 and 30

McCracken testified he was a former project engineer for Respondent (T. 88-89). On March 11, 2019, and March 12, 2019, he prepared an outline of the events that occurred on those dates. Resp. Ex. No. 4. He testified consistent with that Incident Notification Report. He testified that he wrote the report because of the threats that were made against the Respondent employees, and because Petitioner returned and made additional threats the next day (T. 100). McCracken was in the jobsite office on March 11, 2019, at 12:30 p.m. when Doose advised Petitioner he was being laid off due to a lack of work. According to McCracken, Petitioner became confrontational and began to argue with Doose, leaving only after another threat to call the police was made.

According to McCracken, at no point during this conversation, and at no point on March 11, 2019, did Petitioner indicate he sustained a work injury. McCracken also testified Petitioner would not have been lifting a pipe in his position as a laborer for Respondent because this is an activity that the Respondent's subcontractor would have performed (T. 96). Petitioner's job duties did not include moving subcontractors' materials.

Petitioner confirmed Doose advised him he was being laid off due to a lack of work (T. 29) but denied that he argued with Doose (T. 30) and denied being upset about being laid off (T. 35, 117). He admitted he told Doose he was to work through the end of the project but denied he told Doose he was going to call his alderman's office about being laid off (T. 31). Petitioner denied that he made any threats but did testify that Doose told him to "get the "F" off of my job" repeatedly, in direct response to his notification of the injury he had sustained. (T. 35-37).

March 12, 2019

Petitioner testified he returned to the jobsite the next day to tell Doose to send him to the doctor, and did so at the direction of the office (T. 37). Petitioner claimed he parked on the street (T. 39). He claimed Doose told him he was not sending Petitioner anywhere and to "get the "F" off of his jobsite or Doose would call the police (T. 37).

Doose testified that when Petitioner appeared at the jobsite March 12, 2019 (T. 82-83) Petitioner claimed he got hurt on the job and needed to complete an incident report. Doose testified that Petitioner had never reported an injury the day before. (T. 84).

Petitioner applied for unemployment benefits. Resp. Ex. No. 2. The Notice of Claim the Respondent received from the Illinois Department of Employment Security indicates Petitioner noted the reason for separation from the employer was due to a lack of work, and that he was laid off. There is no indication that the reason for separation was due to a work injury.

Medical Treatment

Petitioner did not seek medical treatment on March 11, 2019, the date of his accident (T. 55). He presented for medical treatment the next afternoon, on March 12, 2019, at Rush University Medical Center. Pet. Ex. No. 1, p. 8. He complained of 10/10 atraumatic low back pain for one day after lifting something heavy at work the day prior. Pet. Ex. No. 1, p. 16. He was not experiencing any radiating pain (T. 57). *Id.* at p. 16. The same medical note documented a history of a back surgery. *Id.*

The doctor diagnosed Petitioner with lumbar pain and a work-related injury. The doctor advised Petitioner to return to the emergency department for worsening of his condition, and to follow up with his primary care provider.

Petitioner next presented to Dr. Khan at Modern Pain Consultants on March 16, 2019. Pet. Ex. No. 2, p. 3. Petitioner was noting lumbar pain, myofascial pain, and was now complaining of right lower extremity pain. According to the surgical history section of that note, Petitioner underwent an L5-S1 fusion 11 years prior. He assessed Petitioner with a work-related injury, lumbago, lumbar facet joint pain, lumbar radiculitis, and myofascial pain. He recommended Meloxicam, a topical ointment and gel, over-the-counter nonsteroidal anti-inflammatory drugs, Gabapentin, and Cyclobenzaprine. Dr. Khan also recommended Petitioner begin physical therapy, and he referred Petitioner for an MRI. He restricted Petitioner from work.

Petitioner began physical therapy at ATI on March 28, 2019. Pet. Ex. No. 3, p. 14. The physical therapist also noted a history of a back surgery 11 years prior, and a total knee arthroscopy

5 years prior. Petitioner followed up with Dr. Khan on March 30, 2019 and noted no significant improvement with physical therapy but also noted Petitioner had just begun physical therapy. Pet. Ex. No. 2, p. 10. Dr. Khan recommended Petitioner remain off work and again recommended an MRI. Petitioner was to follow up with Dr. Khan in four weeks.

Physical therapy continued at ATI through May 2, 2019. Pet. Ex. No. 3. Petitioner testified he noted improvement with physical therapy (T. 58) and the records document improvement in his back strength, range of motion, and symptoms. By April 22, 2019, Petitioner was reporting zero pain on a 10-point scale. Petitioner confirmed he was no longer needing to take his medications (T. 58). Petitioner was discharged from physical therapy on May 2, 2019 and placed into a work hardening program which began May 6, 2019.

