ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC012704
Case Name	Joaquin Banderas v. TSA Processing
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0001
Number of Pages of Decision	15
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Matthew Jones, Brenton Schmitz
Respondent Attorney	Andrea Carlson, Peter Stavropoulos

DATE FILED: 1/2/2024

/s/ Deborah Simpson, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF)

☐ 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: Neither	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JOAQUIN BANDERAS,

Petitioner,

vs. NO: 22 WC 12704

TSA PROCESSING,

Respondent.

DECISION AND OPINION ON REVIEW

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

Respondent stipulated that Petitioner sustained a work-related accident on February 7, 2022, when he fell on the worksite. The Arbitrator found that the accident caused Petitioner's current condition of ill-being of his right shoulder. He awarded him 37 weeks of temporary total disability benefits, medical expenses submitted into evidence, and ordered Respondent to authorize and pay for "surgery recommended by Dr. Shah (*i.e.* arthroscopy, biceps tenodesis, labral debridement, rotator cuff debridement versus repair, chondroplasty, and capsular release) including

reasonable post-operative care, post-operative therapy, medication, radiographic imaging, and other associated treatments, pursuant to Sections 8.2 and 8 (a) of the Act and subject to the fee schedule." The Arbitrator also awarded Respondent $6,600.00 in credit for paid temporary total disability benefits.

The Commission agrees with the analysis of the Arbitrator and his conclusions regarding the issues of causal connection, the award of temporary total disability benefits, the award of credit to Respondent totaling $6,600.00 in paid temporary total disability benefits, and the award of current medical expenses submitted into evidence. Accordingly, the Commission affirms and adopts those aspects of the Decision of the Arbitrator.

The Commission also agrees with the Arbitrator that Petitioner is entitled to prospective treatment for his work-related condition and from the doctor of his choice. However, the Commission takes exception with the specificity of the Arbitrator's award identifying specific surgical procedures. Therefore, the Commission vacates the Arbitrator's award of prospective treatment and *in lieu* thereof substitutes "Respondent shall authorize and pay for prospective treatment currently recommended by Dr. Shah, pursuant to Sections 8.2 and 8 (a) of the Act and subject to the fee schedule."

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated November 21, 2022, is hereby modified as specified above and is otherwise affirmed and adopted, and is attached hereto and made a part hereof.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $642.39 per week for a period of 37 weeks, commencing February 7, 2022, through October 24, 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 medical expenses submitted in Petitioner's exhibits 1 through 8, under §8(a) of the Act, and subject to the applicable fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for prospective treatment currently recommended by Dr. Shah, pursuant §8(a) and subject to the applicable fee schedule in 8.2 of the Act.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $70,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

January 2, 2024

DLS/dw
O-11/1/23
46

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC012704
Case Name	Joaquin Banderas v. TSA Processing
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	11
Decision Issued By	Frank Soto, Arbitrator

Petitioner Attorney	James McHargue
Respondent Attorney	Adan Ramirez, Peter Stavropoulos

DATE FILED: 11/21/2022

THE INTEREST RATE FOR THE WEEK OF NOVEMBER 15, 2022 4.44%

/s/Frank Soto, Arbitrator

Signature

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Joaquin Banderas Case # **22** WC **012704**
Employee/Petitioner

v. Consolidated cases:

TSA Processing
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 **Frank Soto**, Arbitrator of the Commission, in the city of **Elgin**, on **October 24, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

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

G. ☐ What were Petitioner's earnings?

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

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

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

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

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

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

N. ☐ Is Respondent due any credit?

O. ☐ Other

FINDINGS

On the accident date, **February 7, 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 sustained an accident that arose out of and in the course of employment.

Timely notice of this accident w*as* given to Respondent.

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

In the year preceding the injury, Petitioner earned $**47,216.09**; the average weekly wage was $**963.59**.

On the date of accident, Petitioner was **55** years of age, **single** with **1** dependent children.

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

Respondent shall be given a credit of $**6,600.00** for TTD, $**0** for TPD, $**0** for maintenance, and **$0** for medical, and **$0** for other benefits, for a total credit of $**0.**

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

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $642.39/week for 37 weeks, commencing February 7, 2022 through October 24, 2022, as provided in Section 8(b) of the Act

Medical Benefits

Respondent shall pay the medical expenses identified in Petitioner's exhibits 1 through 8 pursuant to Sections 8(2) and 8(a) of the Act subject to the fee schedule. Respondent shall be given credit for medical bills previously paid by Respondent and Respondent shall hold Petitioner harmless from bills which Respondent claims a credit.

Prospective Medical

Respondent shall pay for the surgery recommended by Dr. Shah (*i.e.* arthroscopy, biceps tenodesis, labral debridement, rotator cuff debridement versus repair, chondroplasty, and capsular release) including reasonable post-operative care, post-operative therapy, medication, radiographic imaging, and other associated treatments, pursuant to Sections 8.2 and 8 (a) of the Act and subject to the fee schedule.

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

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

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

NOVEMBER 21, 2022

By: /o/ *Frank J. Soto*
Arbitrator

ICArbDec19(b)

Procedural History

This case proceeded to trial on 10/24/22 pursuant to Sections 19(b) and 8(a) of the Act. The disputed issues are whether Petitioner's current condition of ill-being is causally connected to his injury, whether Respondent is liable for unpaid medical bills, whether Petitioner is entitled to TTD benefits and whether Petitioner is entitled to prospective medical care. Respondent also seeks a credit for TTD benefits previously paid. (Arb. Ex. #1).

Findings of Facts

Joaquin Banderas (hereinafter referred to as "Petitioner") testified he had been working for TSA Processing (hereinafter referred to as "Respondent") for five years as of February of 2022. (T. 8-9). Petitioner testified his job duties included tying metal using a machine, operating trucks to move metal, carrying metal, polishing and sanding metal. (T. 9-10). Petitioner testified to lifting big panels weighing between fifty and one hundred pounds throughout the day. (T. 10).

Petitioner testified he was performing the above-described job duties on February 7, 2022, when he tripped over a box falling on the cement ground landing on his right hand and chest. (T. 13-14). Petitioner testified he attempted to brace himself with his right hand but ended up hitting the right side of his chest and right shoulder on the ground. (T. 14-15). Petitioner testified he felt pain in his right shoulder and chest and notified his supervisor who took him to the emergency room. (T. 15-16).

On February 7, 2022, Petitioner presented to the emergency room at Rush Hospital with right sided chest pain. (Px1). X-rays and CT scans were taken of Petitioner's chest which were normal. Petitioner was diagnosed with contusion of the right chest wall and placed off work until February 8, 2022. At trial, Petitioner testified that he was having difficulty breathing at the hospital so the examination focused on his chest but that his right shoulder was also bothering him. (T. 16).

The following day, February 8. 2022, Petitioner followed up with Advocate Occupational Health reporting pain in the right anterior superior chest and right shoulder. (Px2). The physical examination noted tenderness over the right anterior chest and right shoulder tenderness and pain. Petitioner was taken off work at that time. (Px2).

Petitioner continue to treat at Advocate Occupational Health reporting severe right chest and right shoulder pain. (Px2). On February 21, 2022, X-rays were taken of the chest which showed right anterolateral 4th and 5th rib mildly displaced fractures. Dr. Gorovits, from Advocate Medical

Group, referred Petitioner to Illinois Bone and Joint Institute and ordered a right shoulder MRI. (Px2).

On March 1, 2022, Petitioner underwent a right shoulder MRI which showed: (1) abnormal elongated/oblong appearance of the humeral head that may be congenital/developmental in nature and degenerative changes of the glenohumeral joint space with fairly extensive tearing of the labrum; and (2) rotator cuff appears thin with minimal supraspinatus tendinosis. (Px2).

On March 3, 2022Petitioner followed up at Advocate Occupation al Health reporting severe pain to the right chest and right shoulder. At that time, Petitioner was kept off work and he was referred to Illinois Bone & Joint Institute (IBJI). (Px2). On March 3, 2022, Petitioner also presented to Dr. Skjong of IBJI reporting right shoulder pain and reduced range of motion of the right shoulder. (Px3). Dr. Skjong administered a right shoulder steroid injection and referred Petitioner to a right shoulder specialist and kept Petitioner off work. (Px3).

On March 15, 2022, Petitioner presented to Dr. Portland of IBJI reporting right shoulder pain. (Px3). On physical examination, Dr. Portland noted a positive Hawkins test. Dr. Portland recommended physical therapy and medication. Petitioner attended physical therapy at Athletico from March 22, 2022 through March 31, 2022. (Px6).

Petitioner followed up with Dr. Portland on April 12, 2022 with continued right shoulder pain. (Px3). On physical examination, Dr. Portland noted positive Impingement, Hawkins, Empty Beer Can, and reduced range of motion. Dr. Portland noted Petitioner failed conservative treatment and, at that time, surgical options were discussed including arthroscopy to repair to debridement with decompression to replacement. On April 28, 2022, Petitioner returned to Dr. Portland reporting continued right shoulder pain. At this visit, Dr. Portland reviewed the MRI imaging which he noted showed arthritis, partial tearing of the rotator cuff, and a labrum tear. Dr. Portland recommended two possible surgery options depending upon Petitioner's pathology consisting of either a labrum debridement and decompression, if Petitioner has frank arthritic changes, or labral repair if arthritis is not too severe. (Px3).

On May 6, 2022, Petitioner presented to Dr. Lipov for a telephonic consult at Illinois Orthopedic Network for a second opinion regarding the right shoulder, right-sided rib pain, numbness/tingling in right hand, and periodic neck pain. (Px4). On May 16, 2022 Petitioner followed up with an orthopedic specialist, Dr. Shah, of Illinois Orthopedic Network, reporting significant right shoulder pain with no improvement. On physical examination, Dr. Shah noted

loss of range of motion, pain and weakness with supraspinatus testing, positive Neer and Hawkins testing, and tenderness in the bicipital groove. At this visit, Dr. Shah recommended a right shoulder arthroscopy, biceps tenodesis, labral debridement, rotator cuff debridement versus repair, chondroplasty, and capsular release. Dr. Shah placed Petitioner off work and opined Petitioner was not at maximum medical improvement. (Px4).

On June 16, 2022, Petitioner presented Dr. Patari pursuant to Section 12 of the Act. (Rx4). At that visit, Petitioner reported right shoulder pain with lifting the right shoulder and cracking with extension. On physical examination, Dr. Patari noted positive AC joint crepitus and glenohumeral crepitus with motion. Dr. Patari diagnosed Petitioner with right shoulder pain from preexisting glenohumeral joint arthritis and right AC joint pain from AC joint arthritis. Dr. Patari opined that Petitioner's mechanism of injury was consistent with a chest wall contusion and that Petitioner's shoulder pain was likely referred pain from the chest wall contusion. Dr. Patari opined Petitioner's right shoulder condition was preexisting and not aggravated by the work accident. Dr. Patari also opined Petitioner reached maximum medical improvement as of February 21, 2022 and that surgery was not warranted. Dr. Patari further opined all the medical treatment rendered was reasonable and necessary but not related to the work accident. (Rx.4).

At trial, Petitioner testified that he has not worked for Respondent or any other employer since the date of accident. (T19). Petitioner testified prior to the accident, he never had any issues or injuries with his right shoulder or ribs. (T27). Petitioner testified he has not had any injuries or accidents to his ribs or right shoulder since the work accident. (T27).

Petitioner testified he is right hand dominant. Petitioner testified his right shoulder feels bad, has poor range of motion and lacks strength. (T24). Petitioner testified his right shoulder affects his ability to lift things and ability to pull open a door. (T25-26). Petitioner testified he wishes to proceed with the surgery recommended by Dr. Shah but, if that surgery was not approved, he like to undergo the surgery recommended by Dr. Portland. (T25). Petitioner testified he prefers to proceed with Dr. Shah's recommended surgery as the treating physician but would proceed with the surgery recommended by Dr. Portland if the surgery recommended by Dr. Shah was not approved. (T30).

On cross examination, Petitioner testified he was involved in an automobile accident in April of 2019. Petitioner testified he did not suffer any injuries as a result of the automobile accident. (T31).

The Arbitrator found Petitioner to be credible.

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

In pre-existing condition cases, recovery will depend on the employee's ability to show that a work-related accidental injury aggravated or accelerated the pre-existing disease such that the employee's current condition of ill-being can be said to have been causally-connected to the work-related injury and not simply the result of a normal degenerative process of a pre-existing condition. *Caterpillar Tractor Co. v. Industrial Comm'n,* 92 Ill.2d 30, 36-37. When a worker's physical structures, diseased or not, give way under the stress of their usual tasks, the law views it as an accident arising out of and in the course of employment. *General Electric Co. v. Industrial Comm'n,* 89 Ill.2d 432, 60 Ill.Dec. 629, 433 N.E.2d 671 (1982). Even though an employee has a preexisting condition which may make him more vulnerable to injury, recovery for an accidental injury will not be denied as long as it can be shown that the employment was also a causative factor. *Caterpillar Tractor Co. v. Industrial Comm'n,* 129 Ill.2d 52, 133 Ill. Dec. 454, 541 N.E.2d 665 (1989). Employers are to take their employees as they find them *A.C.&S. v. Industrial Commission,* 710 N.E.2d 8347 (Ill. App. 1st Dist. 1999) citing *General Electric Co. v. Industrial Commission,* 433 N.E.2d 671, 672 (1982). Causal connection between work duties and an injured condition may be established by a claim of events including claimant's ability to perform duties before the date of an accident and inability to perform same duties following date of accident. *Darling v. Industrial Commission*, 176 Ill.App.3d 186, 530 N.E.2d 1135 (1st Dist. 1988) "When the claimant's version of the accident is uncontradicted and his testimony is unimpeached, his recital of the facts surrounding the accident may be sufficient to sustain an award. *International Harvester v. Industrial Comm'n*, 93 Ill.2d 59, 63-64 (1982).

The Arbitrator carefully reviewed and considered all medical evidence along with all the testimony. The Arbitrator finds Petitioner proved by the preponderance of the credible evidence that his current conditions of ill-being are causally connected to his work injury of February 7, 2022.

Petitioner testified that prior to his work accident he was not experiencing any right shoulder or chest symptoms. Petitioner testified on February 7, 2022, he tripped over a box landing on the cement floor injuring his outstretched right arm and right side of his chest. Immediately following the work accident, Petitioner notified his supervisor who then took Petitioner to the emergency room at Rush Hospital the same day. Petitioner then presented at Advocate Occupational Health from February 7, 2022 through March 2, 2022 reporting significant right shoulder pain. Petitioner underwent an MRI of his right shoulder on March 1, 2022, which showed arthritis, extensive tearing of the labrum, and rotator cuff tearing. As Petitioner's subjective complaints regarding his shoulder continued to progress, Petitioner was referred to Dr. Skjong at IBJI who performed a right shoulder steroid injection and noted positive physical examination findings to the right shoulder. Dr. Skjong then referred Petitioner to Dr. Portland at IBJI, who noted Petitioner's history of falling, positive physical examination findings including reduced ROM, Neers, Hawkins, and Empty Beer Can. As Petitioner failed conservative treatment, Dr. Portland recommended two potential right shoulder surgeries.

Petitioner then presented to Illinois Orthopedic Network for a second opinion. Petitioner first presented to Dr. Lipov on May 6, 2022 where Dr. Lipov noted Petitioner's symptoms began after the work accident and referred Petitioner to Dr. Shah at Parkview Orthopedics. Dr. Shah noted Petitioner's right shoulder pain, difficulty with ROM, and physical examination findings including pain with supraspinatus testing, positive Neer and Hawkins, and tenderness in the bicipital groove. Dr. Shah recommended a slightly different right shoulder surgery than Dr. Portland. Dr. Shah noted, in his May 16, 2022 record, "painful arthritis aggravated by this injury, partial thickness versus thin rotator cuff tendon and labral repair." (Px4).

Two shoulder specialists, Dr. Shah and Dr. Portland, both reviewed the MRI and found there to be shoulder pathology that was aggravated by the work accident. Both doctors noted that Petitioner attempted conservative treatment which failed. Both Dr. Shah and Dr. Portland recommended right shoulder surgeries for Petitioner.

The Arbitrator finds the opinions of Drs. Portland, Skjong, Lipov and Shah more persuasive than the opinions of Dr. Patari who opined that Petitioner's work accident did not cause a temporary or permanent aggravation of his preexisting arthritic condition. Dr. Patari acknowledged Petitioner was experiencing right shoulder pain and symptoms but he opined Petitioner's pain was due to Petitioner's preexisting glenohumeral joint arthritis and AC joint arthritis without any explanation or support. Dr. Patari failed to address whether Petitioner was experiencing right shoulder pain or symptoms prior to his work accident and, if not, how pain and symptoms, which developed after the work accident, was not an aggravation of Petitioner's preexisting degenerative condition. Dr. Patari further opines Petitioner reached MMI two weeks after the accident and that Petitioner's right shoulder complaints may be referred pain from a chest wall contusion. Dr. Patari's report only contains opinions without any support or explanation. The Arbitrator finds Dr. Patari's opinions to be based upon guess, surmise or conjecture. It is axiomatic that the weight accorded an expert opinion is measured by the facts supporting it and the reasons given for it; an expert opinion cannot be based on guess, surmise, or conjecture. *Wilfert v. Retirement Board*, 318 Ill. App. 3rd 507, 514-15 (First Dist. 2000).

The Arbitrator finds Petitioner also sustained his burden of proof based upon the chain-of-events theory. Proof of an employee's state of good health prior to the time of injury, and the change immediately following the injury, is competent as tending to establish that the impaired condition was due to the injury. *Westinghouse Electric, Co. v. Industrial Comm'n*, 64 Ill.2d. 244, 356 N.E.2d. 28 (1976). Prior to his work accident, Petitioner was able to work and perform all of his work duties. After the work accident, Petitioner was taken off work and he has been unable to return to work due to his injuries.

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

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

Respondent disputed liability for the medical treatment based upon causation and not that the treatment was unnecessary or reasonable. Dr. Patari acknowledged the medical treatment

Petitioner received was reasonable and necessary. Given the Arbitrator's finding on causation, the Arbitrator further finds Petitioner proved by the preponderance of the evidence the medical treatment was causally related and necessary to diagnose, relieve or cure the effects of Petitioner's injury. The Arbitrator finds the medical opinions and treatment plans set forth in the medical records from Dr. Portland and Dr. Shah are both credible and appropriate and consistent with Petitioner's complaints, exam findings and diagnostic tests. As such, Respondent shall pay the medical expenses identified in Petitioner's exhibits 1 through 8 pursuant to Sections 8(2) and 8(a) of the Act subject to the fee schedule. Respondent shall be given credit for medical bills previously paid by Respondent and Respondent shall hold Petitioner harmless from bills which Respondent claims a credit.

With respect to issue "K", Whether Petitioner is entitled to Prospective medical care, the Arbitrator finds as follows:

The Arbitrator finds Petitioner proved by the of the preponderance evidence that he is entitled to prospective medical treatment. Respondent denied the recommended treatment based upon causation. As stated above, the Arbitrator found Petitioner's condition was caused by his work accident. The Arbitrator further finds Petitioner's condition has not stabilized and that surgery has been recommended. Petitioner testified he prefers to proceed with Dr. Shah's recommended surgery as the treating physician. (T30). As such, Respondent shall pay for the surgery recommended by Dr. Shah (*i.e.* arthroscopy, biceps tenodesis, labral debridement, rotator cuff debridement versus repair, chondroplasty, and capsular release) including reasonable post-operative care, post-operative therapy, medication, radiographic imaging, and other associated treatments, pursuant to Sections 8.2 and 8 (a) of the Act and subject to the fee schedule.

Respondent introduced a few utilization reviews at trial. Rx.1, Rx2, Rx3. On appeal, the utilization review, dated May 20, 2022, certified the surgeries recommended by Dr. Portland. (Rx2). As both Dr. Shah and Dr. Portland recommended surgeries with one of the surgeries being certified, the Arbitrator gives greater weight to the evidence supporting the necessity for the right shoulder surgery.

With respect to issue "L" whether Petitioner is entitled to TTD benefits, the Arbitrator finds as follows:

"The period of temporary total disability encompasses the time from which the injury incapacitates the claimant until such time as the claimant has recovered as much as the character

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

Petitioner claims to be entitled to TTD benefits from February 7, 2022 through October 24, 2022. Respondent denied TTD benefits based upon Dr. Patari's causation opinion. As stated above, the Arbitrator found Petitioner's condition was caused by his work accident. The Arbitrator further found that Petitioner's condition has not stabilized. Petitioner was initially taken off work by Rush Hospital on February 7, 2022. Petitioner was then taken off work by his treating physicians at Advocate Occupational Health as well as Drs. Skjong, Portland, Lipov and Shah. Having previously found Petitioner's current condition of ill-being causally related to his work injury, the Arbitrator further finds that Petitioner has proven by the of the preponderance evidence he is entitled to TTD benefits from February 7, 2022 through October 24, 2022. As such, Respondent shall pay Petitioner TTD benefits from February 7, 2022 through October 24, 2022 representing 37 and 1/7th weeks, subject to a credit for TTD benefits Respondent previously paid.

By: /o/ Frank J. Soto — November 18, 2022

Arbitrator — Date

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ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC022276
Case Name	Twana Lavigne v. Swipejobs for Premier Employee Solutions & 1st Class St
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	24IWCC0003
Number of Pages of Decision	23
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Gerald Connor
Respondent Attorney	Robert Smith

DATE FILED: 1/5/2024

/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

Twana Lavigne,

Petitioner,

vs. NO: 21 WC 22276

Swipejobs for Premier Employee Solutions & 1st Class St.,

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, causal connection, temporary total disability, medical expenses, and prospective medical care, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 21, 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.

January 5, 2024

MP:yl
o 12/21/23
68

/s/ *Marc Parker*
Marc Parker

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC022276
Case Name	Twana Lavigne v. Swipejobs for Premier Employee Solutions & 1st Class St
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	20
Decision Issued By	Joseph Amarilio, Arbitrator

Petitioner Attorney	Gerald Connor
Respondent Attorney	Robert Smith

DATE FILED: 3/21/2023

THE INTEREST RATE FOR THE WEEK OF MARCH 21, 2023 4.62%

/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)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Twana Lavigne
Employee/Petitioner

v.

Case # **21** WC **022276**

Consolidated cases: **N/A**

Swipejobs for Premier Employee Solutions & 1st Class St.
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Joseph Amarilio**, Arbitrator of the Commission, in the city of **Chicago**, on **January 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. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] Is Petitioner entitled to any prospective medical care?
L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [x] Other **Future medical under Section 8(a)**

FINDINGS

On the date of accident, **8/2/21**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did 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 $**N/A**; the average weekly wage was $**440.00**.

On the date of accident, Petitioner was **42** years of age, ***married*** with **3** dependent children.

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

Respondent shall be given a credit of $**0.00** 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

Benefits under the Illinois Workers' Compensation Act are denied because Petitioner failed to prove by a preponderance of the evidence that she sustained an accident that arose out of in the course of her employment. The remaining disputed issues are moot.

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

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

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

/s/ *Joseph D. Amarilio*

Signature of Arbitrator Joseph D. Amarilio

MARCH 21, 2023

ICArbDec19(b)

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

THE ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(B)

Twana Lavigne Case # **21** WC **022276**
Employee/Petitioner

v. :

Swipejobs for Premier Employee Solutions & 1st Class St.
Employer/Respondent

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Ms. Twana Lavigne (Petitioner), by and through her attorney, filed an Application for Adjustment of Claim for benefits under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2014)). Petitioner alleged that she sustained an accidental injury on August 2, 2021 while employed by Swipejobs for Premier Employee Solutions & 1st Class St. (Respondent"). On February 25, 2023, a hearing was held pursuant to Section 19(b) of the Act and proofs were closed.

1. FINDINGS OF FACT

Petitioner testified that she was employed with Respondent, Swipejobs, a staffing agency, on August 2, 2021, as a labor worker, which she had been doing on-and-off for about two (2) years. (Tr. 13). Timecards submitted into evidence show that Petitioner worked a total of 32 hours over a two (2) week period prior to August 2, 2021. (RX 3).

Petitioner testified that she was picking up boxes, estimated to be between zero (0) to sixty (60) pounds, and putting them on an assembly line. (Tr. 14-15, 52). She testified that on August 2, 2021, she noticed pain in her lower back radiating into her legs. (Tr. 15).

Associated Medical Centers of Illinois ("AMCI")

On August 6, 2021, Petitioner first presented for medical care with AMCI complaining of low back pain. (PX 1, p. 3). She gave a history that she was on duty as a line worker, repetitively bending, turning, and lifting up to forty (40) pounds for six (6) hours when she felt sharp pain in her low back that radiated down into both of her legs. (PX 1, p. 3). She stated that she reported the incident to her supervisor and immediately went home to care for her symptoms, calling off work the next day because her symptoms worsened. (PX 1, p. 3). Petitioner rated her pain at 10/10 with no relief from conservative treatment modalities. (PX 1, p. 3).

Petitioner was advised to remain off work and proscribed a course of physical therapy and pain management. In addition, Dr. Day recommended an MRI of the lumbar spine. (PX 1). As to causation, the record states, "Diagnosis are causally related to the incident noted in the initial history above." (PX 1, p. 4).

She also provided a history a prior work accident in 2020 with an injury to her low back with radicular symptoms. (PX 1, p. 3). She was diagnosed with a disc bulge and treated conservatively at AMCI and was last symptomatic in May 2020. (PX 1, p. 3).

Petitioner was assessed with a lumbar sprain and radiculitis. (PX 1, p. 4). She was provided tension bands for home exercise, recommended for therapy, and placed off-work. (PX 1, p. 4). She was also referred to Dr. Day for interventional pain management. (PX 1, p. 4).

Petitioner then presented for a course of therapy with AMCI. (See PX 1). Therapy modalities included: hot moist packs, interferential current (electrical stim) to the lumbar spine, and up to thirty (30) minutes of therapeutic exercises. (See PX 1). She noted improvement in her symptoms over the course of therapy. (PX 1, p. 11, 18).

On August 9, 2021, Petitioner filed a Workers' Compensation Application for Adjustment of Claim. (Tr. 53; IWCC CompFile).

On August 18, 2021, Petitioner presented to Dr. Day for a consult. (PX 1, p. 7). She rated her low back pain at 10/10, with intermittent pain and numbness to her lower extremities. (PX 1, p. 7). The pain extended from her low back, down the posterolateral thighs and legs to the bottom of the bottoms of her feet. (PX 1, p. 7). She noted that the prior injection from 2020 provided no benefit. (PX 1, p. 7). Dr. Day recommended an MRI to assess disc involvement. (PX 1, p. 8). She was to remain off-work. (PX 1, p. 8).

An x-ray of the lumbar spine from August 20, 2021, revealed "superior endplate compression of L1" but was otherwise unremarkable. (PX 1, p. 10).

An MRI of the lumbar spine without contrast was taken on August 24, 2021. (PX 1, p. 13; PX 2, p. 44). The radiologist report noted: intervertebral disc/endplate osteophytosis L1-L2 and L5-S1, L5-S1 bilateral neuroforaminal stenosis moderate on the right, mild on the left with disc osteophyte complex, slight chronic anterior wedging of L1. (PX 1, p. 13). There was no indication of spondylolisthesis and discs L1-2, L2-3, L3-4, and L4-5 were noted to be intact with central canal and neuroforamen patent. (PX 2, p. 44).

On September 1, 2021, Petitioner returned for a follow-up with Dr. Day with continued complaints of pain at 10/10. (PX 1, p. 12). She reported that the symptoms were similar to her prior injury. (PX 1, p. 12). She noted that therapy and home exercises were being performed with improved tolerance and have been helpful, reporting that she was sleeping better. (PX 1, p. 12). Physical examination revealed full strength and a normal sensory exam, with limited range of motion due to pain. (PX 1, p. 13). Dr. Day indicated that the MRI findings may be contributing to Petitioner's on-going symptoms. (PX 1, p. 13). Nerve testing was recommended, as well as a TENS Unit rental for electrical stimulation at home. (PX 1, p. 13). Petitioner was also to continue therapy and remain off work. (PX 1, p. 14).

On September 29, 2021, Petitioner returned for a follow-up with Dr. Day. (PX 1, p. 24). She reported pain at 7/10 with radiation into her legs not previously present. (PX 1, p. 24). Her physical examination was unchanged. Dr. Day reviewed the EMG/NCV which was reportedly indicative of right L5, S1 radiculopathy and possible left L5 radiculopathy. (PX 1, p. 25, 27-28). An L5-S1 lumbar epidural injection was recommended. (PX 1, p. 25). Therapy was placed on hold and Petitioner was recommended to remain off work. (PX 1, p. 26).

On October 27, 2021, Petitioner returned for a follow-up with Dr. Day with pain at 7/10, which Petitioner reported had increased since the last visit. (PX 1, p. 33). Physical examination was unchanged, and Dr. Day continued to recommend the L5-S1 lumbar epidural injection and off-work restriction. (PX 1, p. 34).

On November 17, 2021, Petitioner presented to Dr. Day for a follow-up and review of the IME report of Dr. Bergin. (PX 1, p. 36). Dr. Day indicated that there was on-going slow improvement, though minimal, with Petitioner noting her symptoms were unchanged. (PX 1, p. 36). Petitioner requested a second opinion with a spine specialist given the poor progression. (PX 1, p. 36).

Dr. Day responded to the IME from Dr. Bergin indicating that an initial presentation of vague symptoms only further necessitates the need for EMG/NCV testing, and that an MRI is "likewise poor at predicting symptoms and compression". (PX 1, p. 37). Dr. Day then stated that the suggestion of a sprain/strain entirely ignores that MRI and EMG findings were consistent with radiculopathy. (PX 1, p. 37). Dr. Day indicated that had Dr. Bergin performed a physical

examination, he would have noted positive straight leg raise testing. (PX 1, p. 37). Dr. Day opined that further care was warranted, including the L5-S1 epidural injection. (PX 1, p. 37). Dr. Day agreed that electrodiagnostic findings are not an indication for surgical intervention alone. (PX 1, p. 38).

On January 7, 2022, Petitioner underwent the lumbar steroid injection at L5-S1. (PX 1, p. 40; PX 3, p. 47). Petitioner returned to Dr. Day for a follow-up, reporting 100% relief in her radicular symptoms for seven (7) days following the injection, but reported her symptoms returned. (PX 1, p. 41). A surgical consultation was recommended. (PX 1, p. 42).

Parkview Orthopedic Group ("Parkview")

On March 21, 2022, Petitioner presented to Dr. Chintan Sampat of Parkview Orthopedics for a surgical consultation. (PX 4, p. 54). She reported low back pain since she was repetitive lifting boxes on August 2, 2021. (PX 4, p. 54). She stated she had a prior injury in 2020 with low back pain and bilateral lower extremity pain but that the symptoms got better, she also noted that previously the pain was only shooting down one leg but now was shooting down both. (PX 4, p. 54). She rated her pain at 10/10, 50% in the low back and 50% in the lower extremities. (PX 4, p. 54). Injections and therapy provided no significant relief. (PX 4, p. 54).

Physical examination revealed normal gait, pain with flexion and extension, no tenderness, no reproduction of radicular pain with straight leg raise test or femoral nerve stretch test bilaterally, full strength, intact sensation, symmetric reflexes, and negative peripheral nerve testing. (PX 4, p. 55).

Dr. Sampat indicated that Petitioner's symptoms reportedly got worse after August 2, 2021, and, therefore, there appears to be a causal relationship between her symptoms and her work-related injury. (PX 4, p. 55). Dr. Sampat requested review of the MRI imaging. (PX 4, p. 55-56). Dr. Sampat also reviewed Dr. Bergin's IME report. (PX 4, p. 55).

On April 15, 2022, Petitioner returned to Dr. Sampat. (PX 4, p. 59). He reviewed the MRI imaging and noted that Petitioner had "significant spinal stenosis at L5-S1 in the neural foraminal region secondary to disc height loss", which appears to have exacerbated after her work injury. (PX 4, p. 59). Dr. Sampat opined that the only surgical solution would be to perform an interbody fusion at L5-S1 to help restore the neural foraminal height and decompress the neural elements. (PX 4, p. 59). Petitioner was recommended to remain off work until the surgery is conducted. (PX 4, p. 59).

On December 20, 2022, , Petitioner saw Dr. Sampat for the final time. Dr. Sampat reviewed the Respondent's Section 12 report and states:

> I did review an independent medical evaluation by Dr. Christopher Bergin. Dr. Bergin diagnosed Ms. Lavigne with a lumbar strain. I respectfully disagree because the patient has objective findings of lumbar radiculopathy including a positive straight leg raise test as well as pain radiating down both lower extremities left greater than right in the L5 distribution She also has EMG findings of radiculopathy. She does have degenerative disc disease at L5-S1 with foraminal stenosis in the foraminal regions, which is also mentioned by Dr. Bergin. This is what appears to be symptomatic. It was asymptomatic before the work injury and became symptomatic afterwards and therefore, this case represents a situation where there has been an exacerbation of underlying degenerative condition. She has already failed multiple nonoperative treatment measures. She did not have these symptoms before the work injury and became symptomatic afterwards. She reports she did have a prior work-related injury in 2020 but the symptoms subsided, and she was able to return back to work but now the symptoms are much worse. Also, in the 2020 injury she only has one leg that was bothering her but now both legs bother her and therefore, this is a marked worsening of symptoms. (PX 4, Pg. 62)

Dr. Sampat again recommended an interbody fusion surgery at L5-S1 and that Petitioner should remain off work until surgery is conducted. (PX 4, p. 63).

Respondent's Section 12 Examination – Dr. Christopher Bergin

On October 20, 2021, Petitioner presented to Dr. Christopher Bergin with The Spine Center, for an Independent Medical Examination (IME). (RX 1, p. 1). Dr. Bergin's report was submitted into evidence without objection. (Tr. 113). According to the report, Petitioner presented with a complaint of low back pain which radiated into both lower extremities from the buttocks to the posterior thighs, to the claves and feet, as well as down the front of the thighs to the anterior legs to the feet. (RX 1, p. 1).

Petitioner reported that the pain started after an injury at work on August 2, 2021. (RX 1, p. 1). She related a history of working on a production line, lifting, and twisting, as required to put boxes on the line, when she noted pain in her back, radiating down her legs. (RX 1, p. 1). She reported that she informed "Marco" of the pain and presented to a physician a day or two later. (RX 1, p. 1). Petitioner noted that she had undergone physical therapy with some relief, and that a nerve test showed "nerve damage in both legs". (RX 1, p. 1). She stated that her medical providers are recommending injections. (RX 1, p. 1).

Petitioner stated that she had a prior work injury in 2020 resulting in low back pain with radiation into both lower extremities, but that the symptoms subsided, and are now much worse. She stated that her symptoms were previously in one leg, but now were in both. (RX 1, p. 1). She reported having therapy "for a very long time" following the 2020 injury. (RX 1, p. 2).She also had

injections with no relief and that a nerve test only showed nerve damage in one leg. (RX 1, p. 2). Petitioner believed that she aggravated the prior work injury but that it was settled out already. (RX 1, p. 2).

Physical examination revealed limited range of motion due to pain, but was otherwise normal, including negative straight leg raise and full strength. (RX 1, p. 2). Dr. Bergin diagnosed Petitioner with a lumbar strain/sprain, noting that she has subjective complaints of pain but no physical findings of radiculopathy. (RX 1, p. 3). He indicated that Petitioner's history is inconsistent with radiculopathy because the reported pain goes down both entire legs with no particular distribution. (RX 1, p. 3). He further noted that there were nonanatomic complaints. (RX 1, p. 3). Petitioner's symptoms were predominantly axial in nature, with no objective findings consistent with radiculopathy. (RX 1, p. 4).

In terms of further medical care, Dr. Bergin did not believe that the injections would be beneficial given the fact that prior injections provided no benefit, and that Petitioner did not have truly radicular-type symptoms or any significant stenosis. (RX 1, p. 4). Dr. Bergin also felt that the recommendation for electrodiagnostic studies were inappropriate, as EMG/NCVs are notoriously inaccurate to rule in or out compression of nerves in the spine. (RX 1, p. 4). Dr. Bergin went on to state that the recommendation that Petitioner require a surgical consultation based on electrodiagnostic testing is not based on medical science. (RX 1, p. 4). He did not believe that Petitioner was a surgical candidate. (RX 1, p. 4).

Dr. Bergin reviewed the MRI report of August 24, 2021, and indicated that based on the MRI findings, Petitioner would likely continue to have episodes of back pain throughout her life. (RX 1, p 4). However, Petitioner's symptoms are related to the underlying degenerative process and not to any injury on August 2, 2021. (RX 1, p. 4). According to Dr. Bergin, a proper course of treatment for Petitioner's strain/sprain condition would include therapy for four (4) to six (6) weeks, with consideration for medications such as anti-inflammatories, muscle relaxants, and pain medication. (RX 1, p. 5). He did not believe that Petitioner required off-work restrictions from the beginning, noting she could have done light duty for up to six (6) weeks, based on her history and previous symptoms. (RX 1, p. 5). Petitioner could return to full duty work and did not require any further care at the time of the October 20, 2021, examination. (RX 1, p. 5).

Petitioner's Testimony

Petitioner testified that she advised the treating and examining physicians of her 2020 injury to her back. (Tr. 22). She testified that she only had five (5) to six (6) sessions of therapy in connection with the 2020 injury and that her last medical treatment was around April 2020. (Tr. 22). She testified that she returned to full duty work after April 2020 and continued working until August 2021. (Tr. 23).

On cross, Petitioner testified that she treated with AMCI for the low back injury in 2020. (Tr. 25). She testified that the injury occurred in February 2020. (Tr. 27). Petitioner testified that she did not recall receiving an injection and undergoing an EMG in connection with the 2020 injury. (Tr. 28). She testified that she filed a workers' compensation case for the 2020 injury, and that the case was settled. (Tr. 28).

Petitioner testified that she exchanged text messages with Swipejobs before and after August 2, 2021, including advising that she was not able to attend work. (Tr. 30-31). She testified that she would communicate with Swipejobs for work assignments, shifts, payroll-related issues, and advising she could not work. (Tr. 31). Petitioner testified that she was asked to provide Swipejobs with a "selfie" photograph. (Tr. 36).

Petitioner testified that she started working at Mensha on July 20, 2021, working an 8-hour shift. (Tr. 37; RX 3). Petitioner testified that she never really called off work and did not use the "call-off" line. (Tr. 39). She testified that she only used the text messaging service once or twice, and normally she would call the office. (Tr. 40).

Upon showing Petitioner the exhibit containing her text messages with Swipejobs, she confirmed that she received the Employee Notice document and also provided Swipejobs with a texted photo of her ID and Social Security card. (Tr. 43). However, Petitioner testified that she did not recall sending any of the other text messages and also shared her phone with someone named Leron Mitchell. (Tr. 45, 46). When asked about the text message regarding the discrepancy in her paychecks, she affirmed that at the time, she believed her paychecks were incorrect, but did not confirm that the text message regarding same came from her. (Tr. 47).

Petitioner testified that she was not familiar with an employee named Marco with Swipejobs. (Tr. 47). She testified that she could not recall that name of her on-site supervisor at Minooka ["Minasha"]. (Tr. 48). She testified that she did not remember who she reported the work incident too, but that it was a male. (Tr. 48).

Shannon McDaniel (Location Witness) Testimony

Respondent called Shannon McDaniel to testify. (Tr. 55). Ms. McDaniel is employed as the Branch Manager with Respondent (Swipejobs). (55-57). Swipejobs is a staffing agency/temp service which supplies temp labor to different work sites, including Menasha. (Tr. 55-56). Menasha is in the business of making displays for products at Walmart, Target, etc. (Tr. 56). Swipejobs is one of several staffing agencies that provides workers to Menasha. (Tr. 56).

Ms. McDaniel has been employed with Swipejobs since November 2018, and previously held positions such as recruiter, whose main role is to fill job openings, as well as working as an "on-site". (Tr. 57-58, 64). Recruiters also handle onboarding, which includes completing and signing off on a job application, including verification of eligibility of employment. (Tr. 58-59). Additionally, during the onboarding process, recruiters will discuss with employees the procedures for reporting work incidents. (Tr. 59).

When they begin working for Swipejobs, employees are provided with an Employee Notice, which includes information on who to report a work incident to. (Tr. 59; RX 2). Ms. McDaniel testified that either the employee is provided the Employee Notice in person or via text message. (Tr. 60). Respondent submitted into evidence the Employee Notice that was provided to Petitioner. (Tr. 61; RX 2).

Her role as Branch Manager involves managing recruiters in the office and on-site workers. (Tr. 62). An "on-site" is responsible for checking in employees, making sure they follow good manufacturing practices, and ensuring they are where they need to be. (Tr. 62-63). The "on-site" is the point of contact for Swipejbos while the employees are at a particular location. (Tr. 63).

In her experience as an "on-site" for Swipejobs, Ms. McDaniel testified that as soon as they get to a site, they print out their list of who is supposed to be working on that day. (Tr. 64). She testified that each staffing agency has a podium where they check-in employees. (Tr. 64). The "on-site" then provides the employee with their work assignment. (Tr. 65). Then the "on-site" monitors the lines to look for potential safety issues and signs of injury. (Tr. 66). The "line leads" also monitor for signs of injury. (Tr. 66). At the end of a shift, the "on-site" makes sure everyone is off their lines and out of the building. (Tr. 67). They also have to check to make sure everyone is punched out and then sign the End of Shift Report. (Tr. 66).

Ms. McDaniel testified that the End of Shift Report lists information regarding absences, work performance, employees who leave early, including for injuries, and any issues, as well as documenting safety times that they were on the floor. (Tr. 67-68). She testified that this information is required by Menasha. (Tr. 68). Respondent submitted into evidence the End of Shift Report for Menasha second shift on August 2, 2021, prepared by Marco Calvillo. (RX 7). Ms. McDaniel testified that Marco Calvillo was the second shift "on-site" at Menasha on August 2, 2021. (Tr. 63).

In terms of reporting a work incident, Ms. McDaniel testified that the employees are instructed to report a work incident within twenty-four (24) hours. (Tr. 61). This is explained to employees by the recruiters. (Tr. 61). Ms. McDaniel testified that if an employee is hurt on the line, either the "on-site" is called over or the employee is sent to the "on-site". (Tr. 71). Once the employee is with the "on-site", the "on-site" will assess the severity of the injury and determine if emergency

medical assistance is required. (Tr. 71). If the injury does not require emergency medical assistance, then the "on-site" fills out a "step-by-step" report, as well as notifying the risk management team of the accident. (Tr. 74). The "on-site" also obtains statements from the employee and any additional supervisor and witness statements. (Tr. 74). The employee is also asked to sign a medical release. (Tr. 74).

The employee is then instructed to go to the company clinic unless they don't require medical assistance. (Tr. 74). If an employee discovers pain the next day, when they are not on the jobsite, then they will either call or text Swipejobs to report the incident and the investigation process is the same, except it is performed by a recruiter. (Tr. 75, 76). An employee may also go into the office to report the incident. (Tr. 75-76). At the office, the employee will sign in on a keypad and receive a text message assigning them a "wait list" number. (Tr. 76).

Ms. Shannon McDaniel testified once an accident investigation/report is completed by the "on-site", then it is sent to risk management and Menasha. (Tr. 76-77). Menasha tracks all the reported injuries for OSHA purposes and future preventative training. (Tr. 77).

Ms. McDaniel also testified that if an employee is unable to present for work, then they would notify Swipejobs via text message. (Tr. 78). Swipejobs uses a computer software program called Zipwhip for sending and receiving text messages from employees. (Tr. 79). The text messages appear on the phones or computers at the Swipejobs office and are stored under the employee's phone number. (Tr. 79, 81).

Respondent submitted into evidence the text messages exchanged between Petitioner and Swipejobs. (RX 4). The text messages begin on July 27, 2020, and go through August 24, 2021. (RX 4). In reviewing the text messages exchanged between Petitioner and Swipejobs on or near August 2, 2021, Petitioner texted on July 30, 2021, "hi this is Twana Lavigne im not going to make it into-work my baby is not feeling well! I will return Monday 2nd shift". (RX 4, p. 7). The next exchange appeared on August 3, 2021, wherein Petitioner texted "I had an emergency where someone shot in my window last night i will be able to return Wednesday". (RX 4, p. 8). On August 4, 2021, Petitioner texted, "I am pulled over i will return tomorrow". (RX 4, p. 8). There was also an exchange on August 6, 2021, regarding issues with Petitioner's paycheck. (RX 4, p. 8). The remaining messages relate to confirmation of 2nd shift work. (RX 4, p. 8-10).

Ms. McDaniel testified that she was first made aware of Petitioner's workers' compensation claim via an email from the Risk Department requesting additional information on the case, but she was unable to locate anything as there was no documentation of any injury. (Tr. 84, 85). She testified that this was unusual because when some is injured, they will let Swipejobs know right away. (Tr. 84).

She also testified that she had no vested interest in the outcome of Petitioner's claim. (Tr. 94). She testified that Swipejobs deals with a lot of workers' compensation cases and will "pay them out". (Tr. 94). There is no policy with Swipejobs to deny every single workers' compensation claim that they receive. (Tr. 95).

Respondent Exhibit 3 - Timeclock Timecards

Respondent also submitted Timeclock Timecards for Petitioner showing Petitioner worked on August 2 and August 3, 2021. (RX 3).

Respondent's Exhibit 4 – Text Messages

Respondent Exhibit 4 was introduced into evidence. It contains printed text messages between Respondent and Petitioner for the period of July 27, 2020 through August 24, 2021.

The following test messages are relevant regarding the claimed Monday, August 2, 2021 accident and are quoted as is:

July 21, 2021

"*hi this twana try to make sure u received the call about me being in an accident"*
Sent by Twana Lavigne Do not confirm 4:48 pm 07/21/2021….

July 22, 2021

"Hi Twana, we received a call, however, there was no a message left on the voicemail. We are sorry to hear about the accident and hope that you're feeling better…please keep us posted as to your status?"
Sent by Francis Mangrum 9:48 am 07/22/2021….

July 30, 2021

"Hi this Twana Lavigne im not going to make into work my baby is not feeling well I will return Monday 2nd shirt"
Sent by Twana Lavigne Do not confirm 10:54am 07/30/2021 ….

"Noted, hope the baby feels better soon"
Sent by Francis Mangrum 10:57am 07/30/2021

"Thank you. I will definitely be back Monday" ....
Sent by Twana Lavigne Do not confirm 10:57am 07/30/2021
[Monday being the date of the alleged accident of August 2nd]

August 3, 2021

"This is Twana Lavigne
I had an emergency where someone shot my window last night I will be able to return Wednesday"
Sent by Twana Lavigne Do not confirm 10:24am 08/03/2021

"thank you for letting us know"
Sent by Amanda Ramirez 10:42am 08/03/2021

"no problem"
Sent by Twana Lavigne Do not confirm 10:57am 08/03/2021

August 4, 2021

"I am pulled over I will return tomorrow"
Sent by Twana Lavigne Do not confirm 3:11 pm 08/04/2021

"oh noo !! thank you for letting us know
txt back tomorrow after 10:30 AM for the next confirmation list
thank you!"
Sent by Amanda Ramirez 3:24 pm 08/04/2021

"*will definitely do"*
Sent by Twana Lavigne Do not confirm 3:25 pm 08/04/2021 ….

August 6, 2021

"my *check is not correct*
Sent by Twana Lavigne Do not confirm 7:41am 07/21/2021" ….

"*im missing thursday my check is 400.00 and I worked every day but friday*"
Sent by Twana Lavigne Do not confirm 7:42am 08/06/2021

"*Did the rate of pay change"*
Sent by Twana Lavigne Do not confirm 7:42am 08/06/20

Petitioner's Rebuttal Testimony

As rebuttal to the testimony provided by Ms. McDaniel, Petitioner testified that she informed her employer of the work accident orally, advising her supervisor at Swipejobs, Marco. (Tr. 96-97). She testified that Marco walked her off the line and gave her an ice pack and sent her to the cafeteria, and that he did not provide her with any papers to fill out. (Tr. 97).

On cross, Petitioner testified that she previously had no idea who Marco was but stated that her memory was refreshed after questioning on what she reported to Dr. Bergin, Respondent's Section 12 examiner. (Tr. 98, 101). She also testified that supervisor from Swipejobs never changed. (Tr. 101). She testified that she did not request any medical assistance. (Tr. 99). She testified she never went to the Swipejobs office to report the incident, nor did she call or report the incident via text message. (Tr. 100).

II. CONCLUSIONS OF LAW

Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, Petitioner bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. 820 ILCS 305/1(b)3(d). To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of his or her claim *O'Dette v. Industrial Commission,* 79 Ill. 2d 249, 253 (1980) including that there is some causal relationship between the employment and the injury. *Caterpillar Tractor Co. v. Industrial Commission*, 129 Ill. 2d 52, 63 (1989). Decisions of an Arbitrator shall be based exclusively on stipulation of the parties, the evidence in the record of proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e) The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below.

Credibility Assessment: 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 The Arbitrator viewed Petitioner's demeanor under direct examination and under cross-examination and considered the testimony of Petitioner with the other evidence in the record and finds that Petitioner's testimony is not consistent with the record as a whole and was not corroborated by the material and relevant contemporaneous documentary evidence.