In work hardening at ATI, by May 21, 2019, Petitioner reported he was 100% better. Petitioner was discharged from physical therapy at ATI on May 20, 2019. The physical therapist noted he was at full strength with the ability to push/pull 100 pounds and lift/carry 75 pounds without increased pain. He met all his short-term goals and long-term goals.

Current Condition

Petitioner testified he did not return to work for Respondent after he was discharged from physical therapy (T. 24). He returned to work as a construction laborer in a full duty capacity without restrictions for another employer (T. 62). He continues to work as a construction laborer, performing the same duties he performed before March 11, 2019. On the day of the hearing, he testified his lower back was good and that he did not notice any pain on that date. (T. 24-25). However, he testified he has undergone injections to his back as recently as four months prior to hearing to address continued problems (T 25).

Prior Accidents/Prior Medical Treatment

Petitioner testified to prior work injuries and prior work claims but was asymptomatic in the couple of years before the March 11, 2019 accident. Those records were admitted into evidence as Resp. Ex. No. 6, Resp. Ex. No. 5, Resp. Ex. No. 1, and Resp. Ex. No. 7, pgs. 0045-46 and Resp. Ex. No. 3.

CONCLUSIONS OF LAW

In support of the Arbitrator's decision relating to (C), whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent, and (F), whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds the following:

In the case at hand, Petitioner proved, by a preponderance of the evidence, that he sustained accidental injuries arising out of and in the course of employment. Petitioner further proved that his current condition of ill-being is causally related to the injury.

First, the Arbitrator finds Petitioner credible based on his demeanor, body language, tone of voice and testimony. He testified that he was assigned to move large pipes from one end of a room to another section in the boiler room of the construction site. Although this testimony was

contradicted by the testimony of both Respass and McCracken, the Arbitrator does not find that their testimony was credible but rather, appeared to be rehearsed and self-serving and biased. The Arbitrator notes the testimony proffered by Respass that he advised Petitioner that the only work available was clean up on the roof. Respass testified that this was in response to Petitioner refusing to perform the work on the roof, shortly before he was laid off. According to Respass, Petitioner was never working in the boiler room on the date of the accident. According to Repass, Petitioner had been working on the roof of the building the entire morning, performing clean up activities on the roof. This testimony is contradicted by the co-worker of Petitioner who was in ear shot of the Petitioner at the time of the accident. The Arbitrator judged the credibility of all of the witnesses and finds the Petitioner and the co-worker to be more credible and believable than the witnesses of the Respondent employer.

McCracken testified that Petitioner's job duties did not include moving subcontractor's material and that the pipes Petitioner was moving were the materials of a subcontractor. Again, the Arbitrator did not find this testimony credible and does not accept as true that a laborer would never move material of a subcontractor.

Petitioner's testimony that he was denied assistance in performing the alleged job duties, again, is deemed to be both believable and credible. According to Doose, not only did he never tell Petitioner to lift plumbing pipes in the boiler room, he also never told Petitioner to perform this activity by himself or deny assistance in doing so. Respondent's witness, Doose, was neither credible or believable.

The Arbitrator has weighed the testimony of Petitioner and Respondent with respect to the conversation which occurred in the contractor's office. In summary, it was an argument. The Arbitrator deduces that both Petitioner and Respondent were involved in this heated exchange. Although Respondent produced more witnesses regarding this exchange, the Arbitrator did not believe the witnesses which again were not credible and appeared self-serving and rehearsed and biased. The Arbitrator believes that Petitioner was told to "get the "F" off of my jobsite" in response to his reporting of the work injury. In fact, when Petitioner begins to talk about the conversation wherein he gave notice of the injury to Doose, he is re-directed back to the conversation regarding the layoff. Counsel for respondent even says,

> "A. I had a conversation before that.
>
> Q. I'm not asking about that conversation.
>
> A. Oh, okay."
>
> T. 29 and 30

The Arbitrator accepts as true that the Petitioner was advised that the police would be called but also believes and judges as credible the testimony offered by Petitioner that he advised of the accident preceding that exchange and that what followed basically could be characterized as retaliation.

The overwhelming evidence supports the Arbitrator's conclusion that Petitioner proved an accident occurred that arose out of and in the course of Petitioner's employment by Respondent. The Arbitrator notes that Petitioner is experienced at filing Workers' Compensation claims as noted in the Findings of Fact section above, and having had prior experiences, provided the requisite notice to Respondent of his injury on the date it occurred.