The Arbitrator viewed the of Ms. Shannon McDaniel demeanor under direct examination and under cross-examination. The Arbitrator considered the testimony of Ms. McDaniel with the other evidence in the record. Ms. McDaniel's testimony is found to be consistent with the record as a whole and corroborated by the material and relevant documentary evidence.

In support of the Arbitrator's Decision regarding Issue (C), whether an accident occurred that arose out of and in the course of Petitioner's employment with Respondent, the Arbitrator concludes as follows:

Petitioner failed to prove that she sustained accidental injuries to the low back arising out of and in the course of her employment with Respondent on August 2, 2021.

A claimant bears the burden of proving by a preponderance of the evidence that the injury arose out of and in the course of the employment. 820 ILCS 305/2. Both elements must be present in order, to justify compensation. *Illinois Bell Telephone Co. v. Industrial Commission*, 131 Ill. 2d 478 (1989). The phrase "in the course of" refers to the time, place, and circumstances under which an incident occurred. Orsini v. Industrial Commission, 117 Ill. 2d 38 (1987). The words "arising out of" refer to the origin or cause of the incident and presuppose a causal connection between the employment and the accidental injury. *Caterpillar Tractor Co. v. Industrial Commission,* 129 Ill. 2d 52 (1989). "Preponderance of the evidence is evidence which is of greater weight or more convincing than the evidence offered in opposition to it; it is evidence which as a whole shows that the fact to be proved is more probable than not." *Parro v. Industrial Commission*, 260 Ill.App.3d 551 (1st Dist. 1993); *Central Rug & Carpet v. Industrial Commission*, 361 Ill.App.3d 684 (1st Dist. 2005). Among the factors to be considered in determining whether a claimant has sufficiently carried his burden is his credibility. See, *Parro*, supra. 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 witness's demeanor and any external inconsistencies with testimony.

The Commission is not required to find for a claimant merely because there is some testimony which, if it stood alone and undisputed, might warrant such a finding. *Burgess v. Industrial Commission*, 169 Ill.App.3d 370 (1st Dist. 1988). The mere existence of testimony does not require its acceptance, *U.S. Steel Corporation v. Industrial Commission*, 8 Ill. 2d 407 (1956), and the Commission is not required to accept unrebutted testimony. Sorenson v. Industrial Commission, 281 Ill.App.3d 373, 384 (1996). Where the sole support for an award rests on the claimant's own testimony, and claimant's actual behavior and conduct is inconsistent with that testimony, the Commission has held that an award cannot stand. *McDonald v. Industrial Commission*, 39 Ill. 2d 396 (1968); *Swift v. Industrial Commission*, 52 Ill. 2d 490 (1972).

To determine whether a claimant has met his requisite burden of proof by a "preponderance of credible evidence," it is necessary for the Arbitrator to look for consistency and corroboration between a witness' testimony, conduct, and other documentary evidence to determine the truth of the matter. Where that other evidence tends to impeach or undermine a claimant's testimony, there may be sufficient cause to find that a claimant has failed to meet his requisite burden.

After reviewing the evidence in its' entirety, weighing the credibility of the witnesses and their testimony, examining the medical records provided by Petitioner and the process and procedures Respondent has in place for reporting an accident, as well as the End of Shift Report and text messages between Petitioner and Respondent, the Arbitrator concludes that Petitioner has failed to prove by a preponderance of the evidence, that she sustained accidental injuries arising out of and in the course of her employment with the Respondent.

Section 6 (c) of the Act provides in relevant part: " Notice of accident shall be giving to the employer as soon as practicable, but not later than 45 days after the accident….No 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."

The parties stipulated that Respondent received notice within the 45-day time limit stated in the Act. (Arb X 1). Petitioner's Application for Adjustment of Claim was filed on August 9, 2021. (IWCC CompFile) Moreover, Ms. McDaniel, testified that the Application for Adjustment of claim was received within 45 days. There is no question that Petitioner gave notice within 45 days.

However, the Arbitrator questions whether Petitioner gave notice of accident as soon practicable in light of the three post August 2nd accident text message exchanges of August 3rd , August 4th and August 6th wherein Petitioner neither mentioned her accident nor need for medical treatment. The Arbitrator does not address this failure on the issue of notice but rather on the issue of accident.

Petitioner's trial testimony has inconsistencies with the other evidence which undermines her testimony. One inconsistency came to light from Ms. McDaniel's testimony. Ms. McDaniel testified as to the process and procedures in place for reporting an injury, as well as the required End of Shift Report and text messages between Petitioner and Swipejobs. Petitioner testified that she told her on-site supervisor of her work injury and stated that she only informed her employer of the work injury orally. She testified that she was given an ice pack and sent to the cafeteria but was not provided with any papers to fill out after the alleged incident.

The Arbitrator notes that Petitioner also testified that she was not familiar with an employee named Marco with Swipejobs and could not recall the name of her on-site supervisor, though she noted that this person never changed during the time she worked there. She later stated on Rebuttal that she was familiar with Marco Cavillo, the on-site supervisor, upon having her memory refreshed with having informed Dr. Bergin, Respondent's Section 12 examiner, that she gave oral notice to her supervisor named Marco. This inconsistency is, however, not inconsistent with memory fading with the passage of time but recalling his name with having her memory refreshed.

However, Petitioner's testimony is inconsistent with the procedures in place for reporting a work injury as described by Ms. McDaniel. According to Ms. McDaniel, employees are provided with an Employee Notice, which includes procedures on reporting an accident/injury. Petitioner acknowledged receipt of the Employee Notice via text message. Ms. McDaniel stated that employees are instructed to report a work incident within twenty-four (24) hours and that this information is not only included in the Employee Notice but reviewed with the employees by a recruiter during "onboarding". But then, the Arbitrator is mindful that the lengthy document was received via test message, not an ideal form of communication for long messages.

Petitioner alleges that she was injured on the line, during her shift, and informed her on-site supervisor at the time. According to Ms. McDaniel, in this circumstance, the on-site supervisor would assess the severity of the injury and determine if emergency medical assistance is required. If the injury does not require emergency medical assistance, then the on-site supervisor fills out a step-by-step report, and notifies the Risk Management Team of the accident. The on-site supervisor would also obtain statements from the employee and any additional supervisors and witness statements. The employee is also asked to sign a medical release. Once an accident investigation/report is completed by the "on-site", then it is sent to risk management and Menasha. (Tr. 76-77). Menasha tracks all the reported injuries for OSHA purposes and future preventative training. (Tr. 77). Additionally, at the end of the shift, the on-site supervisor, prepares an End of Shift Report, which would document any reported work injuries during the shift.

The Arbitrator notes that according to the End of Shift Report for August 2, 2021, there is no indication that Petitioner was an "early out" or any documentation of Petitioner reporting a work injury or that a work injury occurred. (RX 7). Furthermore, Ms. McDaniel testified that there was no record of investigation conducted regarding Petitioner's injury, including witness statements or a report prepared by the on-site supervisor. She testified that she was first made aware of Petitioner's workers' compensation claim via an email from the Risk Department requesting additional information on the case, but that she was unable to locate anything as there was no documentation of any injury. She testified that Swipejobs deals with a lot of workers' compensation cases and that it was unusual that there would be no documentation of Petitioner's alleged injury because when someone is injured, they will report it to Swipejobs as instructed.

The most troubling evidence that undermines her testimony is the undisputed fact that Petitioner communicated with Swipejobs via text message after the alleged work incident on three (3) separate occasions and made no mention of the work incident in her communications. Petitioner texted Swipejobs a few days before the alleged incident to inform Respondent that she would not be able to work because her child was not feeling well. Petitioner also texted Swipejobs the day after the alleged incident date stating that she would be unable to work because "*I had an emergency where someone shot my window last night I will be able to return Wednesday".* Oddly, and without explanation, this text message appears to be inconsistent with the payroll records

reflecting that she worked Monday, August 2nd and Tuesday August 3rd and is also inconsistent with her testimony and her statements recorded in the medical records that she did not return to work after her alleged Monday, August 2nd accident. None of the text messages from Petitioner notify Respondent of an August 2, 2021 incident.

Moreover, although Petitioner testified that her preferred method of communication was to call rather than text message, her testimony is inconsistent with her test message of July 21,2021, just over one week before her alleged accident, wherein she texted: ***"****hi this twana try to make sure u received the call about me being in an accident"*. Clearly, Petitioner had no issue utilizing the text messaging system to advise of her work absences or other issues with her employment. And yet, she elected not to send a confirming text to "make sure" that Respondent was notified of her accident and need for treatment.

In light of all the evidence, the Arbitrator finds that Petitioner failed to meet her burden of proof by a preponderance of the evidence that an injury took place that arose out of, and occurred in the course of her employment during her shift on August 2, 2021. All other issues are moot.

In support of the Arbitrator's Decision regarding Issue (F), is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator concludes as follows:

Based upon the finding that Petitioner failed to prove by a preponderance of the evidence that she sustained accidental injuries that arose out of and in the course of her employment, the Arbitrator finds this disputed issue moot.

In support of the Arbitrator's Decision regarding Issue (J), whether the medical services that were provided to Petitioner and related medical bills are reasonable and necessary, the Arbitrator concludes as follows:

Based upon the finding that Petitioner failed to prove by a preponderance of the evidence that she sustained accidental injuries that arose out of and in the course of her employment, the Arbitrator finds this disputed issue moot.

In support of the Arbitrator's Decision relating to (K) (O), prospective medical treatment pursuant to section 8(a) of the Act, the Arbitrator finds the following:

Based upon the finding that Petitioner failed to prove by a preponderance of the evidence that she sustained accidental injuries that arose out of and in the course of her employment, the Arbitrator finds this disputed issue moot.

In support of the Arbitrator's Decision relating to Issue (L), whether Petitioner is entitled to Temporary Total Disability (TTD), the Arbitrator concludes as follows:

Based upon the finding that Petitioner failed to prove by a preponderance of the evidence that she sustained accidental injuries that arose out of and in the course of her employment, the Arbitrator finds this disputed issue moot.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC003955
Case Name	Ron Sandy v. Continental Tire
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0004
Number of Pages of Decision	15
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Dane Nelson
Respondent Attorney	Andrew Keefe

DATE FILED: 1/8/2024

/s/ Deborah Simpson, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF)
JEFFERSSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RON SANDY,

Petitioner,

vs. NO: 22 WC 3955

CONTINENTAL TIRE,

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, causal connection, temporary total disability benefits, current medical expenses, and credit and being advised of the facts and law, reverses the Decision of the Arbitrator and finds that Petitioner sustained his burden of proving a compensable accident on June 6, 2021, which caused his current condition of ill-being of his left shoulder, and awards benefits. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

Findings of Fact - Testimony

Petitioner testified he worked for Respondent for almost 11 years. Most recently he was in the position of bead winder. Petitioner believed that on October 11, 2021 he was filling in as a trucker and doing his job as well. As a trucker he would haul bead racks to and from the machines when needed. Essentially, the bead winder produces a bead, makes sure it is sized correctly, the quality is OK, places them on a rack, and puts them in rack storage.

On October 11, 2021, he was moving a rack of finished beads when the "wheels on the rack got hung up" on a rough area of floor. He tried to pull the rack out to get it with the "walkie," a backwards forklift, and he felt a pop and pain in his shoulder and back. Petitioner thought he had "just pulled a back muscle right here in [his] shoulder area." Petitioner acknowledged that he continued to work as trucker/bead winder and did not report the accident until November 1st. He did not report it earlier because he thought he had just suffered a pulled muscle. He did not have to use his injured arm much working as a trucker. He agreed that he told Dr. Paletta that he had pain while moving pins, moving racks, and bending over. He was injured working as a trucker and not as a bead winder.

Petitioner explained that he was able to continue working despite the pain by changing how he did things. He would lift and stabilize items with his left hand and keep it under shoulder level, otherwise it would hurt more. Then, he would apply heat/cold and try stretching it. He avoided overhead movement which was the most painful. Prior to this accident, Petitioner never had any medical treatment for his shoulder, though about 20 years earlier he dislocated his shoulder. He did not have sustained pain prior to the accident but he had since. His pain was greater and more frequent than it had been before the accident.

Petitioner acknowledged that when he reported the accident/injury on November 1st, he was put on light duty. That assignment terminated on January 26th when he was informed he "needed to vacate the property." Petitioner agreed he reported to Dr. Paletta that he had 10/10 pain. He testified he still experienced such levels of pain. He then testified this was not the worst pain he ever experienced; it was worse in 1991 when he was going through testicular cancer. He explained that he can experience pain while walking because his arms swing. He reiterated that initially he thought he just suffered a strain and it would resolve without medical treatment. When he reported the accident, Respondent sent him to their health care provider, Heartland Regional, which sent him to physical therapy, and placed him on light duty with no use of the left arm. Medical services were terminated once his claim was denied.

Thereafter, Petitioner went to a nurse practitioner with his primary care physician. She took him off work and referred him to Dr. Keener, a specialist, who continued his off-work status and recommended physical therapy.

Petitioner reiterated that he was moving a full rack of beads when he was injured. The pain he felt in his left shoulder after the accident was different from the pain he had in his other shoulder and knees. Before the accident he had simply general joint aches/pains. He still sees Dr. Keener who has not released him to return to work at full duty.

Petitioner testified that currently his shoulder felt sore, and hurt. He did not have this sensation prior to the accident. His mobility and strength were now limited. His arm has never felt as good as it did prior to the accident. Respondent will not allow him to return to work with restrictions.

On cross examination, Petitioner agreed that on the day of the accident, Respondent had a day shift trucker. There is very little overhead work as a trucker. He disagreed that bead winding also required minimal overhead work; it constituted 1/3 of his work in that job. He has had a prior workers' compensation claim against Respondent and was aware of its theoretical policy of immediately reporting accidents, at latest by the end of the shift. He also agreed that theoretically his reporting of the injury about three weeks later was inconsistent with that policy.

Petitioner acknowledged that on intake forms he put in some question marks concerning the date of the accident. He "didn't think a whole lot of it to keep track in" his head. His intention was to work through the injury. He was told to put down the 11th because he knew it was sometime in that week.

Petitioner agreed that the last day he worked was October 29th. It was a Friday and he would have been off the weekend. He did very little that weekend except resting his shoulder, using ice/heat, and trying to stretch. He did not see anybody witness the accident. He also admitted he did not tell co-workers about the incident because he just thought he pulled a muscle. Respondent's physical therapy prescribed him a sling to wear during the day and to take off at night. Petitioner testified that when he reported the accident on November 1, 2021 he was sent back to work without restrictions. He was not given restrictions until after he saw the nurse. She imposed work restrictions, which Respondent accommodated.

Petitioner agreed that on November 22, 2021 he told a therapist that he "had been moving [his] shoulder a lot at work and felt painful pops." He also agreed on December 13th he told a therapist he felt 9/10 while pushing a shopping cart. He also reported to a therapist that he had significant increase in pain after he mowed the lawn. His pain would "briefly" reach 10/10, as he reported to Dr. Paletta. He agreed that ordinary everyday activities can cause symptoms. He thought his grandmother may have been diagnosed with osteoarthritis. Although he has modified his activities in his activities of daily living, he was still able to cook, shop, and mow the lawn, though he has to let his arm rest when mowing. With the help of his wife, he was able to dress like Santa Claus, as well as carry and deliver presents to children.

After he was informed that he needed to see an orthopedist, Petitioner asked to be referred to Dr. Lee in Effingham. He thought Respondent was setting up the appointment with Dr. Lee. Ms. Johnson referred him to Dr. Keener instead because of "word of mouth from some other people." Petitioner had been taking Flexeril for years, because of his knees.

Petitioner first saw Dr. Keener in early March. Dr. Keener "probably misunderstood" him when he noted that he reported the accident within a few days and had been taken off work. Dr. Keener mistakenly indicated he had the accident on October 21st; Petitioner corrected him at the next visit. He described his work activities to Dr. Keener, to the extent he asked. He reviewed Dr. Keener's notes.

On redirect examination, Petitioner testified his prior workers' compensation claim against Respondent involved an amputation of a portion of a pinky finger, which was reattached. He did not hire a lawyer for that claim. He had no problem mowing his yard prior to the accident and he did not have to stop unless he wanted to drink a beer. Prior to the accident, he had no difficulty pushing a shopping cart. He was not written up for not immediately reporting the shoulder injury. Respondent's policy of immediately reporting minor injuries is not practical; "it's not what people do there."

Mr. Toby Lee Peterson was called to testify by Respondent for which he worked for 16 years. For almost a year, he has been lead supervisor of the bead room. On October 11, 2021 he was transitioning, simultaneously training his replacement while being trained for his new position. Reports of accidents come to him. Employees are instructed to report injuries to health services. Thereafter, an e-mail is sent to all parties that needed the information. After a report of accident/injury there is almost always an investigation to see if the accident/injury could have been prevented.

Mr. Peterson was familiar with the job duties of both trucker and bead winder. He was informed that Petitioner had reported injuring his shoulder three weeks after the alleged occurrence. Thereafter, an investigation was performed. No action was taken to correct any issue with the floor. Since he has been supervisor there had never been any remediation to the floor in that area and no other employee has reported an injury to their shoulders from pulling those bead racks.

Mr. Peterson was familiar with Petitioner and considered him a good worker. He would be on the floor daily and see Petitioner perform his duties. Employees have come to him reporting a strain or a pain. To his recollection, Petitioner never came up to him and told him he hurt his shoulder. Also to best of his knowledge, Petitioner did not report having issues with his shoulder between October 11, 2021 and November 1, 2021. Petitioner was not reprimanded because of his job performance during that time. While Mr. Peterson was watching Petitioner he did not notice him performing his work any differently before the alleged accident and after.

On cross examination, Mr. Peterson testified he was shift floor supervisor before he was bead room lead supervisor. He was in that position for six years which also included supervising the bead room. He believed Petitioner was honest and hard working. He would see Petitioner working daily because his machine was right on the aisle way. Petitioner would have been at the machine or on a walkie.

Mr. Peterson noted he was not looking for anything out of place and was not scrutinizing Petitioner. Currently, he supervised 106 employee. At that time they had about 25 employees on the shift. While he would see Petitioner daily, he did not have any idea about the specific dates.

Findings of fact – Documentary/Medical evidence

On November 1, 2021, Petitioner reported in an incident report that during the week of October 11, 2021, at an unknown time, he sustained injury to his left shoulder "moving full bead racks & full spools of wire, felt a pop and some pulling in [his] left shoulder and shoulder blade area." He described the injury as pulled left shoulder. Petitioner indicated that in order to prevent the accident they needed "better wheels on the racks on smoother floors." On the Form 45 filed on the same day, LPN Grogan noted that Petitioner reported pulling full racks of beads and rolling the spools of wire on October 11, 2021 when he felt a pop and pain in his left shoulder.

On November 4, 2021, Petitioner presented to NP Hartman at the Heartland Regional Occupational Health for left shoulder pain. Occasionally, the pain in the shoulder shot down into the upper arm and into the elbow. He reported an accident that occurred on October 11th in which he felt a pop/pain in his shoulder "pulling full racks of beads and rolling [these] pools of wire." He had to push/pull "full bead reacts which can weigh as much as 1,500 pounds and stools of wire that [weigh] as much as 1,100 pounds."

Petitioner reported no previous shoulder injury, but his statement of events indicated he injured his left shoulder 20 years previously. He also had carpal tunnel surgery in 2002 and radial tunnel surgery in 2003. Ms. Hartman noted limited range of motion in the shoulder and tenderness over the AC joint. She referred Petitioner to progressive health for shoulder pain, advised Petitioner to use ice/heat/non-steroidal inflammatory medications, and restricted him to a five-pound lifting restrictions with the left hand.

Petitioner returned on November 18, 2021, and reported continued pain, severe at times, in the back of the shoulder radiating down to the fingers. He had four therapy sessions with progressive health with no change in pain. They recommended imaging and continued physical therapy. Ms. Hartman referred Petitioner for "MRI/X-rays" and continued work restrictions. Petitioner reported no benefit at the next visit and Ms. Hartman ordered an MRI. The MRI of the left shoulder taken on January 5, 2021 showed "glenohumeral arthrosis with labral degeneration *** in association with some manifestation of chondral loss and some manifestations of chondral calcinosis."

Petitioner returned for review of MRI results and continued to report pain in the shoulder and weakness in the left arm. He wore the sling at work, took it off at home, but avoided activity or use of the left arm. Ms. Hartman informed Petitioner that the MRI showed some arthritic/degenerative changes in his shoulder. She continued current work restrictions and advised Petitioner that once he was referred to a specialist, he would no longer be seen at Heartland. Petitioner stated he wanted to be referred to Dr. Lee (or Leigh) in Effingham.

On March 2, 2022, Petitioner presented to Dr. Keener for evaluation of his left shoulder. He reported "he was pulling on a heavy rack of wire which was caught on the ground. These can weigh over several [thousands of pounds] and felt a painful pop in his shoulder." After physical therapy did not help he had an MRI and was unable to return to work. In late January he was informed workers' compensation no longer accepted the claim and to not return to work until medically cleared. He had some "mild activity related pain in his left shoulder prior to this injury but nothing this severe." Petitioner was ambidextrous but mostly wrote with the right hand.

Dr. Kenner noted that MRI showed "moderate-to-severe glenohumeral joint arthritis, mild osteophytosis around the joint, and diffuse labral fraying." Rotator cuff tendons were intact. He advised Petitioner that the work injury did not cause his arthritis but "probably aggravated" it. He concluded that Petitioner had not completed conservative treatment. He administered an injection and put him back in physical therapy for range of motion and gentle strengthening. He told Petitioner that they really could not perform elective surgery until "there is some dedicated weight loss."

Petitioner returned on April 13, 2022, reporting the shoulder did not respond to the injection physical therapy/medication and he had continued pain. Medication and physical therapy seemed to help a little. Petitioner believed his scapular pain was related to his "lifting injury at work" and had not improved a lot since the accident. He was off work but receiving no workers' compensation benefits. Dr. Kenner believed the majority of his symptoms were related to periscapular muscle pain. He recommended continued physical therapy and referred him to a physiologist to consider trigger point injections. He noted that shoulder replacement was not indicated at that time, based on the degree of arthritis and the lack of response to the glenohumeral injection. He also recommended Petitioner remain off work.

Two weeks later, Petitioner presented to Dr. Metzler for left shoulder blade pain. It began on October 11th, he was injured at work, and felt a pop. He had some paresthesias but that that had decreased. The pain was worse with walking, driving, standing, shopping, showering, and mowing the lawn. It was improved with heat, muscle relaxants and rest. He was 5'8" and 327 pounds. X-rays showed mild left AC and moderate glenohumeral arthritis. Dr. Metzler diagnosed left shoulder/scapular pain, possible cervical radiculopathy, and possible myofascial pain. He ordered a cervical x-rays/MRI to rule out cervical disc herniation. An MRI taken on April 25, 2022 showed only mild degenerative changes.

On May 25, 2022, Petitioner returned to Dr. Keener who noted the MRI ruled out cervical radiculopathy. He had a series of trigger point injections from Dr. Metzler a week previously. Petitioner reported nothing else provided as good pain relief, but he was concerned it was wearing off. He had localized pain in the shoulder/periscapular area but no numbness/tingling in his fingers. Dr. Kenner recommended an image guided glenohumeral injection which might help his rehabilitation. He put a 10-pound lifting/pushing/pulling, restriction below shoulder level, with no overhead lifting at all.

Findings of Fact – Doctor Depositions

Dr. Keener testified by deposition on July 8, 2022. He was an orthopedic surgeon who specialized in shoulder and elbow conditions/reconstruction. He was familiar with Dr. Paletta, who performed a Section 12 medical examination on Petitioner. Dr. Keener does not perform IMEs in either personal injury or workers' compensation claims.

He first saw Petitioner on March 2, 2022. Petitioner reported he was in his normal state of health when he suffered an injury to his left shoulder in October 2021. He was pulling on a heavy rack of wire which was caught on the ground and felt a painful pop in his shoulder with some numbness/tingling. He reported the accident a few days later. He had some physical therapy, which did not help. He was informed workers' compensation was no longer accepting the claim and to not return to work until he was "feeling better."

On examination, Petitioner exhibited reduced active/passive range-of-motion and shoulder pain, but he had reasonable strength. Dr. Kenner noted that MRI showed moderate-to-severe glenohumeral joint arthritis, mild osteophytosis around the joint, and diffuse labral fraying, which was consistent with glenohumeral arthritis. He thought the MRI also showed inflammation. He diagnosed shoulder pain of multiple etiologies. He offered Petitioner an injection and physical therapy. Because he did not respond particularly well to the injection, Dr. Kenner believed his symptoms were related to periscapular muscle pain.

Dr. Kenner referred Petitioner for possible trigger point injections. He last saw Petitioner on May 23, 2022. Petitioner had trigger point injections and felt better and his range-of-motion was better. However, he was concerned the effects were wearing off. He generally relied on the interpretations of MRIs made by his partners such as Dr. Metzler. When asked whether Petitioner did anything to make Dr. Kenner believe he was not being honest, he responded he was "a little suspicious" about his reduced range-of-motion based on the severity of his arthritis.

Dr. Kenner testified that the fact that Petitioner continued to work three weeks after the accident would not change his causation opinion; "most people" "wait a few days and see if it gets better." Dr. Kenner "would expect somebody with his injuries to be able to continue to carry on for at least a while."

Dr. Kenner was asked about the opinion of Dr. Paletta that he did not believe Petitioner's condition was related to his work because of the lack of evidence of inflammation or swelling on the MRI. He responded that Dr. Paletta was correct, if one attributes his symptoms to arthritis, or periscapular muscle pain. Inflammation of that muscle would not show up in an MRI at all.

Dr. Kenner was then asked whether the MRI taken January 5th showed evidence of acute injury, he responded he did not review the MRI but his recollection was that the report indicated that the majority of findings were consistent with chronic conditions. Petitioner did not have any treatment for arthritis prior to the accident, to the best of Dr. Kenner's knowledge.

Dr. Kenner explained that he believed Petitioner had three pain generators: the glenohumeral joint, which he did not believe was aggravated by the accident; the AC joint which he believed was likely exacerbated by the accident "given the inflammation on the MRI;" and periscapular muscle pain, which "could very easily be caused by the traction injury at work and not show up on the MRI." He would expect to continue seeing inflammation on an MRI, if that continued causing him pain.

On cross examination, Dr. Kenner testified according to his history, Petitioner had the accident on October 21st and reported it on November 1st. Dr. Kenner reiterated that Petitioner reported he was pulling heavy racks of beads and wires which got caught on the floor and that Petitioner reported the racks can weigh "over several thousand pounds." He agreed that he assumed the racks were on wheels and he actually was not lifting the thousands of pounds. He did not know the force Petitioner used or the angle of his shoulders when he was pulling. He could not recall any of Petitioner's general work activities.

Dr. Kenner agreed that Petitioner was right-handed and the injury was to his left shoulder. He agreed that Petitioner did not report any injury to his right shoulder. Dr. Kenner agreed that it was his impression that Petitioner was taken off work on November 1st when he reported the accident. Petitioner's report of some mild activity-based pain would not surprise him based on his arthritis. He also noted that 60 to 70% of patients who had dislocations 15 to 20 years previously will show arthritis on MRI. He agreed that Petitioner was not asymptomatic prior to the accident. Arthritis can cause bone spurs. Weight can adversely affect posture and cause periscapular pain.

Dr. Kenner testified Petitioner's lack of response to the glenohumeral joint injection indicated to him that the glenohumeral joint was not the source of his pain. He did not believe there was a cervical component to Petitioner's condition, but Dr. Metzler is very thorough and ordered the cervical MRI on his own. Dr. Kenner did not review Dr. Paletta's IME report or his deposition testimony.

On redirect examination, Dr. Kenner testified that at his initial examination, Petitioner reported moderate pain aggravated with movement. The tingling he initially reported was gone. He had "some mild activity-related pain prior to this injury, but nothing this severe."

Dr. Paletta testified by deposition on May 6, 2022. He is a board-certified orthopedic surgeon specializing in treatment of conditions of the shoulder, elbow, and knee. At the request of Respondent, he performed a Section 12 medical examination on Petitioner's left shoulder, reviewed some medical records, and issued a report. Petitioner reported injuring his left shoulder on or about October 11, 2021 while working for Respondent as a bead winder. He stated he was moving a bead rack while standing, with his arms between waist and chest height, and the floor of the plant was "somewhat irregular, and there is sometimes little what he called potholes, and the wheels of these bead racks sometimes get stuck."

On the day of the accident he reported that a bead rack got stuck and when he tried to pull it, he felt a pop in his left shoulder. He also mentioned other maneuvers he had to perform. "So [Petitioner] was attributing it in part to moving this bead rack and in part to spinning these spools." He did not report performing any overhead work and all was at chest-level or below.

Petitioner reported he did not report the accident until November 1, 2021, which was confirmed by the medical records. It was the understanding of Dr. Paletta that Petitioner worked full duty between October 11, 2021 and November 1, 2021. He had no indication that Petitioner was wearing a sling while working during that period. Dr. Paletta then summarized treatment records to date. Petitioner had been treated conservatively with anti-inflammatories, activity modification, job restriction, and physical therapy without benefit. There were discussions/recommendations regarding injections (presumably the trigger point injections) of the shoulder.

On examination, Petitioner reported mild pain, 2-3/10 pain in the shoulder/shoulder blade, but it could reach 10/10 "even just walking around." Initially, he had some numbness/tingling, but that had resolved. He was not taking prescription medication for his shoulder. Petitioner reporting dislocating the shoulder when he was 30, which was about 20 years earlier. That injury certainly possibly increased the risk of developing osteoarthritis, though he was taking Meloxicam for arthritis. Petitioner also had arthritis issues with his knees.

Petitioner exhibited reduced range-of-motion of the left shoulder with pain with both active/passive motion and had some crepitus. Otherwise, the examination was normal and he had normal rotator cuff strength. X-rays showed moderate osteoarthritis of the glenohumeral joint. The MRI taken January 5, 2022 showed moderately severe arthritis, with severe cartilage thinning, and apparently full-thickness loss in some areas. He had some osteophytes, edema/inflammation in the socket, and irregularities in the labrum but no tear. The MRI results were consistent with a diagnosis of osteoarthritis and with chronic degeneration; he saw no acute pathology.

Dr. Paletta explained the criteria he used to conclude that all the pathology was chronic. He noted the diffuseness of the cartilage wear, the formation of osteophytes, which take years to develop, and the lack of evidence of focal inflammation/swelling/edema. After his examination, Dr. Paletta diagnosed symptomatic moderate-to-severe osteoarthritis of the left glenohumeral joint and that no causal relationship exited between his work injury and his condition of ill-being. He also noted Petitioner's confusion about the date/time of the accident concerned Dr. Paletta because a patient with that severe arthritis would remember an event which caused an increase of pain to 10/10 "even with walking." He was also skeptical that a patient reporting as severe symptoms as Petitioner would be able to continue to perform the type of job he was performing for three weeks.

Dr. Paletta explained that when he stated in his report that he agreed with Dr. Keener's opinion on causation, he was referring to Dr. Keener's opinion that the accident did not cause Petitioner's underlying arthritis. He acknowledged that Dr. Keener opined that the accident probably aggravated the condition, but that was an opinion with which Dr. Paletta did not agree. He again noted the lack of any imaging that was consistent with any recent injury that would qualify as an aggravation. Dr. Paletta believed Petitioner may need prospective treatment, but the need for any such treatment was not related to the work-related injury. He also believed that Petitioner could work with the restrictions of no lifting above shoulder-level or anything overhead. However, once again, such restriction was not caused by the work injury.

On cross examination, Dr. Paletta agreed the Form 45 indicated that Petitioner initially thought he suffered a strain/pulled muscle and experienced pain thereafter. However, Petitioner reported the moderate-to-severe pain did not resolve over time. Dr. Paletta believed Petitioner was honest with him and he saw no indication in the records of any doctor believing him to be untruthful.

Dr. Paletta believed the treatment Petitioner received was necessary and reasonable, Dr. Paletta saw no evidence of prior treatment of the left shoulder, and Petitioner reported he was asymptomatic prior to the accident. Dr. Paletta testified he actually toured Respondent's facility about five years previously. He reiterated that it was his opinion that the accident in no way accelerated Petitioner's condition or the need for treatment. Dr. Paletta opined that based on the severity of Petitioner's arthritis, "he was going to need treatment at some point."

On redirect examination, Dr. Paletta agreed he testified that Petitioner reported he was asymptomatic prior to the accident. However, he was directed to Dr. Keener's initial note from March 2, 2022 in which he reported shoulder symptoms prior to October 11, 2021. Dr. Paletta referred to the dislocation 20 years earlier and "some mild activity-related pain in his left shoulder prior to this injury."

On re-cross examination, Dr. Paletta reiterated that Petitioner reported mild pain, 2-3/10 pain in the shoulder/shoulder blade, but it could reach 10/10 even just walking around. He did not ask Petitioner whether he changed the manner in which he worked after the accident.

Conclusions of Law

In finding Petitioner did not sustain his burden of proving accident, the Arbitrator noted that it was not clear from the evidence when the accident actually occurred. He noted Petitioner's uncertainty about the exact date/time of the accident, the lack of any witnesses and he did not report the accident until 21 days after the incident, which was not in compliance with Respondent's policies. Finally, he noted that Petitioner did not mention that the racks had gotten stuck until he first saw Dr. Keener. The Arbitrator also noted that Mr. Peterson testified that there were no defects in the floor where the accident allegedly occurred.

Petitioner argues the Arbitrator erred in not finding accident. He disputes the Arbitrator's assertion that he did not mention anything about problems moving the racks due to the floors, noting that he reported that the accident could have been avoided with smoother floors and better wheels. He notes that his testimony was not rebutted and Respondent did not present any evidence of the condition of the floor.

The Commission finds that Petitioner sustained his burden of proving he sustained a compensable accident on October 11, 2021 and reverses the Decision of the Arbitrator on that issue. First, overall the Commission finds Petitioner credible. The Arbitrator may be correct that Petitioner did not initially mention to his treaters that the rack got stuck until he first saw Dr. Kenner. However, he specifically noted in his incident report, executed prior to any treatment was rendered, that the accident/injury could have been prevented with "better wheels on the racks on smoother floors." In addition, no treater or Dr. Paletta found Petitioner to be untruthful or malingering, though it is possible that he may have somewhat overstated the level of his pain.

We do not find the delay in reporting the accident to be as consequential as did the Arbitrator. He testified credibly that he did not consider the injury to be serious initially and/or in need of treatment. He only believed the injury to be serious when it did not improve after a couple of weeks, at which time he tried to trace back to the likely date of the accident. Petitioner also explained that in reality Respondent's requirement to report injuries immediately is impactable for what are deemed minor injuries. Under the circumstances the delay in reporting and the uncertainty in the exact date of the incident in understandable and does not disqualify his claim.

Once the Commission has found Petitioner sustained his burden of proving accident, we must then address the issue of causation. The Arbitrator found Petitioner did not prove causation to his current condition of ill-being based on his interpretation that the causation opinions of Dr. Paletta more persuasive than those of Dr. Keener. He observed that Dr. Keener's opinions were equivocal and based on an inaccurate timeline, while Dr. Paletta based his opinions on his interpretation of the MRI that showed no acute or recent injury. Petitioner argues the Arbitrator erred in not finding causation. He stresses that the Arbitrator erred in finding Dr. Paletta more persuasive than Dr. Keener because Dr. Keener was Petitioner's treater more concerned with treatment than finding inconsistencies in his statements. In addition, Petitioner argues the Commission should reverse the Decision of the Arbitrator based on a chain-of-events analysis.

The Commission concludes that Petitioner had significant pre-existing osteoarthritis in his left shoulder, as he did in other joints in his body. Nevertheless, we find that the accident on October 11, 2021, at least aggravated his condition necessitating treatment. That was the opinion of Petitioner's treater, Dr. Kenner. In addition, in Dr. Paletta's testimony when he was asked whether the accident could have aggravated the arthritis, he answered, no, because "he would have needed treatment for his arthritis at some point." The Commission interprets that testimony to suggest that the injury may have accelerated the need for treatment, which in itself is sufficient to establish causation to his current condition of ill-being.

In addition, the Commission agrees with Petitioner that the chain-of-event analysis supports causation. Stated simply, the record indicates that Petitioner had minimal symptoms in his left shoulder and was able to perform his work activities without difficulty prior to the accident. However, after the accident his symptoms increased, he had difficulty performing his job activities, and he sought medical treatment. Therefore, based on the entire record before us, the Commission finds that Petitioner sustained his burden of proof that the accident aggravated Petitioner's underlying condition and accelerated the need for treatment.

After the Commission has found a compensable accident, *i.e.* accident and causation of a current condition of ill-being, the Commission must award benefits. The Arbitrator did not address the issues of temporary total disability benefits and medical expenses because those issues were moot based on his findings that Petitioner neither proved accident nor causation. The Commission notes that both Dr. Kenner and Dr. Paletta opined that the medical treatment Petitioner received was both necessary and reasonable. Therefore, the Commission awards the medical expenses incurred to date and submitted into evidence.

On the issue of temporary total disability benefits, Petitioner seeks such benefits for a total of 25&6/7 weeks from January 27, 2022 through the date of arbitration, July 26, 2022 because Respondent did not accommodate the restrictions imposed on him by his medical providers. The Commission agrees with the Petitioner's analysis on the issue of temporary total disability benefits, and awards the benefits Petitioner requests.

Although he did not preserve the issue, Petitioner argues the issue of credit in his brief. The Arbitrator awarded Respondent $10,626.18 in credit for paid short-term disability benefits. He noted that Respondent tendered payment records which showed short-term benefits paid with withheld federal and state taxes deducted. However, he noted that the gross amount of $12,214.71 included $533.52 in regular wages. The Arbitrator deducted that amount and arrived at a credit of $10,626.18. In the body of the Decision, the Arbitrator noted that pursuant to *Navistar International Transportation Corp. v. I.C.C*, 734 N.E.2d 900 (1st Dist. 2000), federal and state taxes must be deducted from the amount of gross non-occupational benefits paid to Petitioner. However, the decision only referred to taxes and gave no additional guidance on whether FICA and Medicare deductions should also be deducted. He declined to do so.

Petitioner argued before the Arbitrator and now before the Commission, that the Arbitrator should have deducted the FICA/Medicare withholding as well and that Respondent should be given credit in the amount of $9,889.07, which was the benefit he actually received. Respondent argues the Arbitrator was correct in awarding the credit after deducting withheld state and federal taxes. It stresses that "Petitioner has provided no case law to establish FICA and Medicare should be deducted when calculating an 8(j) credit."

The Commission agrees with Petitioner's argument and reduces the credit to $9,889.07, or the amount Petitioner actually received. The *Navistar* Court noted that the issue was one of 1st impression and interpreted the statute to allow credit for the amount actually paid to the employee. The Appellate Court found that the award of credit with state/federal taxes deducted was not against the manifest weight of the evidence. FICA and Medicare withholding are considered taxes, and the Commission sees no reason why such withheld "taxes" should not be deducted from the award of credit.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August, 29, 2022, is hereby reversed and the Commission finds that Petitioner sustained his burden of proving a compensable accident on June 6, 2021, which caused the current condition of ill-being of his left shoulder.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner total disability benefits of $614.80 per week for 24&6/7 weeks, from April 24, 2021 through February 25, 2022, that being the period of temporary total incapacity for work pursuant to §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the necessary and reasonable services submitted into evidence, pursuant to §8(a), subject to the applicable medical fee schedule in §8.2 of the Act.

IT ISFURTHER ORDERED BY THE COMMISSION, that in no instance shall this award be a bar to subsequent hearing and determination of any additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit of $9,889.07 for paid non-occupational disability benefits.

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:
O-11/15/23

DLS/dw
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	21WC017187
Case Name	Benito Fuentes v. Ferrara Candy Company
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0005
Number of Pages of Decision	19
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Matthew Jones
Respondent Attorney	Jim Magiera

DATE FILED: 1/8/2024

/s/Carolyn Doherty, Commissioner

Signature

STATE OF ILLINOIS)	☐ Affirm and adopt (no changes)
) SS.	☐ Affirm with changes
COUNTY OF)	☐ Reverse
COOK)	
	☒ Modify Credits

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

BENITO FUENTES,

Petitioner,

vs. NO: 21 WC 17187

FERRARA CANDY COMPANY,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under Section 19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, prospective medical care, and temporary total disability, and entitlement to a credit under section 8(j) of the 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 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 writes additionally on the issue of temporary total disability to clarify that the benefit rate is $791.45 per week, based on the stipulated average weekly wage of $1,187.18.

The Commission also modifies the Decision of the Arbitrator to award Respondent a credit under section 8(j) of the Act for $1,297.89 as stipulated in the Request for Hearing, and a $15,353.36 credit for medical payments already made, as Petitioner agreed in its response brief.

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 15, 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 Petitioner temporary total disability benefits of $791.45 per week for 92 and 6/7ths weeks, commencing June 1, 2021, through March 13, 2023, 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 that Respondent is entitled to a credit under Section 8(j) of the Act in the amount of $1,297.89, as stipulated by the parties in the Request for Hearing. Respondent shall hold Petitioner harmless from any and all claims by any providers of the services for which Respondent is receiving this credit as provided in Section 8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit of $15,353.36 for medical expenses previously paid.

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

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

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

Bond for the removal of this cause to the Circuit Court is hereby fixed at the sum of $37,200.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

January 8, 2024

o: 12/21/23
CMD/kcb
045

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

/s/ *Marc Parker*
Marc Parker

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC017187
Case Name	Benito Fuentes v. Ferrara Candy Company
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	16
Decision Issued By	Antara Nath Rivera, Arbitrator

Petitioner Attorney	Matthew Jones
Respondent Attorney	Jim Magiera

DATE FILED: 5/15/2023

THE INTEREST RATE FOR THE WEEK OF MAY 9, 2023 4.89%

/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
19(b)

BENITO FUENTES,
Employee/Petitioner

v.

FERRARA CANDY COMPANY,
Employer/Respondent

Case # **21** WC **017187**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Antara Nath Rivera**, Arbitrator of the Commission, in the city of **Chicago**, on **March 13, 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, **May 20, 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 $**61,733.36**; the average weekly wage was $**1,187.18**.

On the date of accident, Petitioner was **43** years of age, ***married*** with **1** dependent children.

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

Respondent shall be given a credit of $**39,798.63** 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 all reasonable and necessary medical services, pursuant to the medical fee schedule and as outlined in PX 1, PX 2, PX 3, PX 4, PX 5, and PX 6, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall authorize and provide payment for the right peroneal nerve peripheral nerve stimulator as recommended by Dr. Mohiuddin, as provided in Section 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner TTD benefits commencing on June 1, 2021, through March 13, 2023, representing 92 6/7 weeks, as provided in Section 8(b) of the Act.

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

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

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

MAY 15, 2023

Signature of Arbitrator
ICArbDec19(b)

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Benito Fuentes,	)	
	)	
Petitioner,	)	
v.	)	Case No. 21 WC 017187
	)	
Ferrara Candy Company,	)	
	)	
Respondent.	)	

FINDINGS OF FACT

This matter proceeded to hearing on March 13, 2023, in Chicago, Illinois before Arbitrator Antara Nath Rivera on Petitioner's Petition for Immediate Hearing under Section 19(b) Issues in dispute include Petitioner's current condition of ill-being, temporary total disability, medical bills, and prospective medical. (Arbitrator's Exhibit ("AX") 1A)[1]

Accident

Benito Fuentes ("Petitioner") testified that he worked for Ferrara Candy Company ("Respondent"), as a forklift operator, for 20 years before the accident date of May 20, 2021. (Transcript "T." 15-16) He testified that his job duties required him to constantly get in and out of the forklift, lift products with the forklift, and enter information on the products. (T. 16) Petitioner testified that from time to time he would carry covers that weighed between 10-15 pounds. *Id*.

Petitioner testified that he was scheduled to work on May 20, 2021, on second shift, from 12:30 pm until 10:30 pm. (T. 16-17) Petitioner testified that he normally parked close, due to having a handicap parking permit, but when he arrived on that day, he was told by the security guard to park farther away where there was available space. (T. 17; 46) Petitioner testified that after he parked his car, he walked on the pathway that people normally walked. *Id*. Petitioner testified that the parking lot had train tracks. *Id*. Petitioner testified that he did not realize the deterioration of the pavement until one of his feet landed on one of the tracks. (T. 17-18) Petitioner testified that that was when he injured his knee. (T. 18)

Petitioner testified that when his left foot "fell inside" the track, he fell forward on the ground, his right foot twisted, and was stuck in that position. (T. 18-19) Petitioner testified that he had to get fellow

[1] It should be noted that the parties submitted an "Amended Illinois Workers' Compensation Commission Request for Hearing" after proofs were closed. Arbitrator's Exhibit 1 was amended for a limited purpose whereas the parties agreed to amending line 9, TTD credit for Respondent, from $37,798.63 to $39,798.63. As such, the amended Request for Hearing will be made part of the record and referred to as Arbitrator's Exhibit 1A.

coworkers to help him get up because his foot was stuck in the railway tie and he couldn't get up due to pain in his right leg, foot, and ankle. (T. 18-19)

Petitioner testified that on May 21, 2021, he woke up with pain in his ankle and an upset stomach due to the medication he was given. (T. 21) Petitioner testified that that his right foot and ankle pain was different than his "prior issues" as his ankle pain was constant pulsing. (T. 24) Petitioner testified that the pain worsened when he put weight on it. *Id*. Petitioner testified that he did not have any right ankle pain prior to the accident. (T. 24)

Petitioner testified that he was scheduled for work on May 21, 2021. (T. 24) Petitioner testified that he went to work and worked within his restrictions. *Id*. Petitioner worked light duty up until June 1, 2021. *Id*. Petitioner testified that that during this time period, he had constant pain in his right foot and ankle. (T. 25) He also felt weakness in the muscle area because he wasn't working them or exercising them. *Id*. Petitioner testified that that he continued to use crutches. *Id*. Petitioner testified that that after June 1, 2021, light duty work was no longer available and he began to receive workers' compensation benefits. (T. 25-26)

Summary of Medical Records

Petitioner testified that he was sent to Concentra Medical Center, on May 20, 2021, at the request of his employer, and examined by Dr. Robin Glueckert. (T. 19-20; Petitioner's Exhibit ("PX") 1) Petitioner reported a pain level of 10/10 in his right ankle and left knee, with the right ankle being worse than the left knee. (PX 1) During the physical examination, Dr. Glueckert noted tenderness over the medial left knee, limited range of motion, tenderness, and swelling in the lateral malleolus of the right ankle. (PX 1 at 110) Dr. Glueckert diagnosed Petitioner with a right ankle strain and left knee contusion, placed Petitioner on light duty work restrictions, and recommended physical therapy. (PX 1 at 111-112; T. 20) Petitioner was restricted to occasional walking with crutches, weight bear as tolerated, refrain from driving and sitting 60% of the time. (PX 1 at 112) Petitioner testified that he did not return to work that day as he did not leave Concentra until 11:30 p.m. (T. 20)

On May 21, 2021, Petitioner began physical therapy at Concentra. (PX 1 at 88-90) Petitioner completed a course of physical therapy at Concentra from May 21, 2021, through June 23, 2021. *Id.* Petitioner testified that he did not notice any improvement during this time. (T. 26)

On June 2, 2021, Petitioner presented to Dr. Stanley Simon, M.D., at Concentra. (PX 1 at 113) Dr. Simon noted that Petitioner's knee pain was improving and that the severity of the pain was mild. *Id.* Dr. Simon indicated that Petitioner's right ankle pain was "throbbing in nature" and that the pain was moderate. *Id.* Dr. Simon diagnosed Petitioner with right ankle strain and contusion of the left knee. *Id.*

On June 9, 2021, Petitioner presented to Dr. Simon. (PX 1 at 116) Dr. Simon opined that Petitioner could work the entire shift with modified work activity and that Petitioner should wean off the crutches. (PX 1 at 120) Dr. Simon recommended that Petitioner continue physical therapy. (PX 1 at 119)

On June 15, 2021, Petitioner presented to his primary care doctor, Dr. Amado Rueda. (PX 2; T. 26) Petitioner reported pain in his right ankle due to a fall on May 20, 2021, and difficulty walking. (PX 2 at 30) Dr. Rueda diagnosed Petitioner with "pain in right ankle and joints of right foot." (PX 2 at 28)

On June 23, 2021, Petitioner again presented to Dr. Rueda. (PX 2 at 25-26) Petitioner reported his pain level was 8/10, that he was unable to bear any weight on his right foot, and that he still used crutches. *Id*. Dr. Rueda recommended an MRI of his right ankle and referred to an orthopedic surgeon for evaluation. (PX 2 at 25) Also, on June 23, 2021, Petitioner's physical therapist instructed to non-weight bear and use crutches. (PX 1 at 19)

On July 9, 2021, Petitioner underwent an MRI at Hawthorne Works Medical Imaging. (PX 3 at 9-10) The MRI revealed partial tear of the anterior talofibular ligament; sprain of the deltoid ligament; appearance of a chronic avulsion fracture fragment; minimal ankle joint effusion; and ganglion cyst along the dorsolateral margin of the navicular. *Id*. ATF ligament was consistent with a sprain and there was no evidence of bony contusions or osteochondral injury to the ankle joint. (PX. 3 at 4)

On July 20, 2021, Petitioner presented to Dr. Nicolas Anderson at Orthopaedic Associates of Riverside. (PX 3 at 4-7) Dr. Anderson reviewed the MRI and diagnosed Petitioner with an attenuated ATF ligament and ankle sprain. *Id*. Dr. Anderson continued his recommendation of a CAM boot, due to the amount of pain, sedentary work restrictions, and physical therapy. (PX 3 at 4-7; T. 28)

On July 27, 2021, Petitioner presented to Dr. Rueda to review the MRI results. (PX 2 at 20) Dr. Rueda noted that the MRI of the right foot indicated a right talofibular ligament partial tear. *Id*.