The Arbitrator makes note of the fact that two of the Respondent's witnesses were no longer employed by the Respondent at the time they testified. This, although interesting, does not make them non-biased witnesses who for whatever reason, might not enjoy testifying against the Petitioner. Petitioner testified regarding his prior relationships with these individuals.

This is how Petitioner described his relationship with witness Respass:

Q. And after that incident, you kept working until lunch, correct?

A. Did I keep working?

Q. Yes.

A. No.

Q. You stopped working?

A. Yeah. That was it.

Q. Well, after lunch on March 11th, 2019, you had a conversation with Tobias Respass about the work to be performed, correct?

A. With who?

Q. Tobias Respass from All Masonry. The individual sitting behind me.

A. No, I didn't ever have no conversation with him.

Q. You never spoke with him that day?

A. No. I talked to Jeff. I never had no conversation him.

Q. So you never had any conversations with Tobias Respass on March 11th on the work to be performed that day? Is that your testimony?

A. Yeah. I never had no conversation with him because we never got along. So I always went to Jeff because Jeff was the superintendent because me and him didn't see eye to eye.

Q. You and Tobias?

A. Me and him. Yes.

T. 27 and 28

This is how the relationship with witness McCracken was described:

A. I don't know who Tim McCracken is. I don't know who that is. I don't know who that is. Only -- I don't know who that is.

T. 35

The Arbitrator judged them both from their demeanor, tone of voice and body language, and concludes that their testimony lacked credibility and they were not believable. Respondent produced McCracken's Incident Notification Report. This report purportedly documented the Petitioner's hostility towards the Respondent's witnesses when he was laid off but does not document Petitioner reporting a work injury. It was represented that this document was prepared contemporaneous with the events that occurred on March 11, 2019. Although offered to provide further support that Petitioner did not sustain an accident, it does not. The document was neither read, signed or agreed to by the Petitioner, who in fact testified that he could not read, and the Arbitrator viewed it as a self-serving non credible document and gave it very nominal consideration.

When the Petitioner appeared on the next day, Respondent claims he was confrontational and that he gave notice the day after of an injury the day before. The Arbitrator viewed this testimony in the same light as previously stated.

The Arbitrator also points to the Petitioner's application for unemployment benefits. Resp. Ex. No. 2. Although Petitioner did not indicate on that form that the basis for his separation from the Respondent was due to a work injury, he also testified that he did not fill out the form but rather, due to his inability to read, it was filled out on his behalf.

The Arbitrator finds Sylvia Mack's testimony to be credible and supportive of Petitioner's accident. She did not see the actual occurrence, but rather, testified to hearing the Petitioner yell and seeing the pipe he had attempted to move.

Petitioner sought medical treatment the afternoon of the following day, reporting pain at a level of 10 on a 10-point scale. This delay gives further credibility in the Arbitrator's opinion of the hostile nature of the exchange between the Petitioner and the Respondent and bolster's Petitioner's account of the events which transpired when he gave notice.

Finally, the Arbitrator notes the medical records support causal connection. Petitioner had a chronic prior back condition that pre-existed his work for the Respondent yet in the years preceding this accident, he was working without complaints. Petitioner's complaints and course of treatment, as outlined above are consistent with his testimony regarding the accident which occurred on March 11, 2019.

The records from 2001 and 2006 offered into evidence do not impact the discussion of this claim, Petitioner was asymptomatic at the time of this injury and was working for Respondent at full capacity prior to this accident. The Record does not reflect that Petitioner had ever taken time off work due to low back pain. No evidence was introduced about Petitioner's pre-accident work performance not being satisfactory. No mention was made that he requested any accommodation because of a lower back condition. Petitioner's position was physical and yet again, no evidence was introduced that he was taken off work because of his lower back. There was no evidence presented of intervening or subsequent injuries to the lower back that could explain Petitioner's injury and current condition. The Arbitrator finds the Petitioner met his burden of proof by a preponderance of the evidence that his condition of ill-being was causally related to his work accident based on the chain of events in addition to the medical opinions contained in the record establishing causal connection. Respondent presented no medical other than the irrelevant medical records dating as far back as 22 years ago.