Petitioner testified that over the next month of physical therapy at Athletico, he noticed improvement. (T. 28-29; PX 5) Petitioner testified that during therapy when he worked the muscles and moved them, it hurt a lot, however but the next day, it would feel better and that while the pain never went away, "[t]he pain got better." (T. 29) Petitioner completed a course of physical therapy at Athletico from August 26, 2021, through May 31, 2022. (PX 5)

On August 30, 2021, Petitioner telephoned the office of Dr. Anderson and informed he was told that he needed to return to work on September 2, 2021, and requested to see Dr. Anderson sooner than his current appointment of September 21, 2021. (PX 3 at 34) Petitioner stated he would like to undergo an additional injection because his last injection helped him. *Id*.

On September 3, 2021, Petitioner saw Dr. Anderson and received an injection to the right ankle. (PX 3; T. 29) He subsequently received additional injections on September 16, 2021, and October 12, 2021. (PX 3; T. 30) Petitioner testified that the injections helped but he remained off from work as light duty was not available. *Id*.

On September 10, 2021, Petitioner followed up with Dr. Rueda and reported that his right ankle pain was worse following physical therapy. (PX 2 at 11) Diagnosis was right ankle pain and he was instructed to continuing wearing a special boot and to use crutches to aide with ambulation. (PX 2 at 12) Dr. Rueda recommended that Petitioner was to remain off from work unless he was accommodated with a sitting job. *Id*.

On September 16, 2021, Petitioner returned for follow up with Dr. Anderson and reported that the cortisone injection was helpful and that it decreased his pain. (PX 3 at 48) Dr. Anderson administered another corticosteroid injection. *Id*. Dr. Anderson continued to recommend physical therapy and work restrictions. *Id*.

On October 18, 2021, Petitioner presented to Dr. Ari Kaz, an orthopedic surgeon, at the Illinois Bone & Joint Institute. (PX 4) Petitioner reported significant right ankle pain and weakness, with radiating pain down the fifth metatarsal region. (PX 4 at 17) Dr. Kaz diagnosed Petitioner with neurogenic pain of the right ankle and peroneal nerve injury. (PX 4 at 2-3) Petitioner testified that Dr. Kaz recommended an EMG and ultrasound of the right foot and ankle and continued Petitioner's light duty restrictions. (PX 4, p. 18; T. 31)

On January 11, 2021, Petitioner underwent the EMG of his bilateral lower extremities, with the neurologist's impressions being right peroneal nerve palsy and motor sensory neuropathy, predominantly motor. (PX 4) EMG of both upper extremities showed denervation activities in the right anterior tibial and extensor hallucis muscles (PX 4 at 25) NCV of the left peroneal and both tibial nerves were slow with low amplitude responses and there was no response from right peroneal nerve. *Id*. NCV of both sural nerves were normal with low amplitude responses. *Id*. The report indicated as such: "[i]mpression: Compatible with #1 right peroneal nerve palsy #2 motor sensory neuropathy, predominantly motor. Patient has history of tumor resection close to the lumbar spinal cord. …. He has allodynia on touching the lateral aspect of the right ankle. I suspect he had a focal complex regional pain here related to the trauma of the right ankle." *Id*.

On January 31, 2022, Petitioner returned to Dr. Kaz to discuss his results. (PX 4; T. 31) Dr. Kaz reviewed the ultrasound which included the presence of osteopathy noted within the ATFL. (PX 4) Dr. Kaz continued Petitioner's sedentary work restrictions throughout his treatment of Petitioner. *Id.*

On February 21, 2022, Dr. Kenneth Candido performed a Section 12 Independent Medical Examination ("IME"). (Respondent's Exhibit "RX" 1) Petitioner reported the May 20, 2021, accident and

reported a pain level of 5/10 at rest, a pain level of 9/10 on a bad day for his right ankle pain, and difficulty moving around the house. (RX 1 at 10-11) Petitioner also reported that he was depressed and wanted to have surgery because he is suffering economically and wanted to go back to work. (RX 1 at 11) Dr. Candido noted hypesthesias on the tibial nerve distribution. (RX 1 at 20) Dr. Candido noted that Petitioner had prior history of spinal tumor removal which resulted in bilateral weakness in the lower extremities. (RX 1 at 34)

Dr. Candido diagnosed Petitioner with "right ankle sprain or strain" superimposed upon a chronic neuromuscular and musculoskeletal condition of the right and left lower extremities due to a spinal tumor. *Id*. Dr. Candido opined that Petitioner's subjective complaints did not match the objective findings but did note that the ankle sprain may have led to the neuropraxia of the tibial, a stretch injury of the small nerves of the right foot and ankle, which would resolve over time without treatment. (RX 1 at 34-36) Dr. Candido found the treatment to be reasonable and necessary to date, placed Petitioner on temporary and sedentary work restrictions for the next three months. (RX at 36-37) Dr. Candido also opined that treatment had not been successful in the resolution of Petitioner's symptoms due to the absence of legitimate diagnosis related to the work injury. *Id*. Dr. Candido recommended Petitioner be limited to sedentary work with limited standing and ambulation, lifting of no more than 20 lbs. and no use of stairs. *Id*. Dr. Candido further opined that Petitioner would be at maximum medical improvement ("MMI") within the next three months. *Id*.

On June 20, 2022, Petitioner presented to Dr. Shoeb Mohiuddin at Regenerative Spine & Pain. (PX 6) Petitioner reported a pain level of 8/10 in his right lateral ankle, weakness in right foot, and a history consistent with the testimony at trial. (PX 6 at 1) During the physical examination of the right ankle, Dr. Mohiuddin noted positive pain elicited with inversion/eversion. (PX 6 at 3) Dr. Mohiuddin noted that Petitioner has history of spine surgery in past with weakness in legs but was working normal duty prior to the work accident. (PX 6 at 6) Dr. Mohiuddin diagnosed Petitioner with an injury of the right leg peroneal nerve at the lower leg level, neuralgia, neuritis, and right foot pain. (PX 6 at 14) Dr. Mohiuddin recommended a right peroneal nerve peripheral nerve stimulator, under a 60 day trial, and placed Petitioner off work. *Id*. Dr. Mohiuddin made the same recommendation on August 9, 2022, after a follow up visit. (PX 6 at 20)

On September 25, 2022, Dr. Candido authored an addendum report. (RX 2 at 35-39) In the addendum report, Dr. Candido found Petitioner to be at MMI, no further treatment was reasonable or necessary, and that Petitioner could return back to his regular full duties based on the job description. *Id*.

On January 24, 2023, Petitioner followed up with Dr. Mohiuddin and complained of pain in his right ankle. (PX 6) Dr. Mohiuddin noted that the EMG findings were compatible with right peroneal palsy, motor sensory neuropathy. *Id*. Dr. Mohiuddin continued to recommend the right peroneal nerve peripheral nerve stimulator and placed Petitioner off work. *Id*. Petitioner testified that he wants to have the stimulator. (T. 33)

Petitioner's Current Condition

Petitioner testified that prior to the accident on May 20, 2021, he had spine surgery which was performed more than 20 years prior. (T. 21) Petitioner testified that the surgery was performed to remove a tumor in his lumbar spine. (T. 22) Petitioner denied having any ongoing symptoms or problems with his right leg leading up to the date of accident but then confirmed medical records indicated that there were some numbness issues prior to the date of accident. *Id*. Petitioner testified that the sensation was in both of his feet and was from his waist down. *Id*. Petitioner testified that throughout the 20 years he worked for Respondent, he was able to work, without issue, as a forklift driver. (T. 23-24) Petitioner testified that the tumor surgery had nothing to do with "weak" feet or twisted feet. (T. 44-46) Petitioner testified that he even got a lot of recognition from his bosses because he was told that he was doing a good job. (T. 23)

Petitioner testified that after the accident, his pain was different, the pain was a constant, pulsing pain throughout his right ankle. (T. 24) Petitioner testified that prior to the work accident, he did not have pain in his right ankle. *Id*. Petitioner testified that he worked light duty from May 21, 2021, through June 1, 2021, for Respondent. (T. 25) Petitioner testified that as he was working during the week after the work accident, he felt constant pain and weakness in his right ankle. *Id*. Petitioner testified that he is still using crutches. *Id*. Petitioner testified that light duty was no longer available at Respondent after June 1, 2021. (T. 25-26)

Petitioner testified that he wants to proceed with the nerve stimulator recommended by Dr. Mohiuddin. (T. 33) Petitioner testified that is depressed and wants the ability to support his family as he did prior to the work accident.[2] (T. 33-34; 55-56) Petitioner testified that he continues to feel constant pulsing pain above two inches above the ankle bone. (T. 35) Petitioner testified that that the soft brace he was wearing over his sock on his right ankle had been provided by Dr. Anderson. (T. 36-37) Petitioner testified that the brace provided a pressure and support for his ankle. (T. 37) Petitioner testified that Dr. Anderson recommended the wrap and Dr. Mohiuddin stated he could continue to use it. (T. 43) Petitioner testified that that Dr. Mohiuddin told him that the wrap would help with pain. (T. 44) Petitioner testified that at night he removed the wrap to sleep and sometimes he would wake up with pain every so often. (T. 44)

Petitioner testified that that prior to the accident he did not use a brace or crutches and he never felt pain in his ankle because his ankle was not injured. (T. 38) He testified that that he did not have pain going into his toes prior to the accident. (T. 39) Petitioner testified that "[b]efore I had a normal life. I was able to do my duties, my job." (T. 38) Petitioner testified that that currently he depended on his crutches a lot and he could not be without them. (T. 39)

[2] The Arbitrator noted that Petitioner became emotionally overwhelmed when discussing his current condition.

Petitioner testified that he was not currently working and his employment was terminated on March 13, 2022. (T. 39) Petitioner testified that he worked light duty until June 1, 2021, has not worked since that date, and was not currently receiving workers' compensation payments. (T. 24; 40; 53-54)

Testimony of Mandee Delso

Respondent's witness, Mandee Delso, testified that she was employed as the Environmental Health and Safety Manager at Respondent's Itasca plant and that she had been employed there for three years. (T. 58) She testified that she was familiar with Petitioner because he used to work at that plant. (T. 58-59) She testified that that she saw Petitioner using a cane coming to or leaving work, on occasion, at the facility and prior to the accident on May 20, 2021. (T. 59) Ms. Delso testified that in the weeks leading up to the accident she observed Petitioner using a cane to enter and exit the parking lot. (T. 60)

Ms. Delso testified that that light duty seated work was available to Petitioner for approximately two weeks after the accident and he completed the work. (T. 59-60) She testified that after the two weeks, the light duty seated work was no longer available. (T. 60) Ms. Delso also testified that she was there the day of the accident, that she spoke to Petitioner the day the incident occurred, and that she has no other knowledge of Petitioner's condition other than what he reported on the accident date. (T. 63)

Deposition of Dr. Shoeb Mohiuddin

On November 10, 2022, Dr. Shoes Mohiuddin testified regarding his treatment of Petitioner and his opinions related to causation and medical. (PX 7) Dr. Mohiuddin testified that he is board certified in anesthesiology and certified in pain management. (PX 7 at 7) Dr. Mohiuddin testified that he treats nerve pain and performs installation of spinal cord stimulators. (PX 7 at 9) Dr. Mohiuddin testified that when he saw Petitioner on June 20, 2022, it was 13 months post-accident, and that he was complaining of right ankle pain. (PX 7 at 13) Dr. Mohiuddin indicated that he reviewed the EMG report, which showed right peroneal nerve palsy. *Id*. Dr. Mohiuddin testified that nerve palsy is a "sign of nerve injury itself," which can be exhibited through symptoms such as foot drop or pain on the lateral side of the foot. (PX 7 at 14)

Dr. Mohiuddin testified that the EMG findings correlated with Petitioner's subjective complaints and physical examination findings as Petitioner was "reporting pain with motion of his foot, and then he additionally is reporting ongoing right-sided lateral ankle pain." *Id*. Dr. Mohiuddin testified that Petitioner had attempted conservative care for over a year, was still suffering from 8/10 right ankle pain, so they discussed possibility of a peripheral nerve stimulation. (PX 7 at 15) He testified that that he believed Petitioner's nerve palsy was caused by the work accident as opposed to Petitioner's prior spinal injury due to Petitioner's subjective reporting before and after his work accident. (PX 7 at 28, 37)

Dr. Mohiuddin testified that he reviewed Dr. Candido's report in that Dr. Candido diagnosed Petitioner with neuropraxia. (PX 7 at 15) Dr. Mohiuddin testified that he was able to rule out neuropraxia

as a diagnosis because neuropraxia would have resolved within months. (PX 7 at 16-17) Dr. Mohiuddin testified that he was able to distinguish Petitioner's ongoing right ankle complaints and nerve injury from the weakness in his legs related to the removal of the spinal tumor as follows: "[t]his guy. . . has a spinal cord injury 20 years ago, and then you establish what baseline functions are, and. . . what he's been doing and how he's been living his life. And then. . . this new injury and where is that. So basically this guy has some residual weakness in his legs, but. . .he's still working normally. . . . And then he goes into this parking lot, injures his right ankle, and now he just has right ankle pain." (PX 7 at 18)

Dr. Mohiuddin testified that he recommended the 60-day peripheral nerve stimulator, which would be implanted in the leg around the peroneal nerve. (PX 7 at 21) Dr. Mohiuddin testified that the goal for the stimulator is to "disrupt the pain" and potentially provide fifty percent relief at least. (PX 7 at 23) Dr. Mohiuddin testified that the hope was that Petitioner would have significant improvement from the stimulator and then potentially return to work within a few weeks. (PX 7 at 25) Dr. Mohiuddin testified he took Petitioner off work in the June of 2022 visit, because Petitioner was having difficulty walking and ability to stand. (PX 7 at 26) Dr. Mohiuddin testified that he did not note any symptom magnification or malingering. (PX 7 at 27)

Deposition of Dr. Kenneth D. Candido

On February 23, 2023, Dr. Kenneth Candido testified regarding his examination of Petitioner and his opinions contained in his IME reports. (RX 4) Dr. Candido is a Professor of Clinical Surgery and Anesthesiology at University of Illinois at Chicago, certified and licensed since 1987. (RX 3) He is board certified in anesthesiology through the American Board of Anesthesiology and has attained "added qualifications in pain medicine." (RX 4 at 9)

Dr. Candido testified that it was his understanding Petitioner's accident occurred on May 20, 2021, and he had reviewed Petitioner's medical records. (RX 4 at 11-12) Dr. Candido testified that, with respect to his February 21, 2022, IME, he reviewed the MRI of the right ankle, which showed a chronic ankle sprain. (RX 4 at 12-13) Dr. Candido testified that chronicity means it has been there longer than three or four months. (RX 4 at 13-14) Dr. Candido testified that his review of the EMG report coincided with the neurologist in that it showed peroneal nerve palsy and motor sensory neuropathy. (RX 4 at 18) Dr. Candido testified that that the ultrasound performed on December 22, 2021, showed angulated osteophytes. (RX 4 at 20) The osteophyte "was found deep to the anterior talofibular ligament and the lateral malleolar attachment." *Id.*

Dr. Candido testified that his physical examination of Petitioner showed longstanding reduction in muscle tone on the right foot, lack of range of motion of both feet, and hypesthesias (reduction in appreciation of touch) of the right foot. (RX 4 at 24) Dr. Candido testified that he diagnosed Petitioner with neuropraxia, which is stretching of the nerve. (RX 4 at 25) Dr. Candido testified that Petitioner did not have axonotmesis (nerve is partially cut) or neurotmesis (nerve is totally severed). (RX 4 at 26) Dr.

Candido testified that these conditions would be seen on the ultrasound or EMG. (RX 4 at 27) Dr. Candido testified that Petitioner did not meet the criteria for CRPS. (RX 4 at 28) Dr. Candido testified that at the time of the initial IME, Petitioner did require temporary restrictions. (RX 4 at 29)

Dr. Candido testified that in his addendum report, dated September 25, 2022, Petitioner did not require any further work restrictions. (RX 4 at 29) Dr. Candido testified that a nerve stimulator is not necessary for neuropraxia. (RX 4 at 30-31) Dr. Candido testified that neuropraxia, "statistically speaking," should heal on its own. (RX 4 at 30) Dr. Candido testified that Petitioner did not require a nerve stimulator as neuropraxia can be treated with injections and topical agents. (RX 4 at 32-33)

Dr. Candido testified that Petitioner's work accident could have at least caused neuropraxia. (RX 4 at 40) Dr. Candido testified that in Petitioner's case, his neuropraxia could potentially take two years to resolve, but that it should resolve. (RX 4 at 42) Dr. Candido testified that his opinion that Petitioner's neuropraxia should resolve was based on statistics. (RX 4 at 42-43)

Dr. Candido testified that Petitioner would understand his baseline function in the twenty years since he had the spinal tumor removal. (RX 4 at 47) Dr. Candido testified that Petitioner was working full duty prior to the work accident. *Id*. Dr. Candido testified that Petitioner was not able to work full duty following the work accident. (RX 4 at 48) Dr. Candido testified that Petitioner would have reached MMI by the time of his addendum report. (RX 4 at 48-49)

CONCLUSIONS OF LAW

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

Decisions of an Arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e) The burden of proof is on a claimant to establish the elements of his right to compensation, and unless the evidence considered in its entirety supports a finding that the injury resulted from a cause connected with the employment, there is no right to recover. *Board of Trustees v. Industrial Commission*, 44 Ill. 2d 214 (1969)

Credibility is the quality of a witness which renders his evidence worthy of belief. The Arbitrator, whose province it is to evaluate witness credibility, evaluates the demeanor of the witness and any external inconsistencies with his testimony. Where a claimant's testimony is inconsistent with his actual behavior and conduct, the Commission has held that an award cannot stand. *McDonald v. Industrial Commission*, 39 Ill. 2d 396 (1968); *Swift v. Industrial Commission*, 52 Ill. 2d 490 (1972)

It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence and assign weight to witness testimony. *O'Dette v. Industrial Commission*, 79

Ill.2d 249, 253, 403 N.E.2d 221, 223 (1980); *Hosteny v. Workers' Compensation Commission*, 397 Ill. App 3d 665, 674 (2009) Internal inconsistencies in a claimant's testimony, as well as conflicts between the claimant's testimony and medical records, may be taken to indicate unreliability. *Gilbert v. Martin & Bayley/Hucks*, 08 ILWC 004187 (2010)

In the case at hand, the Arbitrator observed Petitioner during the hearing and finds him to be a credible witness. Petitioner was calm, well-mannered, and composed. The Arbitrator compared Petitioner's testimony with the totality of the evidence submitted and did not find any material contradictions that would deem the witness unreliable.

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

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).

The Arbitrator notes that Petitioner was diagnosed with a right ankle strain and left knee contusion, by Dr. Glueckert, and placed on light duty work restrictions, and recommended physical therapy. (PX 1 at 111-112; T. 20) The Arbitrator notes that Dr. Simon diagnosed Petitioner with right ankle strain and contusion of the left knee. (PX 1 at 113) The Arbitrator notes that Dr. Rueda diagnosed Petitioner with "pain in right ankle and joints of right foot." (PX 2 at 28)

The Arbitrator notes that Dr. Rueda noted that the MRI of the right foot indicated a right talofibular ligament partial tear. (PX 2 at 20) The Arbitrator notes that Dr. Anderson reviewed the MRI and diagnosed Petitioner with an attenuated ATF ligament and ankle sprain. (PX 3 at 4-7) The Arbitrator notes that Dr. Anderson administered three separate injections to the right ankle due Petitioner's complaints of pain. (PX 3; T. 29) The Arbitrator notes that Petitioner testified that the injections helped but he remained off from work as light duty was not available. (T. 30)

The Arbitrator also notes that Dr. Kaz diagnosed Petitioner with neurogenic pain of the right ankle and peroneal nerve injury. (PX 4 at 2-3) The Arbitrator notes that Dr. Mohiuddin diagnosed Petitioner with an injury of the right leg peroneal nerve at the lower leg level, neuralgia, neuritis, and right foot pain. (PX 6 at 14) Dr. Mohiuddin continued to recommend the right peroneal nerve peripheral nerve stimulator. *Id.*

The Arbitrator notes that Petitioner testified that after the accident, his pain was different and that the pain was a constant, pulsing pain throughout his right ankle. (T. 24) The Arbitrator notes that Petitioner testified that prior to the work accident, he did not have pain in his right ankle. *Id*. The Arbitrator notes that Petitioner testified that "[b]efore I had a normal life. I was able to do my duties, my job." (T. 38) The Arbitrator notes that Petitioner testified that he continues to feel constant pulsing pain above two inches above the ankle bone. (T. 35) The Arbitrator notes that Petitioner testified that he wants to proceed with the nerve stimulator recommended by Dr. Mohiuddin. (T. 33) The Arbitrator notes that Petitioner testified that is depressed and wants the ability to support his family as he did prior to the work accident. (T. 33-34; 55-56)

Based on the Petitioner's testimony and supporting medical records, the Arbitrator finds that Petitioner's current condition of ill-being, with respect to his right foot and ankle, is causally connected to the May 20, 2021, work-related accident.

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

Under Illinois Law, the Respondent is required to pay for all necessary medical services which are reasonably required to cure and relieve the effects of an accidental injury sustained by petitioner which arises out of and in the course of employment. *Elmhurst Memorial Hospital v. Industrial Comm'n*, 323 Ill.Apat3d 758, 764 (2001) The Petitioner only has entitlement to recover medical expenses which are found to be reasonable and causally related to the work injury. *Id*. at 764-765.

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).

As the Arbitrator found that Petitioner's current condition of ill-being was causally connected to the work-related accident, the Arbitrator finds that the following medical treatment and services Petitioner received were reasonable and necessary. (PX 1, PX 2, PX 3, PX 4, PX 5, and PX 6)

The Arbitrator notes that the medical opinions and treatment plans set forth in the medical records from Dr. Simon, Dr. Rueda, Dr. Anderson, Dr. Kaz, and Dr. Mohiuddin are credible and appropriate for his work-related injuries. The Arbitrator also notes that Dr. Candido diagnosed Petitioner with a chronic ankle sprain and that Dr. Candido found the treatment, to date, to be reasonable and necessary. (RX 4 at 12-13) (RX at 36-37)

Based on the above, the Arbitrator finds that Respondent shall pay all reasonable and necessary medical services, pursuant to the medical fee schedule and as outlined in PX 1, PX 2, PX 3, PX 4, PX 5, and PX 6, as provided in Sections 8(a) and 8.2 of the Act.

WITH RESPECT TO ISSUE (K), WHETHER PETITIONER IS ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, AS RELATED TO 18WC011359 AND 18WC011360, THE ARBITRATOR FINDS AS FOLLOWS:

As the Arbitrator found that Petitioner's current condition of ill-being, with respect to his right foot and ankle, was causally related to the injuries sustained on May 20, 2021, and that medical services provided, thus far, were reasonable and necessary, the Arbitrator finds that the Petitioner is entitled to the right peroneal nerve peripheral nerve stimulator as recommended by Dr. Mohiuddin. (PX 6)

The Arbitrator notes that Dr. Mohiuddin diagnosed Petitioner with a right peroneal nerve injury, confirmed by the EMG, and testified that he was recommending the nerve stimulator to "disrupt the pain." (PX 7 at 23) The Arbitrator notes that Dr. Mohiuddin testified the goal of the stimulator is to provide Petitioner with at least fifty percent relief, ideally more. *Id*. The Arbitrator notes that Dr. Mohiuddin testified that the purpose of implanting the stimulator is also to get Petitioner back to work. (PX 7 at 24) The Arbitrator notes that Petitioner testified that he wishes to proceed with the stimulator so that he can return back to work and provide for his family.

As such, the Arbitrator finds that Respondent shall authorize and provide payment for the right peroneal nerve peripheral nerve stimulator as recommended by Dr. Mohiuddin, as provided in Section 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 the Arbitrator found that Petitioner's current condition of ill-being was causally connected to the work-related accident, the Arbitrator finds that Petitioner is entitled to receive TTD benefits. The Arbitrator notes that Petitioner was initially placed on work restrictions by Concentra on May 20, 2021. The Arbitrator notes that Petitioner testified that that after June 1, 2021, light duty work was no longer available and that he began to receive workers' compensation benefits. (T. 25-26) The Arbitrator notes that Petitioner testified that he was not currently working and his employment was terminated on March 13, 2022. (T. 39) The Arbitrator notes that Petitioner testified that he has not worked since June 1, 2021, and was not currently receiving workers' compensation payments. (T. 24; 40; 53-54)

Thus, having previously found that Petitioner's current condition of ill-being was causally related to his work injury, the Arbitrator finds that Respondent shall pay Petitioner TTD benefits commencing on June 1, 2021, through March 13, 2023, representing 92 6/7 weeks, as provided in Section 8(b) of the Act.

It is so ordered:

Arbitrator Antara Nath Rivera

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC015637
Case Name	Melissa Drone v. State of Illinois - Vienna Correctional Center
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0006
Number of Pages of Decision	30
Decision Issued By	Kathryn Doerries, Commissioner, Amylee Simonovich, Commissioner

Petitioner Attorney	Thomas C Rich
Respondent Attorney	Kenton Owens

DATE FILED: 1/8/2024

/s/Kathryn Doerries, Commissioner
Signature

DISSENT: /s/Amylee Simonovich, Commissioner
Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse Other-explain*	☐ Second Injury Fund (§8(e)18)
*Causal Connection; Medical; modify TTD	☐ PTD/Fatal denied
☐ Modify Choose direction	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MELISSA DRONE,

Petitioner,

vs. NO: 20 WC 015637

VIENNA CORRECTIONAL CENTER,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses and prospective medical, causal connection, temporary disability, and the nature and extent of the injury, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below, reverses the Arbitrator's Conclusions of Law on causation relative to Petitioner's lumbar spine condition, reverses the Arbitrator's award of medical expenses related to Petitioner's lumbar spine treatment and lumbar spine prospective medical, and modifies the Arbitrator's award of temporary total disability (TTD) and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission affirms and adopts the Arbitrator's Procedural History and Statement of Facts, however, views the evidence differently than the Arbitrator and, therefore, reverses or modifies the Arbitrator's Conclusions of Law regarding Issues (F), (J), (K) and (L) as set forth below.

Regarding Issue (F), the Commission reverses the Arbitrator's finding that Petitioner's lumbar spine condition is causally related to the work accident of June 3, 2020, and therefore, further reverses the Arbitrator's award of past and prospective medical expenses related to the Petitioner's lumbar spine condition including the surgery Petitioner underwent on January 20, 2021, and modifies the award of medical and TTD. In doing so, the Commission strikes the Arbitrator's Conclusions of Law and substitutes the paragraphs designated below for Issues (J), (K) and (L).

The Commission modifies Issue (F), the first heading under the Arbitrator's Conclusions of Law on page 8 by striking the words "his" and "neck" and substituting the words "her" and "lumbar spine" respectively. The new heading now reads as follows:

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

The Commission further modifies the Arbitrator's Conclusions of Law under Issue (F) by striking everything after the second paragraph on page nine through the last paragraph under Issue (F) on page 10 and substituting the following paragraphs:

The Commission, however, does not find that the subject accident aggravated or accelerated Petitioner's pre-existing condition. In arriving at this conclusion, the Commission analyzed the record regarding the evidence of Petitioner's pre-existing lumbar spine condition and treatment, plus examined the totality of the evidence in the record.

In 2008, Petitioner injured her low back. (RX8) An arbitration hearing proceeded pursuant to §19(b) on April 16, 2009, and a Decision was entered on May 26, 2009. *Id.* The Arbitrator noted that Petitioner underwent a lumbar spine MRI on November 7, 2008, which confirmed L3-4 minimal bilateral foraminal disk bulges causing minimal bilateral foraminal narrowing, L4-5 minimal concentric disk bulge causing minimal bilateral foraminal narrowing, L5-S1 minimal posterior disk bulge does not contact the S1 nerve roots of the thecal sac. *Id.* Petitioner treated with Dr. Matthew Gornet on January 19, 2009, when Dr. Gornet noted the MRI Scan revealed the possibility of subtle annular tear at L5-S1 and he recommended a further new high quality MRI scan. *Id.*

The Arbitrator's Decision notes that on March 2, 2009, Dr. Gornet felt the possibility of a subtle annular occult lesion at the L5-S1 level was still present and also a possible subtle disc lesion at L4-5. *Id.* Dr. Gornet recommended steroid injections on the left side and a CT discogram if Petitioner had not improved. Dr. Gornet noted that as far as her clinical presentation she was still having low back pain, Dr. Gornet wanted to see a series of injections, two or three, and then if Petitioner was not improved, a CT discogram. Petitioner testified she was in need of and desired medical care from Dr. Gornet. The Arbitrator found that Petitioner's condition of ill-being, that being of an injury at L4-5 and L5-S1 causally related to the 2008 work accident and awarded the treatment as recommended by Dr. Gornet. *Id.* Dr. Gornet testified that he last treated Petitioner

for the 2008 accident in 2011. (PX12, 38) The workers' compensation case was settled in 2012. (RX9)

Petitioner had a subsequent, non-work related injury to her lumbar spine in 2018 when she fell backward on her low back at Sam's Club. (T. 13-14) She treated with Dr. Gornet until the time of her June 3, 2020 accident at work. (T. 14) Petitioner testified that Dr. Gornet has been her doctor for going on 13 years. (T.1 5) Petitioner testified that she and Dr. Gornet had discussed surgery after the Sam's Club incident but that she was trying to avoid surgery if possible. (T. 16)

The medical records from the treatment Petitioner underwent after the 2008 and 2018 accidents were not submitted into evidence.

On June 18, 2020, Petitioner saw Dr. Gornet for the first time after the June 3, 2020, work accident, marked as "Follow-up Visit." (PX3, 2) The Commission notes that this "follow-up" is in reference to the 2018 treatment. Petitioner also reported the June 3, 2020, fall. Under the section "Radiographs and Tests" Dr. Gornet notes that he reviewed a new June 18, 2020, lumbar spine MRI scan, which revealed "disc pathology and annular tear on the right side at L3-4 as well as what may be a focal tear centrally at 5-1. To me there is not a big change on this MRI compared to her previous scan of 7/26/18." *Id.*

On September 22, 2020, Petitioner underwent a two level lumbar discogram per Dr. Gornet's referral, administered and interpreted by Dr. Matthew Ruyle. (PX8) Petitioner's baseline pain was noted to be across her low back, greater left than right, radiating into the left buttock. Her baseline pain was noted to be 6/10 in severity before beginning the procedure. The technique localized only two discs, L4-L5 and L5-S1, the same two discs Dr. Gornet had suspected had lesions in 2009 and were notably contemplated in his 2018 treatment plan documented on February 6, 2020. Both levels exhibited concordant pain characterized as "identical with a portion of her procedure symptoms." Dr. Ruyle outlined his Impression:

> 1) L4-L5: This is a positive level. The patient experienced severe low back pain to the left of midline at 9/10 in severity, identical with a portion of her preprocedure symptoms. Images demonstrate a left foraminal full thickness annular tear with contrast extravasation into the left L4 perineural space and left sided epidural space.
> 2) L5-S1: This is a positive level. The patient experienced a moderate degree of central low back pain, 6/10 in severity, and identical with a portion of her preprocedure symptoms. Images demonstrate both anterior and posterior Dallas grade 2 to 3 internal annular fissures/tears. No full-thickness annular tear or contrast extravasation into the epidural space are observed.

On November 30, 2020, Dr. Gornet documented that Petitioner "continues to be symptomatic with symptoms, particularly left buttock, left hip and left leg. These are symptoms that began after a fall of May 25, 2018. We were working her up for surgical treatment and then she had a subsequent fall of 6/3/20. I believe this probably aggravated her underlying condition,

but prior to this, we were already talking about surgery." (PX3, 4) Dr. Gornet's tentative plan was disc replacement at L3-4 and L4-5. He noted that the discogram was "negative at L5-S1, although she did have some pain present there. She understands the MRI spectroscopy is an augment to some of our surgical thinking and we have talked about this today." *Id.*

Dr. Gornet testified that he performed an MRI spectroscopy in 2019. He testified, "it had—in 2019, it had increased chemicals at L4-5. L3-4 was moderate." (PX12, 30) Dr. Gornet then testified that "MRI spectroscopy is no different than discogram; you have to take the information. What it does tell us is she had objective chemicals that could cause back pain at L4-5 in 2019." (PX12, 31) When he saw her on February 6, 2020, she was going to need a disc replacement at L3-4. (PX12, 31) Dr. Gornet further testified, that he was thinking "she would need at least L3-4, possibly L5-S1."

Dr. Gornet testified that Petitioner underwent a discogram in 2019. (PX12, 29) He further testified, "we just did L3-4, and I think I was trying to do L5-S1, but for whatever reason I couldn't do it." *Id.*

Dr. Gornet testified to his thoughts and plan for disc replacement surgery during his February 6, 2020, office visit:

A.Yes. I said--I am thinking she would need at least L3-4, possibly L5-S1.

Q. And then you also considered another discogram for L4-5 and L5-S1?

A. Yes. Again, with trying to see whether L5-S1 was indeed part of her back pain, using potentially L4-5 as a negative control.

Q. And you noted that she continued to have significant symptoms but continued to work as a supply supervisor.

A. She continued to have significant symptoms, which affected her quality of life, but she was working full duty. That is correct.

***

Q. Oh, I'm sorry. Regardless of the June 3rd, 2020, accident, was she going to need disc replacement at L3-4?

A. My opinions was that I thought that she had a structural problem present there, but she was working with it.. But that was what was being considered. Yes, sir. (PX12, 31-33)

Dr. Gornet testified his plan at the time of the February 6, 2020, office visit was to "again probably send her to Matt Ruyle for exactly what I ultimately sent her for, discography, L4-5 and L5-S1. I -my note says she continues to have significant complaints, which affect her quality of life, and I said that exam is nonfocal, we would move forward with further testing. So that was what was written on the note of 2-6-20." (PX12, 38-39)

Dr. Gornet testified that on September 10, 2020, he wanted to do a discogram at L4-5 and

L5-S1, with the understanding that L3-4 was already considered painful. (PX12, 30)

Dr. Gornet testified that before the subject work accident Petitioner's pain was left buttock, left hip pain and low back pain. (PX12, 34) He testified that his note of June 2020 stated she reported low back pain central to her upper lumbar spine, radiates to both sides, left greater than right. *Id.*

Regarding the surgery, Dr. Gornet testified that there was a tear in the disc at L3-4 and a small herniation in the tear on the right side at L3-4. At L4-5, there was a large right-sided tear and left-sided tear he felt were significant.

Dr. Michael Chabot evaluated Petitioner twice pursuant to §12. Dr. Chabot issued opinion contemporaneous reports as a result of these §12 evaluations performed on February 10, 2021, and July 22, 2021. (RX1, RX2) Petitioner completed a form called Spine Questionnaire. On the form dated July 22, 2021, when asked how long her problem had been present, Petitioner responded "2-3 years" indicating since her 2018 accident. (RX3, DepX4)

On February 10, 2021, Dr. Chabot notes that Petitioner gave him a history of seeing Dr. Gornet prior to the subject work accident for back pain complaints. (RX1, 1) Petitioner reported to Dr. Chabot that Dr. Gornet diagnosed her with two torn discs from the 2018 accident. She talked about surgery with Dr. Gornet during the time of the 2018 treatment. Petitioner reported to Dr. Chabot that she was getting ready for surgery, but then COVID-19 hit in 2020. She stated that she delayed any surgical intervention and returned to work regular duty. *Id.*

The February 10, 2021, report chronicles the medical records he reviewed in conjunction with his clinical and physical evaluation of Petitioner. In answer to questions posed, Dr. Chabot opined the records document that Petitioner sustained a strain/contusion injury to the lumbar spine as a result of the June 3, 2020, accident. With regard to whether or not the medical treatment to date has been reasonable and necessary, Dr. Chabot opined, that "[t]he MRI study fails to reveal any evidence of significant pathology that can be directly related to her alleged injury of June 3, 2020. The CT discogram results from Dr. Ruyle are not available for review. Dr. Gornet mentioned results of other diagnostic studies performed working this patient up for the same complaints associated with the prior injury from 2018. I do not have records that document the results of those prior studies that he performed. According to Dr. Gornet, she had positive concordant pain with injections at all three lumbar levels, which would suggest that the control level was never found. It is unclear just how Dr. Gornet selected the L3-4 and L4-5 levels as the levels to undergo the disc replacement procedure. Without the additional medical records, it would be difficult for me to suggest that the disc replacement procedure performed at L3-4 and L4-5 was reasonable and necessary, especially in light of reviewing an MRI, which for all intents and purposes, is normal for her age." (RX1, 5-6)

Dr. Chabot's July 22, 2021, opinion report includes a review of Petitioner's past treating records. (RX2) One entry reviewed was a note from Dr. Granberg to Dr. Gornet dated March 20,

2009, indicating he had evaluated Petitioner and noted that her MRI revealed multilevel degenerative changes at L4-5 and L5-S1. She had an ESI at L4-5 on March 20, 2009, without complication. In a note from Dr. Granberg dated April 2, 2009, Petitioner had presented for re-evaluation noting the previous ESI at L4-5. She reported that it did not offer much improvement in her complaints but underwent a second L4-5 translaminar ESI on that date without complication. *Id*. at 3

Dr. Chabot further reviewed records from Dr. Gornet. (RX2, 3-4) Dr. Gornet's July 26, 2018, office notes indicated she presented for re-evaluation and he reported results of her MRI, which revealed evidence of a herniated disc at L3-4, suggestion of an annular tear at L5-S1, small tear extrusion on the left at L3-4. He reviewed her prior MRI from September 15, 2011, and he felt that the pathology at L3-4 was new. The pathology at L5-S1 was unchanged. He felt that the 2018 fall aggravated her pathology at L5-S1 as well as causing a new injury at L3-4. (RX2, 3)

Dr. Gornet's December 13, 2018, office notes indicated Petitioner underwent a steroid injection at L3-4 on October 9, 2018, a TF-ESI at L3-4 on October 23, 2018, as well as L5-S1 on November 6, 2018. She felt that injection helped most. He recommended discogram of the lower three lumbar levels, but recommended she try to live with her symptoms and follow-up in a few weeks. On May 23, 2019, Petitioner reported still having pain in her back and buttocks, more left buttock and hip. Dr. Gornet recommended discograms at L3-4 and L5-S1. He felt that the L4-5 level appeared benign. He recommended MRI Spectroscopy. A post-discogram CT was performed on July 23, 2019, interpreted by Dr. Ruyle. He felt there was evidence of a right foraminal full-thickness annular tear and protrusion at L3-4 resulting in moderate right foraminal stenosis and left far lateral intra-annular contrast at L5-S1. Dr. Chabot noted that the results of this study suggested pathology on the right at L3-4 but the patient's complaints were left-sided. Dr. Chabot documented that Dr. Gornet's July 23, 2019, office note indicated she reported concordant typical pain reproduced with injection at the L3-4 level (even though the annular tear was on the right, not the left.) Dr. Gornet felt there was non-concordant pain reproduction at the L5-S1 level. (RX2, 4)

Dr. Chabot further notes that Dr. Gornet's August 8, 2019, office notes went over the results of the discogram. The MRI spectroscopy revealed increased chemicals at L4-5 of 8.99 and 5.65 at L3-4. L5-S1 did not hit the signal to noise ratio. He noted that the discogram was positive at L3-4 with annular tear (although the annular tear was on the right, not the left.) The L4-5 level was not tested during the discogram. On October 24, 2019 Petitioner returned to Dr. Gornet and he noted that the discogram was provocative at L3-4 with annular tear although Dr. Chabot points out several times the annular tear was on the right, not the left. Dr. Gornet felt the L5-S1 level was non-provocative. *Id.*

Dr. Chabot's report notes that MRI spectroscopy revealed increased chemical signals at several levels. Dr. Gornet suspected that the discogram was false negative at L5-S1. He felt that the disc problems were at L5-S1 and L3-L4. He thought L4-5 were okay, yet Dr. Chabot points out the spectroscopy results revealed increased chemicals at L4-5 of 8.99 and less so at L3-4 of

5.65. Dr. Gornet planned for L3-4 and L5-S1 disc replacement surgery. On February 6, 2020, Dr. Gornet recommended a new MRI and new MRI spectroscopy. He also recommended strongly considering a CT discogram at L4-5 and L5-S1. When it was originally performed it was at L3-4 and L5-S1. He noted she continued to have significant symptoms but she continued to work. (RX2, 5)

Dr. Chabot opined that on the discogram performed after her June 3, 2020, injury, Petitioner had a positive concordant pain response at both the L4-5 and L5-S1 levels. The prior discogram procedure revealed a positive concordant response at the L3-4 level. No control level was ever documented. The decision to perform a surgical procedure at the L3-4 and L4-5 levels with exclusion of the L5-S1 level is unclear, especially based upon the results of the prior discogram/post-discogram CT studies and MRI spectroscopy reports as documented in Dr. Gornet's records. (RX2, 11) Regarding a causal relationship between the patient's current subjective complaints and reported accident, Dr. Chabot noted that she complained of increasing back complaints following her June 3, 2020, injury. Those complaints were non-focal and were essentially the same as they were prior to her accident. Dr. Chabot opined that Petitioner sustained a strain injury to the lumbar spine as a result of her June 3, 2020, accident. He did not believe that she sustained a new intradiscal injury as a result of her June 3, 2020, accident. *Id.*

Regarding whether or not the medical treatment to date been reasonable and necessary, Dr. Chabot would not have recommended surgical intervention on Petitioner. Dr. Chabot's report explained the basis for his reasons. "She had a high level of subjective complaint, which is well documented throughout the medical records and all interventions to date had failed to significantly improve her complaints. The records from Dr. Blake document a history of use of multiple medications to moderate all symptoms. All injections previously performed did not offer any lasting improvement in her complaints. In reviewing the results of the CT discogram and MRI spectroscopy reports, she had concordant pain responses at L3-4, L4-5 and LS-Sl. No control level was ever obtained. In light of these findings, this patient should have been deemed a poor surgical candidate." *Id.*

Dr. Chabot testified on January 14, 2022, and consistent with his opinion reports. (RX3) Dr. Chabot noted Petitioner's history of chronic back complaints, treatment and diagnostics. (RX3, 9-10)

The Commission finds that Petitioner, by her own admission, told Dr. Chabot she was getting ready for surgery, but then Covid-19 hit in 2020. When Dr. Gornet reviewed the MRI taken after the 2018 accident to the post June 3, 2020, MRI, his notes verify that he thought there was "not a big change." (PX3, 2) The Commission concludes that in this case Dr. Gornet's plan of treatment in February 2020, was, by his own admission, the same plan he proceeded under after he saw Petitioner in June 2020.

Further, Dr. Gornet did not credibly testify regarding the importance of the 2019 MRI spectroscopy result of increased chemicals at L4-L5. Further, his testimony that L5-S1 was the

level of concern in February 2020 is simply not credible. The Commission finds Dr. Gornet's testimony lacks credence. The 2019 MRI spectroscopy result infers that L4-L5 was the second level involved after the 2018 accident. Dr. Gornet himself called the result one piece of information. Dr. Gornet had failed to include L4-5 in the 2018 discogram test and he recommended another discogram on February 6, 2020. Dr. Gornet's notes show that he presumed that L5-S1 discogram result in 2019 was falsely negative. His plan on February 6, 2020, was to confirm which of those levels was going to be the second level of disc replacement at the time of surgery and he planned to get a discogram at those two levels, L4-L5 and L5-S1, to determine which level he would choose, along with L3-4, to do a two level disc replacement surgery. Dr. Gornet testified he was planning to use "potentially L4-5 as a negative control." (RX12, 32) Dr. Gornet was asked on cross-examination if he agreed a true control level was never found with the September 22, 2020 discogram study, and he responded, "[n]o, I actually think that L5-S1 acted as predominantly control." (RX12, 36) When asked about the fact that Petitioner complained of six out of 10 concordant pain, he then conceded "he had to look at that to determine whether or not, I felt that was a positive level or not. I concluded it was not; therefore, I concluded that was the control level." *Id.*

However, according to Dr. Chabot, Dr. Gornet had positive pain scores at L3-4, L4-5 and L5-S1 and no control level was found. (RX3, 12) Dr. Chabot testified that "people who have positive pain responses at multiple disc levels, they become less and less likely to benefit from surgical intervention." (RX3, 13) He also explained, "if you don't find a control, you don't know where to stop." *Id.* Dr. Chabot testified further, "[a]nd the more levels that you have a positive response to, the more likely that person has a pain behavior that would also lead to a poorer outcome." (RX3, 13-14) The fact that Petitioner went back to work is not indicative of her future surgical outcome. Dr. Gornet released her to return to work without seeing her in follow-up. Petitioner testified that she had appointments for follow-up with Dr. Gornet. (T. 18-19)

The Commission finds Dr. Gornet's testimony regarding the control levels and dismissal of a positive pain response at the L5-S1 level lacks persuasive value and lends credence to Dr. Chabot's testimony. Further, it is plainly apparent that Petitioner's symptoms were the same pre and post-accident, low back and left greater than right, such that she reported on the Spine Questionnaire on July 22, 2021, that her pain was present 2-3 years.

Therefore, the Commission finds Dr. Chabot more credible than Dr. Gornet in this case and finds that based on the evidence in the record, Petitioner failed to sustain her burden of proving that the work accident was causally related to her lumbar back condition.

The Commission, having affirmed and adopted the Arbitrator's Procedural history, "notes that it appears that both parties' doctors agree that further right shoulder treatment is necessary and causally related to the work accident." Therefore, the Commission finds that the Petitioner's right shoulder condition is causally related to the June 3, 2020, work accident.

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

The Commission adopts the Conclusions in Issue (F) and incorporates those conclusions into this section regarding Petitioner's entitlement to medical expenses incurred with Dr. Gornet. Therefore, based on the Commission's findings regarding causation, the Commission finds that Petitioner's medical treatment with Dr. Gornet after the subject work accident, was not reasonable and necessary or related to the subject work accident.

The Commission finds Petitioner is entitled to reasonable, and necessary medical expenses incurred related to Petitioner's right shoulder.

Issue (K): Is Petitioner entitled to any prospective medical care?

The Commission adopts the Conclusions in Issue (F) and incorporates those conclusions regarding Petitioner's entitlement to prospective medical care. Having found the Petitioner's lumbar spine condition is not causally related to the work accident of June 3, 2020, the Commission declines to award Petitioner prospective lumbar spine medical treatment with Dr. Gornet.

The Commission, however, concludes Petitioner is entitled to future reasonable and necessary medical treatment related to Petitioner's right shoulder as recommended by Dr. Emanuel, pursuant to the provisions in § 8(a) and § 8.2 of the Act..

Issue (L): What temporary benefits are in dispute? (TTD)

The Commission adopts the Conclusions in Issue (F) and incorporates those conclusions regarding Petitioner's entitlement to TTD. The Commission concludes therefore, that Petitioner is not entitled to TTD for the period she was off-work as a result of her non-work related low back condition.

The Petitioner saw Dr. George Paletta on June 10, 2020. He notes that he previously cared for Petitioner in 2015 and 2016 for right shoulder issues and recommended a right shoulder MRI. The Petitioner was noted to have three prior right shoulder surgeries. *Id.* Dr. Paletta also assigned light duty work with restrictions of no reaching cross body and no reaching overhead work, no lifting greater than one pound and no inmate contact. (PX4, 7) There was no testimony regarding whether or not Respondent could accommodate those restrictions. On July 17, 2020, a right shoulder MRI was performed on referral from Dr. Paletta. (PX6)

Petitioner was examined by Dr. James Emanuel at Respondent's request on February 8, 2021, regarding her right shoulder. Dr. Emanuel agreed with Dr. Paletta's treatment plan, however, felt Petitioner was capable of working full-duty without restriction. Petitioner testified that she wished to participate in treatment recommended with Dr. Emanuel or with a different physician for her right shoulder. (T. 12)

The Commission notes that Respondent stipulated that Petitioner is entitled to TTD benefits from June 4, 2020, through September 26, 2021, and that Respondent paid TTD in the amount of $94,677.58. The Commission finds that Respondent is bound by its stipulation. (See *Walker v. Indus. Comm'n* (*AmerenCIPS)*, 345 Ill. App. 3d 1084, 804 N.E.2d 135. Rule 7030.40 is now 9030.40 and in pertinent part states: "[t]he completed Request for Hearing form, signed by the parties (or counsel), shall be filed with the Arbitrator as the stipulation of the parties and a settlement of the questions in dispute in the case.) However, the Commission finds that Dr. Emanuel's opinion was credible regarding a treatment plan and adopts his opinion regarding Petitioner's ability to work regarding her right shoulder pending additional treatment. Therefore, the Commission awards Petitioner TTD benefits from June 4, 202,0 through September 26, 2021.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed on June 13, 2022, is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of reasonable and necessary medical services for Petitioner's lumbar spine outlined in Petitioner's Exhibit 1 is vacated. Respondent shall have credit for any amounts previously paid for the lumbar spine.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of prospective medical treatment for the Petitioner's lumbar spine recommended by Dr. Gornet is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of temporary total disability benefits of $1,003.91/week for 73 5/7 weeks, representing June 4, 2020, through November 1, 2021, is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $1,003.91 per week for a period of 68-4/7 weeks, representing June 4, 2020, through September 26, 2021, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act. This award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay for the reasonable and necessary medical services outlined in Petitioner's Exhibit 1 related to Petitioner's right shoulder condition, 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.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall provide and pay for reasonable and necessary prospective medical treatment related to Petitioner's right shoulder as recommended by Dr. Emanuel.