Petitioner testified he re-injured his back in another Workers' Compensation claim from November 7, 2011. Petitioner further testified he also underwent an L5-S1 fusion 11 years prior. The two medical providers following the March 11, 2019 work accident documented this prior fusion as well. Based on this, the Petitioner should be believed when he claimed he had no problems with his back in the couple years before the March 11, 2019, accident. The fact that he was working full duty without incident or complaints since 2011 speaks to "no problems with his back in the couple of years prior", not evidence of a debilitating chronic condition as Respondent would have us believe. Any condition of ill being presently at hand is related to the accident sustained on March 11, 2019 and the Arbitrator finds that the Petitioner proved accident, proved causal connection and benefits are awarded as stated herein.

In support of the Arbitrator's decision relating to (J), whether the medical services that were provided to Petitioner were reasonable, necessary, and whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds as follows:

The Arbitrator finds Petitioner's medical treatment to date has been reasonable and necessary and causally related based on the credibility of testimony submitted at trial and the corroborating medical records.

With regards to Rush University Medical Center; the Arbitrator orders Respondent to pay Petitioner directly for the date of service of March 12, 2019, pursuant to the Fee Schedule. The amount of this bill was unavailable at trial but an itemization was produced which was labeled "not a bill". The Arbitrator admitted this into evidence as a basis for obtaining the bill from Petitioner, who testified that it has been sent to collections for nonpayment.

With regards to Modern Pain Consultants; the Arbitrator orders Respondent to pay Petitioner directly for the date of service of March 16, 2019 and March 30, 2019, pursuant to the Fee Schedule. Those bills have an outstanding balance of $823.00. Any amount due regarding this bill which has previously been paid by Petitioner should be reimbursed directly to him.

With regards to ATI Physical Therapy; the Arbitrator orders Respondent to pay Petitioner directly for the dates of service of March 28, 2019 through May 2, 2019, and May 6, 2019 through May 24, 2019, pursuant to the Fee Schedule. Those bills have an outstanding balance of $16,595.21.

With regards to Elite Care RX; the Arbitrator orders Respondent to pay Petitioner directly for the date of service of March 18, 2019 pursuant to the Fee Schedule. That bill has an outstanding balance of $2,970.04.

In support of the Arbitrator's decision relating to (K), whether Petitioner is entitled to any TTD benefits, the Arbitrator finds as follows:

The Petitioner claims that he is entitled to temporary total disability benefits beginning on March 11, 2019, through May 24, 2019.

The Arbitrator finds that on March 16, 2019, and on March 30, 2019, Dr. Farooq opined that he should remain off work. Petitioner did not return to Dr. Farooq after March 30, 2019, but he continued physical therapy until he was discharged on May 2, 2019. However, Petitioner could not return to work at this time as the ATI records indicate that he continued to have strength deficits with lifting and carrying for his job. Petitioner began a work conditioning program on May 6, 2019, and was discharged from work conditioning on May 24, 2019.

Accordingly, the Arbitrator finds that the Petitioner is entitled to temporary total disability benefits beginning on March 11, 2019, through May 24, 2019, when Petitioner completed the work conditioning program for the reasons set forth herein.

In support of the Arbitrator's decision relating to (L), the nature and extent of the injury, the Arbitrator finds as follows:

With regard to subsection (i) of §8.1b(b) of the Workers' Compensation Act, the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals Petitioner was employed as a general construction laborer at the time of the accident and that he was able to return to work in his prior capacity. While Petitioner did not return to work for the Respondent, Petitioner testified he returned to work as a general construction laborer elsewhere, performing the same job duties he performed before March 11, 2019. Because of Petitioner's ability to return to his former line of work with the same job duties, the Arbitrator gives nominal weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 53 years old at the time of the accident. Petitioner worked as a laborer which is a strenuous position involving lifting, pulling, carrying and climbing, to name a few. Because of Petitioner's age as it relates to these type of activities, the Arbitrator gives this factor great weight in evaluating permanent partial disability.

With regard to subsection (iv) of §8.1b(b), the future earnings capacity the Arbitrator does not see an impact other than age related as stated above.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the medical records, the Arbitrator notes Petitioner testified his lower back is now "fine," "good," and testified that he was not experiencing any pain "today", interpreted literally by the Arbitrator as the day of hearing. Petitioner, however, testified to having received additional injections as recently as four months prior to the date of hearing for ongoing issues. The ATI Physical Therapy records indicate that all of his short-term and long-term physical therapy goals were met, although he continued to have strength deficits with carrying and lifting. Based on the treating medical records and Petitioner's testimony of ongoing disability, the Arbitrator therefore gives great weight to this factor.

Based upon the totality of the foregoing evidence and factors, the Arbitrator finds that Petitioner sustained serious and permanent injuries equivalent to 12.5% loss of Petitioner's body as a whole.