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

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

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

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

January 8, 2024

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

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

DISSENT

After carefully considering the totality of the evidence, I respectfully dissent from the opinion of the majority and would affirm the Decision of the Arbitrator.

There is no doubt this case involves a Petitioner with a pre-existing low back condition. The record confirms pre-accident pathology at L3-4. The issue presented is whether Petitioner sustained an injury and/or aggravation to L4-5 due to an inmate altercation on June 3, 2020. Dr. Gornet credibly testified that the accident on June 3, 2020 aggravated Petitioner's underlying condition and caused an additional disc injury in her lumbar spine. T. 366. He explained that before the work accident Petitioner was coping with her symptoms, and this injury "tipped her over the edge." *Id*. By contrast, Dr. Chabot opined Petitioner did not sustain a new intradiscal injury. T. 420. He did not appreciate new disc pathology on the MRI. *Id*. He also noted that

while the pre-accident discogram did not test the L4-5 level, the MRI spectroscopy report suggested the presence of a high level of painful chemicals at the L4-5 level. *Id.*

The Commission has consistently ruled against the use of MRI spectroscopy. See *Lewis v. The Ill. Workers' Comp. Comm'n*, 2021 IL App (5th) 200302; *Goldie Cruse v. SOI/Choate Mental Health Center*, 19 IWCC 0419; *Kesha Streater v. Bi-State Development Agency*, 20 IWCC 0034; *Alma Burwell v. Walgreens*, 21 IWCC 0505; *Renaldo Barnett v. SOI/IDOT*, 21 IWCC 0583; *Lachisha M. Salley v. SOI/Choate Mental Health Center*, 21 IWCC 0269; *Jason Cross v. SOI/IDOT*, 22 IWCC 0410; *Joshua Skelly v. Baine Roofing,* 18 IWCC 0110; *Natasha Waddy v. SOI/Choate Mental Health Center*, 23 IWCC 0288; *Jayme Bauer v. SOI/Chester Mental Health Center*, 22 IWCC 0391; *Mark Mitchell v. Darling International*, 23 IWCC 0414; *Felicia Tally-Glispie v. SOI/Warren G. Murray Center*, 19 IWCC 0193; *Aarron Thomas v. Cofco International*, 20 IWCC 0619; *Adam Compton v. City of Herrin Police Dept.*, 17 IWCC 0235.

In fact, in *Susan Pyle v. Hampton Inn*, 21 IWCC 0310, it was noted that Dr. Chabot testified that MRI spectroscopy was not an approved test or procedure in the United States for determining disc pathology. In *Tyres Jones v. American Steel Foundries,*19 IWCC 0259, Dr. Chabot testified the MRI spectroscopy was not accepted in the spine surgeon community as a valid alternative to discography or a diagnostic tool used in conjunction with discography. In *Jamie Schmitt v. Memorial Hospital*, 20 IWCC 0205, this Panel denied payment of Dr. Gornet's MRI spectroscopy based upon Dr. Chabot's testimony that it was for investigational use only and not appropriate for making clinical recommendations.

It is undeniable that Dr. Chabot has a long history of denying the reasonableness of MRI spectroscopy in his testimony in numerous workers' compensation cases. Yet in this case, Dr. Chabot relies on the results of that same diagnostic study for the proposition that Petitioner had a condition at L4-5 prior to her inmate altercation on June 3, 2020. There is no reliable objective evidence to support a finding that Petitioner had a symptomatic condition at L4-5 prior to the inmate altercation on June 3, 2020.

Dr. Chabot's opinion regarding the lack of change in pathology at L4-5 is also not supported by the evidence. While we do not have the pre-accident medical records, Dr. Chabot's July 22, 2021, report indicates that Dr. Gornet interpreted the July 26, 2018, MRI as showing a herniated disc at L3-4, suggestion of an annular tear at L5-S1, and a small tear extrusion on the left at L3-4. T. 412. Dr. Chabot notes that the MRI report indicated minimal disc bulging at L4-5. T. 413.

Dr. Chabot's report also states that the post-discogram CT performed July 23, 2019 showed evidence of a right foraminal full-thickness annular tear and protrusion at L3-4 resulting in moderate right foraminal stenosis; left far lateral intra-articular contrast at L5-S1; no nuclear contrast identified at L5-S1; and there was neither a disc bulge or protrusion nor central canal or foraminal stenosis at that level. T. 413. The L4-5 level was not tested during that procedure. *Id*. The evidence shows that while Dr. Gornet discussed disc replacement procedures at L3-4 and

possibly L5-S1, there was no discussion of surgery at L4-5 prior to the inmate altercation on June 3, 2020. T. 15, 413.

Following the accident, a June 18, 2020 lumbar MRI revealed a central protrusion at L4-5 extending laterally into both foramina resulting in mild bilateral foraminal stenosis. T. 311. During the September 22, 2020 discogram, Petitioner experienced severe low back pain, left greater than right, that she rated at up to 9 out of 10 severity when the L4-5 level was tested. T. 318. The post-discogram CT revealed bilateral L4-5 lateral recess-foraminal protrusions with associated full-thickness annular tears. T. 315. The protrusions measured 2.5-3mm and resulted in mild bilateral foraminal stenosis but no central canal stenosis. *Id*. When Dr. Gornet performed surgery on January 20, 2021, he noted L4-5 had large, significant bilateral annular tears. T. 98. The left tear at L4-5 most significantly correlated with Petitioner's complaints. *Id*.

The physical therapy records also provide evidence of Petitioner's symptomatology at L4-5 following the work accident. The initial examination on June 24, 2020 revealed "+ PA mobilization for symptom reproduction L3-5 and L unilateral PA L4-5." T. 163. On July 14, 2010, the therapist noted "+ PA mobilization for symptom reproduction L4-5 and L unilateral PA L4-5." T. 136. This was reiterated on July 29, 2020 and August 4, 2020. T. 120, 256.

The objective evidence proves a change in the pathology at L4-5 occurred following the June 3, 2020 work accident. Additionally, the evidence shows a functional change in Petitioner following the accident. Dr. Gornet testified that prior to the accident, Petitioner was always able to work full duty. T. 363. Dr. Chabot's report indicates that following Petitioner's pre-accident injury on May 25, 2018, Petitioner saw Dr. Gornet on June 4, 2018, and was authorized to return to work full duty. T. 412. Dr. Chabot likewise notes Petitioner continued working full duty following her visits with Dr. Gornet on July 26, 2018 and December 13, 2018. T. 413. Dr. Chabot does not address Petitioner's work status in his summary of her examinations on May 23, 2019, July 23, 2019, or August 8, 2019. *Id.* Dr. Chabot indicates Dr. Gornet allowed Petitioner to return to full duty on October 24, 2019; however, he makes no reference to her work status following the appointment with Dr. Gornet on February 6, 2020. T. 414.

While the Commission does not have the benefit of reviewing Dr. Gornet's records from prior to the accident, there is no indication in Dr. Chabot's summary of the medical records that Dr. Gornet ever held Petitioner out of work or prescribed light duty restrictions. Furthermore, Petitioner testified that Dr. Gornet never took her off work between her injury in 2018 and the work-related accident of June 3, 2020. T. 14.

Petitioner's declining functional status following the inmate altercation on June 3, 2020 is also demonstrated in the physical therapy records indicating her current safe lifting ability was only 10 pounds. T. 256. She was also unable to perform frequent bending. T. 255. Prior to the accident she was unloading supplies, stacking boxes, and maneuvering pallets with a pallet jack. T. 19. Dr. Chabot noted her position required her to lift up to 25 pounds. T. 407.

Finally, Petitioner's positive result from the lumbar surgery Dr. Gornet performed also supports her claim. Dr. Chabot opined that because a control level was not obtained during the discography, Petitioner should have been deemed a poor surgical candidate. T. 420. He found her prognosis to be guarded and anticipated she would need medications for chronic pain. *Id.* Yet, Petitioner was able to return to full duty work December 6, 2021. T. 18. She testified that prior to the surgery she was "pretty miserable" and "in a lot of pain, to the point to where I would literally lay on the floor with my feet up in the air at points to alleviate the pain." *Id*. Following the surgery, Petitioner testified that she "…can function and do a lot of things that I wasn't able to do, as far as housework, standing, sitting." *Id.* While her pain is not totally gone, "it is much better" and she can manage it with only Tylenol. *Id.*

For these reasons, I find the opinions of Dr. Gornet most credible and would affirm the Decision of the Arbitrator. Dr. Gornet treated Petitioner since 2009. He was in the best position to render opinions regarding the change in Petitioner's lumbar condition following the June 3, 2020 work accident. Moreover, his opinions are supported by the credible evidence.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC015637
Case Name	DRONE, MELISSA v. VIENNA CORRECTIONAL CENTER
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	15
Decision Issued By	Jeanne AuBuchon, Arbitrator

Petitioner Attorney	Thomas Rich
Respondent Attorney	Kenton Owens

DATE FILED: 6/13/2022

THE INTEREST RATE FOR THE WEEK OF JUNE 7, 2022 1.71%

/s/ Jeanne AuBuchon, Arbitrator
Signature

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

June 13, 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)

MELISSA DRONE
Employee/Petitioner

v.

VIENNA CORRECTIONAL CENTER
Employer/Respondent

Case # **20** WC **15637**

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 **February 23, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **6/3/2020**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**78,305.00**; the average weekly wage was $**1,505.87**.

On the date of accident, Petitioner was **48** years of age, ***single*** with **1** dependent children.

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

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

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 Petitioner's treating physicians, including Dr. Gornet and Dr. Emanuel.

Respondent shall pay Petitioner temporary total disability benefits of $**1,003.91**/week for **73 5/7** weeks, representing June 4, 2020 through November 1, 2021, as provided in Section 8(b) of the Act.

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

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

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

Jeanne L. AuBuchon

Signature of Arbitrator

JUNE 13, 2022

PROCEDURAL HISTORY

This matter proceeded to trial on February 23, 2022, pursuant to Sections 19(b) and 8(a) if the Illinois Workers' Compensation Act (hereinafter "the Act"). The issues in dispute are: 1) the causal connection between the accident and the Petitioner's low back condition; 2) payment of medical bills incurred; 3) entitlement to TTD benefits after September 26, 2021; and 4) entitlement to prospective medical care to the Petitioner's low back in the form of follow-up treatment. From the evidence provided, it appears that both parties' doctors agree that further shoulder treatment is necessary and causally related to the work accident. The parties stipulated that if medical expenses are awarded, the Respondent can pay the providers directly.

FINDINGS OF FACT

The Petitioner is employed with Respondent as a supply supervisor and has worked for the Illinois Department of Corrections for 27 years. (T. 10) On June 3, 2020, the Petitioner was helping to restrain an inmate. (T. 11) While her arms were intwined with the inmate's, a coworker came up from behind the inmate and dump dropped him backwards, causing both the inmate and the Petitioner to fall on a pile of crates that were stacked on a pallet. (Id.) She said she scraped her shin and hurt her lower back, right shoulder and right elbow. (T. 12) She reported these injuries on June 5, 2020. (PX13)

The Petitioner testified that at the time of the accident, she had been treating with Dr. Matthew Gornet, an orthopedic spine surgeon at The Orthopedic Center of St. Louis, for low back pain from a non-employment-related injury in 2018. (T. 13-14) She said Gornet had not taken her off work after the 2018 accident but did after the June 3, 2020, accident. (T. 14) She said she also treated with Dr. Gornet in 2008. (T. 15) She said Dr. Gornet did not recommend surgery in 2008, and she was not scheduled for surgery after the 2018 injury, although they did discuss

surgery then. (T. 15-16, 28) She said she was trying to avoid surgery and continued to work full duty with no restrictions – including lifting, moving and pushing boxes of supplies. (T. 15-16, 20) She stated that after the work accident, her low back condition changed such that the pain increased to the point where she knew she was going to have surgery – with more pain up to the middle of her back that was more pronounced onto the left side and increased in intensity. (T. 16-17)

After the June 3, 2020, accident, the Petitioner saw Dr. George Paletta, another orthopedic surgeon at The Orthopedic Center of St. Louis, on June 10, 2020, with a chief complaint of right shoulder pain. (PX4) Her description of the accident was consistent with her testimony. (Id.) She told Dr. Paletta that she initially was seen and evaluated at the medical unit at the prison. (Id.) She previously treated with Dr. Paletta in 2015 and 2016 for shoulder issues. (Id.) At this time, he diagnosed a sprain and prescribed an anti-inflammatory. (Id.)

The Petitioner then saw Dr. Gornet on June 18, 2020, and described the accident consistently with her testimony. (PX3) She felt she injured her right shoulder as well as aggravated her low back. (Id.) She told Dr. Gornet that her pain was central low back and radiated into her upper lumber spine to both sides, left greater than right. (Id.) Dr. Gornet said this was slightly different, with the upper lumbar spine pain seemingly newer. (Id.) An MRI performed that date by Dr. Matthew Ruyle at MRI Partners of Chesterfield showed an L3-4 circumferential disc bulge with a right foraminal annular tear and protrusion extending into a far lateral position, resulting in moderate to severe right greater than left foraminal stenosis but no central canal stenosis. (PX6) Dr. Ruyle also noted a central protrusion at L4-5 extending laterally into both foramina resulting in mild bilateral foraminal stenosis and a central protrusion at L5-S1 without significant central canal or foraminal stenosis. (Id.) Dr. Gornet took the Petitioner off work and prescribed medications and physical therapy. (PX3) He wrote that the accident aggravated the

Petitioner's underlying condition and noted that an MR spectroscopy prior to the accident showed penetration of L5-S1, while L3-4 was unchanged. (Id.)

The Petitioner underwent physical therapy at Athletico Physical Therapy from June 24, 2020, through July 31, 2020, for a total of 17 visits. (PX5) She reported improvement during therapy but still complained of pain and decreased range of motion. (Id.) She did not meet any of her therapy goals. (Id.) The Petitioner testified that conservative treatment did not offer permanent relief. (T. 17) At a follow-up visit with Dr. Gornet on September 10, 2020, the Petitioner reported continued pain even with time off work and physical therapy. (PX3) Dr. Gornet recommended a CT discogram and kept the Petitioner off work. (Id.)

On November 30, 2020, Dr. Gornet reported that a previous discogram at L3-4 was positive, and the latest discogram revealed significant low back pain of 9/10 at L4-5 and 6/10 at L5-S1. (Id.) He said the scan also showed some mild air in the facet joints at L3-4 and L4-5 and a clear left-sided tear at L4-5. (Id.) He said L5-S1 did not show a significant tear, although the Petitioner felt some level of concordant pain. (Id.) Regarding the treatment after the 2018 accident, Dr. Gornet reported that the Petitioner had symptoms in her left buttock, hip and leg after that incident, and he was "working her up" for surgical treatment. (Id.) He said the June 3, 2020, accident probably aggravated the Petitioner's underlying condition. (Id.) He recommended disc replacements at L3-4 and L4-5 and continued off-work orders. (Id.) Dr. Gornet performed decompression and disc replacement on January 20, 2021. (PX3, PX9)

On February 8, 2021, the Petitioner underwent a Section 12 examination on her right shoulder by Dr. James Emanuel. An orthopedic surgeon at Parkcrest Orthopedics. (RX7) After taking a history, performing a physical examination and reviewing medical records from Drs. Paletta, Gornet and Blake, as well as an MRI from July 15, 2020, Dr. Emanuel opined that the

work accident caused a substantial aggravation of prior right shoulder injuries, specifically in the area of the acromioclavicular joint. (Id.) He recommended an injection and stated that if the symptoms returned within three months, the Petitioner would be a candidate for arthroscopic surgery. (Id.) He believed Dr. Paletta's treatment was reasonable and appropriate. (Id.)

The Petitioner underwent a Section 12 examination on February 10, 2021 by Dr. Michael Chabot, an orthopedic surgeon at Orthopedic Specialists. (RX1) Dr. Chabot took X-rays and a history from the Petitioner and examined her. (Id.) He reviewed the accident report, Dr. Paletta's records, Dr. Gornet's current records, physical therapy records, pain management records and the June 18, 2020, MRI. (Id.) He diagnosed the Petitioner with a work-related back strain/contusion. (Id.) He wrote that the MRI was normal for the Petitioner's age and failed to reveal any evidence of significant pathology that could be directly related to her alleged injury of June 3, 2020. (Id.) He believed that at the time of his examination, the Petitioner was not at maximum medical improvement and could only perform clerical/administrative duties with lifting no more than 5-10 pounds. (Id.)

Dr. Chabot performed another examination on July 22, 2021, after reviewing additional medical records from the Petitioner's back treatment in 2009 and 2018. (RX2) None of these records were submitted at arbitration. Dr. Chabot reviewed records from Dr. Granberg (whom the Arbitrator believes to be Dr. Steven Granberg, a pain management doctor in St. Louis) from 2009 indicating that the Petitioner fell at work and developed back, left buttock and posterior thigh pain. (Id.) He said an MRI revealed evidence of multilevel degenerative changes at L4-5 and L5-S1, and Dr. Granberg gave the Petitioner two epidural steroid injections at L4-5. (Id.)

In reviewing Dr. Gornet's records from 2018, Dr. Chabot stated that the Petitioner complained of low back pain to the left side, and pin in the left buttock, left hip and left leg pain.

(Id.) Dr. Gornet's notes reflected that he first saw the Petitioner for back pain in 2011 that was tolerable. (Id.) In the 2018 notes, Dr. Gornet had said an MRI revealed evidence of a herniated disc at L3-4, suggestion of an annular tear at L5-S1 and a small tear extrusion on the left at L3-4. (Id.) Dr. Gornet felt that the pathology at L3-4 was new. (Id.) The Petitioner underwent physical therapy and two interlaminar epidural steroid injections at L3-4 and one at L5-S1. (Id.) Dr. Gornet had suggested disc replacements at L3-4 and L5-S1 on August 8, 2019, October 24, 2019, and February 6, 2020. (Id.)

Dr. Chabot also reviewed records from Athletico; Dr. Helen Blake, a pain management specialist at Pain & Rehabilitation Specialists who performed the injections; and Dr. Sherri Parr, a family medicine practitioner at SIMCA Family. (Id.) He again reviewed X-rays and the June 18, 2020, MRI and reviewed the September 22, 2020, CT discogram. (Id.) He criticized the methodology of the CT discogram for not testing a "control level." (Id.) Dr. Chabot maintained his position that the Petitioner suffered a back sprain but no new intradiscal injury as a result of the June 3, 2020, accident and that she was at maximum medical improvement and could return to work with a lifting limit of 15-20 pounds. (Id.) He believed the Petitioner's complaints after the work accident were essentially the same as prior to the accident. (Id.) He said he would not have recommended surgical intervention because the Petitioner had a "high level of subjective complaint" and all interventions to date had failed to significantly improve her complaints. (Id.)

The Petitioner underwent another round of physical therapy following the surgery from October 11, 2021, through December 3, 2021, for a total of 22 visits. (PX5) Her pain level had decreased, and she performed activities within functional limits for velocity, strength and range of motion. (Id.) The Petitioner testified that before the surgery, she was pretty miserable and in so much pain that she would have to lay on the floor with her feet in the air to alleviate the pain. (T.

17-18) She said she could not even try moving boxes of supplies as she had before the accident. (T. 19-20) She said that after the surgery, she could function and do a lot of things she wasn't able to, such as housework, standing, sitting and moving boxes of supplies at work somewhat. (T. 18) She said her pain was not totally gone, but it was tolerable. (Id.) Notes from follow-up visits showed improvement, and Dr. Gornet released the Petitioner to work full duty beginning November 1, 2021. (PX3)

Dr. Gornet testified consistently with his records at a deposition on November 15, 2021. (PX12) He said the last time he saw the Petitioner before the June 3, 2020, accident was February 6, 2020. (Id.) He acknowledged that at he had suggested disc replacement at L3-4 and possibly at L5-S1. (Id.) He said he had returned the Petitioner to work full duty on October 24, 2019. (Id.)

He stated that his opinion that the Petitioner had a new disc injury and an aggravation of her prior injury was based on knowing the Petitioner both before and after the accident and because the Petitioner had been able to work full duty until the accident. (Id.) He said the Petitioner was significantly worse after the accident, which made it clear that her medical state of well-being or her condition had changed. (Id.) He said that although he was working the Petitioner up for surgery prior to the work accident, that injury tipped the Petitioner over the edge. (Id.)

Regarding the surgery he performed, Dr. Gornet said that intraoperatively he found a small, right-sided herniation and right-sided annular tear at L3-4, bilateral tears at L4-5 – the left-sided tear having been detected on the CT discogram and the large tear on the right side that was not previously detected.. (Id.) He said the Petitioner had very mild disc degeneration. (Id.)

Dr. Gornet disagreed with Dr. Chabot's opinion that the Petitioner suffered a strain to her lumbar spine and not a new intradiscal injury from the work accident because he had known the Petitioner before and after the accident and her symptoms dramatically changed. (Id.) He also

L4-5 was never talked about before the accident but the injury to that disc pushed the Petitioner over the edge. (Id.) As to the rationale for Dr. Chabot's statement that he would not recommend surgical intervention, Dr. Gornet said the failure of injections was a reason to move forward with surgery, and, in the time that he had known the Petitioner, he did not detect her to be malingering.

On cross-examination, Dr. Gornet testified that he would not have returned the Petitioner to work at light duty, as that was not his general practice. (Id.) He said his practice was to return the patient to work at full duty after appropriate rehab. (Id.) He said that particularly with an L3-4 injury, patients need to devote their full capabilities to reconditioning. (Id.) He acknowledged that on February 6, he was still recommending surgery and said he had released the Petitioner to full duty on October 24, 2019, after the 2018 injury. (Id.) Regarding Dr. Chabot's statement that the CT discogram did not use a control level, Dr. Gornet said the L5-S1 acted as a predominately control level because he felt it was not a positive level. (Id.)

On January 14, 2022, Dr. Chabot testified consistently with his reports at a deposition. (RX3) He said that because there had been positive He explained that a lack of using a control level on the CT discogram does not give the doctor an idea of where to stop treating and whether surgery will benefit the patient. (Id.) He said that without a control level, a doctor would not know if other levels were symptomatic. (Id.) He said the more levels that have a positive response, the more likely the patient has a pain behavior that would lead to a poor surgical outcome. (Id.) He believed the Petitioner's surgical outcome was less than satisfactory because she was still treating with Dr. Blake for pain management and had significant pain six months after the surgery. (Id.) He said it was nearly impossible to say that the surgery was related to the work accident because there was positive concordant response beforehand, disc degeneration and chronic complaints predating the injury. (Id.)

On cross-examination, Dr. Chabot acknowledged that it was possible that the type of injuries the Petitioner suffered could cause a lumbar disc injury and that the mechanism of injury could also aggravate a pre-existing condition of the lumbar spine. (Id.)

Also in 2021, the Petitioner underwent pain management treatment for her right shoulder with Dr. Blake. (PX10) On February 22, 2021, Dr. Blake diagnosed worsening right shoulder pain and felt that the June 3, 2020, accident aggravated her underlying shoulder condition. (Id.) Dr. Blake performed diagnostic and therapeutic injections to the AC joint that provided temporary relief. (Id.) She recommended further treatment with an orthopedic surgeon. (Id.) Dr. Blake also sent the Petitioner for an electrodiagnostic study by Dr. Daniel Phillips at Neurological and Electrodiagnostic Institute, that was performed on September 14, 2021, and resulted in a finding that the right shoulder was unremarkable. (PX11) The Petitioner testified that she was willing to go to Dr. Emanuel for the treatment he recommended. (T. 21)

CONCLUSIONS OF LAW

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

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

An accident need not be the sole or primary cause as long as employment is a cause of a claimant's condition. *Sisbro, Inc. v. Industrial Comm'n,* 207 Ill. 2d 193, 205 (2003). An employer takes its employees as it finds them. *St. Elizabeth's Hospital v. Illinois Workers' Compensation Comm'n,* 371 ILL. App. 3d 882, 888 (2007). A claimant with a preexisting condition may recover

where employment aggravates or accelerates that condition. *Caterpillar Tractor Co. v. Industrial Comm'n,* 92 Ill. 2d 30, 36 (1982).

Circumstantial evidence, especially when entirely in favor of the Petitioner, is sufficient to prove a causal nexus between an accident and the resulting injury, such as a chain of events showing a claimant's ability to perform manual duties before accident but decreased ability to still perform immediately after accident. *Pulliam Masonry v. Industrial. Comm'n*, 77 Ill. 2d 469, 471-472, 397 N.E.2d 834, 34 Ill.Dec. 162 (1979); *Gano Elec. Contracting v. Industrial Comm'n*, 260 Ill.App.3d 92, 96–97, 631 N.E.2d 724, 197 Ill.Dec. 502 (4th Dist. 1994); *International Harvester v. Industrial Com.*, 93 Ill.2d 59, 63-64, 442 N.E.2d 908, 66 Ill.Dec. 347 (1982).

The Petitioner had prior low back problems from incidents in 2008 and 2018 to the extent that Dr. Gornet was recommending disc replacements at L3-4 and L5-S1 as late as February 2020. Dr. Gornet believed the Petitioner suffered a new disc injury at L4-5 from the June 3, 2020, accident and performed disc replacements at L3-4 and L4-5. Dr. Chabot believed the Petitioner suffered a low back strain from the latest accident and would not have recommended surgery.

As stated above, the records from 2008 and 2018 were not submitted at arbitration, so the Arbitrator did not have the ability to compare them to the recent records and therefore relies on the representations of the doctors. It does appear that the Petitioner was not having issues with her L4-5 level prior to the latest accident. Dr. Gornet pointed to this difference, as well as changes in the Petitioner's symptoms that led him to his conclusions. As the Petitioner's treating physician, Dr. Gornet had more opportunities to be more familiar with the Petitioner over a period of several years and her condition than Dr. Chabot. Also, Dr. Chabot did not examine the Petitioner prior to her surgery to get a first-hand understanding of her state of well-being as a result of the accident. For all of these reasons, the Arbitrator gives greater weight to the opinions of Dr. Gornet.

In addition, the circumstantial evidence supports Dr. Gornet's opinions. Although the Petitioner had back pain in the months prior to the accident, she was working full duty. After the accident, she was unable to work.

The facts in this case are similar to those in In *Schroeder v. Illinois Workers' Comp. Comm'n*, where the Claimant had a lengthy history of back trouble, and surgery had been considered nine months before her work accident. *Schroeder v. Illinois Workers' Comp. Comm'n*, 2017 IL App (4th) 160192WC, 79 N.E.3d 833. The Appellate Court stressed the Claimant's ability to work before the accident and her inability to work afterwards, despite an absence of changes in objective testing or lack of significant change in the nature and severity of the Claimant's subjective complaints. *Id*. at ¶ 30. In finding that the accident accelerated the need for surgery, the Court relied on the treating physician's that the accident made surgery more appropriate and more viable. *Id*. at ¶ 32. The facts in this case are even more compelling than those in *Schroeder* in that Dr. Gornet found pathology in the L4-5 disc that was not present before the accident and there were changes in the Petitioner's subjective complaints.

Therefore, the Arbitrator finds that the Petitioner has met her burden of proof establishing causal connection between the accident and the Petitioner's lumbar spine condition.

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

The right to be compensated for medical costs associated with work-related injuries is at the very heart of the Workers' Compensation Act. *Hagene v. Derek Polling Const*., 388 Ill. App. 3d 380, 383, 902 N.E.2d 1269, 1273 (2009).

Dr. Chabot said it was nearly impossible to relate the surgery to the work accident. He predicted a poor outcome. But the Petitioner did return to work at full duty following the surgery.

Again, the Arbitrator gives more weight to Dr. Gornet's opinions that the treatment was reasonable and necessary.

Based on this and the above findings regarding causation, the Arbitrator finds that the treatment rendered was reasonable and necessary. Therefore the Arbitrator 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).

From Dr. Gornet's treatment notes, it appears that the Petitioner will be needing some follow-up observation/treatment from the disc replacement surgery. Based on the findings above, the Arbitrator finds that the Petitioner is entitled to prospective medical care as recommended by Dr. Gornet, and the Respondent shall authorize and pay for such care. Regarding the Petitioner's right shoulder, there appears to be no dispute that further treatment is reasonable and necessary. Therefore, the Respondent shall authorize and pay for such care as recommended by Dr. Emanuel.

Issue (L): What temporary benefits are in dispute? (TTD)

The parties dispute temporary total disability benefits after September 26, 2021. An employee is temporarily totally incapacitated from the time an injury incapacitates him for work

until such time as he is as far recovered or restored as the permanent character of his injury will permit. *Archer Daniels Midland Co. v. Indus. Comm'n*, 138 Ill.2d 107, 118 (1990). The ability to do light or restricted work does not preclude a finding of temporary total disability. *Id.* at 121.

In Dr. Gornet's opinion, the Petitioner was not ready to return to work until she completed a substantial portion of her post-surgical physical therapy, which was completed on December 3, 2021. The Arbitrator trusts that, as a treating physician, Dr. Gornet used his professional judgment to determine when the Petitioner could return to work. Therefore, the Petitioner is entitled to temporary total disability benefits pursuant to Section 8(b) of the Act for 73 and 5/7 weeks, from June 4, 2020, through November 1, 2021.

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	21WC008275
Case Name	Renee Searcy v. Sangamon County
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0007
Number of Pages of Decision	18
Decision Issued By	Kathryn Doerries, Commissioner, Amylee Simonovich, Commissioner

Petitioner Attorney	Alex Rabin
Respondent Attorney	R Mark Cosimini

DATE FILED: 1/8/2024

/s/Kathryn Doerries, Commissioner

Signature

DISSENT: /s/Amylee Simonovich, Commissioner

Signature

24IWCC0007

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RENEE SEARCY,

Petitioner,

vs. NO: 21 WC 08275

SANGAMON COUNTY,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability, and permanent partial disability, reverses the Decision of the Arbitrator and denies Petitioner's claim for compensation, for the reasons stated below.

Findings of Fact

Petitioner testified she had been employed as a 911 dispatcher for Respondent for about 20 years. Petitioner testified she used equipment at the 911 dispatch center including six computer screens they watch at one time, two keyboards and three computer mouse. (T. 8) There is a third keyboard, but it is rarely used. (T. 9) All require her to use her hands and arms. (T. 8). Petitioner testified her workstation rotates daily depending on what radio position she is working. (T. 9) The keyboards are on the same level, but they could be moved. (T. 9) In addition to the six computer screens and three keyboards, Petitioner used a phone which she described as a little box keypad. (T. 10) Petitioner testified her job also required her to write. (T. 10) Petitioner is left-hand dominant. (T. 12)

Petitioner testified there are nine workstations, and she would use three daily. (T. 20) The workstations are identical but two of the desks at the workstations are broken and do not raise or lower. (T. 21) The chairs are adjustable in height. (T. 21)

Petitioner testified to the different radio assignments which were primarily dispatch for the Springfield Police Department. (T. 22) Channel 1 allowed radio communication with the officers, Channel 2 was used to run people for warrants or ask for tows, and Channel 5 was backup for the other two channels. (T. 22) They were supposed to rotate daily. Petitioner was one of nine dispatchers picking up the phone. (T. 23) Petitioner testified she can use a mouse to answer the phones, one mouse controls all six screens, and the third one controls the radio. (T. 24) When Petitioner answers the phone, she types the information. (T. 24) On the primary channel, it is constant radio traffic. (T. 25) Petitioner would dispatch the officers by clicking on pending calls for service on a screen using the mouse, directing them over the radio, typing and sending the actual call to their computer in the patrol car. (T. 26) Petitioner testified that on a good day she would get a half hour lunch but if it was "crazy busy" it wasn't possible. (T. 27) If she needed to go to the restroom or grab a snack she could just get up and go. (T. 27) Other than typing and using the mouse, Petitioner testified to other activities she performed for Respondent such as running warrant checks which required typing, doing criminal histories and traffic stops. She agreed it was a lot of clicking on different tabs. (T. 28)

Petitioner testified that she had cramping and numbness in her finger and thumb before and during December 31, 2020, which would wake her up at night. (T. 10) Petitioner testified that when she was at work it would get worse throughout the day. (T. 10) Typing at work caused her symptoms and typing is constant all day every day. (T.11) The symptoms started on the left side and then about a month later she noticed the symptoms on the right side. (T. 12) Her right hand was going numb at night and then the cramping started. (T. 12) She had spasms in her left hand while performing her work duties and it affected her ability to perform her job. (T. 13)

Petitioner testified she saw Dr. Wottowa at the Springfield Clinic Orthopedic Department who performed a left carpal tunnel release surgery. Petitioner testified her left hand is 100 per cent better and she was able to return to work full duty. (T. 15) She did not undergo surgery on the right hand but testified she is still having problems. (T. 15) She missed work from March 9, 2021, through March 18, 2021, and from the date of surgery, July 6, 2021, through August 10, 2021.

On cross examination, Petitioner agreed she periodically had issues with her right hand and arm dating back to 1996. (T. 17) This included surgery for the ganglion cyst, right shoulder surgery, and two EMG studies. (T. 18) When asked if she had any issues with her left wrist or left arm before testing positive for COVID, she responded, "No, not, no." (T. 18) Petitioner did not undergo any EMG studies on her left side or receive any treatment for her left hand or wrist before she tested positive for COVID. (T. 18) Petitioner agreed that she was having intermittent symptoms and then had COVID and the symptoms on the left side became constant. (T. 19) Petitioner agreed Dr. Wottowa discharged her with no restrictions, and she has not been back to see him or any other doctors for her hands since that time. (T. 28) She agreed she is back performing the same job she did before and doing the same rotation. (T. 28)

On redirect examination, Petitioner testified she stopped working for Sangamon 911 a week ago Saturday, by her own choice. (T. 30)

At the request of Petitioner, Dr. Wottowa testified by way of evidence deposition on

January 10, 2022. (PX4) He stated that he is board-certified in orthopedic surgery with a separate board certification in upper extremity and hand surgery. (PX4, T. 6) Dr. Wottowa first examined Petitioner for left wrist complaints on January 4, 2021. He had seen her for an unrelated ganglion cyst problem on the right wrist before this date. She complained of numbness and tingling in both her hands which she had before COVID he testified. She told him she felt COVID made things worse and then noticed it worse with her typing and use of her hands at work. (PX4, T. 7) Her exam revealed positive Phalen and Tinel tests and he diagnosed her with carpal tunnel syndrome. He considered her for a release at that time primarily because of her constant symptoms. (PX4, T. 8) Dr. Wottowa saw Petitioner on March 10, 2021, and she complained of numbness and worsening of symptoms. She advised she was working 12-hour shifts and by the end of her shift her hand was much worse. Dr. Wottowa testified he sent Petitioner for a nerve test which came back normal. (PX4, T. 10) On July 6, 2021, Dr. Wottowa performed a left carpal tunnel release without complications. He released her to return to work on August 9, 2021. (PX4, T. 15)

Dr. Wottowa testified Petitioner's symptoms got worse after she had COVID, a highly inflammatory process. (PX4, T. 11) He further testified there may not be any studies correlating COVID with carpal tunnel syndrome because COVID is only two years old, however he stated, "I don't know that it is not related. Listening to her, it certainly got worse at that time." (PX4, T. 12) Dr. Wottowa testified he did not think COVID was causative because she had symptoms before she had COVID. (PX4, T. 12)

When asked if Petitioner's job duties caused or contributed to the left carpal tunnel syndrome, Dr. Wottowa responded, "I would say definitely not caused. I think the cause of carpal tunnel syndrome is elusive in almost every single case because there are just so many factors: gender, age, sometimes work activities, sometimes outside influence, diabetes, and things like that. She's not diabetic. By her description, her symptoms were aggravated and aggravated to a significant degree." (PX4, T. 16) Dr. Wottowa further testified that, like Dr. Li, he would prefer if he has somebody who has evidence of forceful grip or keeping the wrist in a flexed or extended position for a period of time. (PX4, T. 16) While he testified her description of what she did at work, "may fit that bill because of what she did with her left hand and the use of her combination terminal/mic," he admitted he did not review her workstation. (PX4, T. 17) Also, he thinks her symptoms were aggravated by her job, per her description. They were not caused, he testified. (PX4, T. 17)

On cross examination, Dr. Wottowa testified that he was not aware of any left-hand treatment pre-dating his first visit. He noted that Petitioner had numbness and tingling before the episode of COVID, but it seemed like COVID was the tipping point for her. He testified, "So she did have some symptoms, but then things didn't get really bad until after she got sick." (PX4, T. 19) He agreed Petitioner did have 2 earlier EMG studies, in 2009 and 2019 for the right hand only and during her March 26, 2019, visit, she complained of intermittent numbness and tingling which was pretty mild at the time. (PX4, T. 20) Also, Petitioner stated she has no symptoms on the right side. (PX4, T. 21)

Dr. Wottowa agreed women are more likely than men to develop carpal tunnel syndrome and women in their 40s and 50s are more likely than women in other decades to develop the condition. (PX4, T. 21) He agreed individuals who are a little heavy are more likely to suffer from

carpal tunnel and smoking is a risk factor. (PX4, T. 22) Dr. Wottowa agreed that Petitioner, a female, in her mid-40s who might be a little heavy and is a smoker, is at a higher risk for developing the condition, regardless of her activities. He testified, "[S]he fits the classic demographic for carpal tunnel, yes." (PX4, T. 22) Dr. Wottowa testified Petitioner's symptoms exacerbated during COVID and rapidly increased around the time she had the infection from COVID. (PX4, T. 26) When asked if the condition doesn't normally progress that quickly, Dr. Wottowa said this was an unusual situation noting she went from zero to sixty pretty fast and her symptoms were constant which are a late finding for carpal tunnel. He noted that to have the severity of symptoms on the inside and to have a normal nerve test does not make sense. (PX4, T. 27)

Dr. Wottowa did not review Petitioner's workstation or any pictures of the workstation. (PX4, T. 28) He stated she described her workstation, but they did not get into great detail about ergonomics or if she had any tools or devices that she used. (PX4, T. 28) Dr. Wottowa was asked if Petitioner mentioned whether or not she can adjust the angle of her keyboard to prevent extension or flexion to which he responded, "We didn't get that far down in the weeds, no." (PX4, T. 28)

Dr. Wottowa agreed there is a considerable amount of literature for carpal tunnel and there are numerous studies looking at keyboarding, ten-keying, and use of a handheld device, and "the data has been very very thin. In other words, [there] has not been found to be a direct correlation in those studies." (PX4, T. 29) He further testified that studies have shown the greatest correlation is "where there's going to be force – a forceful grip, forceful grip, preferably through a flexed or extended position." (PX4, T. 29)

On redirect, Dr. Wottowa testified that when Petitioner first saw him in January 2021, she had recovered from COVID but not from carpal tunnel syndrome on the left side. (PX4, T. 32)

At the request of Respondent, Dr. Li testified by way of evidence deposition on February 14, 2022. He is certified by the American Board of Orthopedic Surgery and treats upper and lower extremity conditions both operatively and non-operatively with a focus on shoulders, hands, and knees. He performs about 10 surgeries per week and sees carpal tunnel syndrome every week. (RX13, T. 5) He agreed he evaluated Petitioner on February 25, 2021, and prepared a report contemporaneously. (RX13, T. 7) Dr. Li was provided medical records in conjunction with the exam. Petitioner gave a history stating she was 44 years old, left-hand dominant, and worked full-time as a dispatcher for the police for 22 years. She advised Dr. Li she had to constantly type and mouse. (RX13, T. 7) She "mouses" with the right hand and operates the police radio with the left hand. (RX13, T. 7)

He noted Petitioner first noticed symptoms in November 2020 and more recently, noticed symptoms in her right hand. (PX13, T. 7) She reported tingling in her thumb, index, and long fingers. (RX13, T. 8) She first saw Dr. Wottowa in January 2021 and reported that she had had COVID. When she was sick with COVID, she developed numbness and tingling into her thumb and index finger. (RX13, T. 8) She reported that she had symptoms in the past but never had the left hand tested. Petitioner reported when she typed all day, her numbness gets worse. (RX13, T. 8) Petitioner stated since she has had COVID, the symptoms are now constant and she's numb all of the time. He noted Dr. Wottowa recommended surgery and as far as he knew she had not had an EMG. (RX13, T. 8)

Dr. Li testified that the risk factors Petitioner had for developing carpal tunnel syndrome included smoking, her age of 44 years, and an elevated BMI. (RX13, T. 9) He further testified that the majority of carpal tunnel cases are idiopathic. He agreed Petitioner had a fairly rapid onset of her symptoms and, from Dr. Moy's notes, she had COVID and then developed numbness and tingling. (RX13, T. 10) He explained that COVID is a viral infection, and all infections are inflammatory by nature. (RX13, T. 10) Any inflammatory condition would go throughout her body and obviously involve the arms that could increase the carpal tunnel pressure. (RX13, T. 10)

Dr. Li was asked if Petitioner described her job duties as including use of vibratory tools or any forceful gripping to which he responded, "No." (RX13, T. 11) Dr. Li agreed vibratory stress would "absolutely" be a type of activity that would aggravate the carpal tunnel and forceful gripping would be a causative factor if it was done 25 per cent of the time. (RX13, T. 11) Dr. Li was asked if he was to assume her job duties are basically just typing and using a mouse is there an opinion or consensus in the medical world as to whether there's a causal relationship. Dr. Li testified, "Multiple studies have been done on populations that use keyboard and mouse. And there actually is not an increase in that population of –there's not an increased prevalence of carpal tunnel syndrome in that population versus the general population." (RX13, T. 11)

Dr. Li testified that, within a reasonable degree of medical certainty, he would associate her carpal tunnel condition with COVID due to the temporal relationship. (RX13, T. 12) He further testified her job duties would not aggravate the condition based on the population studies in the medical literature. (RX13, T. 12) He stated that extreme extension and extreme flexion of the wrist can cause carpal tunnel, especially if they are prolonged. He understood she had a sit-to-stand desk, and she could move it to whatever position she was comfortable. (RX13, T. 12) Dr. Li reviewed photos of Petitioner's workstation and testified it is a very routine workstation. He noted there is certainly no extreme extension or flexion of the wrist in the person in the photo. If someone taller came in they could adjust the chair or adjust the desk. (RX13, T. 13) He stated there is nothing about the workstation itself that would put someone at risk for developing carpal tunnel syndrome. (RX13, T. 13)

Petitioner went to the Springfield Clinic on November 9, 2020, complaining of a cough after having been exposed to COVID. (RX10) Her "Active Problems" during that visit included numbness and tingling of the right hand. (RX10) On November 12, 2020, Petitioner tested positive for COVID at the Springfield Clinic and her "Active Problems" during that visit included numbness and tingling of the right hand. (RX11) On November 18, 2020, Petitioner had a telemedicine visit with Dr. Moy of the Springfield Clinic for COVID symptoms. (PX2) Her "Active Problems" included numbness and tingling of the right hand. (PX2) Petitioner was diagnosed with acute sinusitis and COVID-19 and prescribed Azithromycin and prescribed Prednisone. Petitioner returned to the Springfield Clinic on December 8, 2020, with a "Chief Complaint" of "left hand and fingertips numbness with tingling since COVID." (PX2) The medical records further state in the "Subjective" section that, "Renee is a 44 year (*sic*) female seen today for concerns of numbness and tingling in her fingertips since her recent COVID-19 illness." (PX2) Dr. Moy indicated it was initially thought to be related to the Prednisone "but now the sx are persistent in her left hand 1,2,3 digits." (PX2)

Conclusions of Law

An employee seeking benefits for gradual injury due to repetitive trauma must meet the same standard of proof as a petitioner alleging a single, definable accident. *Three "D" Discount Store v. Industrial Commission*, 144 Ill.Dec. 794, 797, 556 N.E.2d 261, 264 (Ill.App. 4 Dist. 1989); citing *Nunn v. Industrial Commission*, 157 Ill.App.3d 470, 109 Ill.Dec. 634, 510 N.E.2d 502 (1987). Further, 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. *Hansel & Gretel Day Care v. Industrial Comm'n*, 158 Ill.Dec. 851, 858, 574 N.E.2d 1244, 1251 (Ill.App. 3 Dist. 1991); citing *Board of Education v. Industrial Comm'n*, 44 Ill.2d 207, 214, 254 N.E.2d 522 (1969).

An employee who alleges injury based on repetitive trauma must "show that the injury is work related and not the result of a normal degenerative aging process." *Peoria County Belwood Nursing Home*, 115 Ill.2d at 530; *Edward Hines Precision Components v. Industrial Comm'n*, 356 Ill. App. 3d 186, 194, 825 N.E. 2d 773, 292 Ill. Dec. 185 (2005). In repetitive trauma cases, the claimant "generally relies on medical testimony establishing a causal connection between the work performed and claimant's disability." *Nunn v. Industrial Comm'n*, 157 Ill. App. 3d 470, 477, 510 N.E.2d 502, 109 Ill. Dec. 634 (1987); see also *Johnson v. Industrial Comm'n*, 89 Ill. 2d 438, 442-43, 433 N.E.2d 649, 60 Ill. Dec. 607 (1982). In resolving disputed causation issues, it is the Commission's province to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine what weight to give testimony, and resolve conflicts in the evidence (particularly the medical opinion evidence). *Holsteny v. Illinois Workers' Compensation Comm'n,* 397 Ill. App. 3d 665, 675, 928 N.E.2d 474, 340 Ill. Dec. 475 (2009); *Fickas v. Industrial Comm'n,* 308 Ill. App. 3d 1037, 1041, 721 N.E.2d 1165, 242 Ill. Dec. 634 (1999).

Based on the above, and the record taken as a whole, the Commission reverses the decision of the Arbitrator and finds that Petitioner failed to prove by a preponderance of the credible evidence that she suffered accidental injuries arising out of and in the course of her employment on or about December 31, 2020, under a repetitive trauma theory and likewise failed to prove that her current condition of ill-being relative to her bilateral hands/wrists is causally related to her employment.

In support of this determination, the Commission relies on the opinion of Respondent's expert, Dr. Li, who had a better understanding of the nature of Petitioner's job duties and workstation. Dr. Li testified Petitioner provided a history to him that she is 44 years old, left hand dominant, worked as a dispatcher for the police for 22 years full time, and she had to constantly type and mouse. She "mouses" with the right hand and operates the police radio with the left hand. She does not use any vibratory tools and her job duties do not include forceful gripping. (RX13, T.11) He viewed the photos of the workstation and stated there certainly is no extreme extension or flexion of the wrist in the person in the photo. He noted the chair or desk could be adjusted. Dr. Li testified multiple studies have been done on populations that use keyboard and mouse and there is not an increased prevalence of carpal tunnel syndrome in that population versus the general population. (RX13, T.11) Dr. Li further testified that her job duties would not aggravate her condition based on the population studies in the medical literature. (RX13, T.12) After reviewing photos of the workstation, Dr. Li testified there's nothing about the workstation itself that would

put someone at risk of developing carpal tunnel.

Dr. Wottowa, Petitioner's treating physician, likewise, testified to the numerous studies looking at keying, keyboarding, ten-keying, and using a handheld device. He agreed with Dr. Li and testified, "[t]he data has been very very thin. In other words, [there] has not been found to be a direct correlation in those studies." (PX4, T. 29) Here, keyboarding is the work activity that Petitioner alleges caused her condition of ill-being. (RX14) Both medical experts agree, and the testimony so indicates, that keyboarding activities have not been shown to cause or aggravate carpal tunnel syndrome. Dr. Wottowa further testified that the studies that have shown the greatest correlation is where there is a forceful grip, preferably through a flexed or extended position and in this case he would have preferred to have somebody who has evidence of a forceful grip or keeping the wrist in a flexed or extended position for a period of time. In this case, there is no evidence of a forceful grip, flexion, or extension of the wrist for an extended period of time.

The Commission notes Dr. Wottowa's opinion her work may "fit that bill" because of "what she did with her left hand and the use of her combination terminal/mic," but does not find this opinion persuasive. Dr. Wottowa did not describe what force, flexion, or extension she did with her left hand, with the terminal, or with the mic. He did not view her workstation, did not view photos of her workstation, and, when discussing Petitioner's work habits with her, did not get into great detail about ergonomics of the workstation or whether she had any tools or devices that she used. (PX4, T. 28)

Further, there is no evidence of vibratory exposure, a recognized cause of carpal tunnel syndrome. Although Petitioner testified she types constantly, the Commission does not find this testimony that she types "all day everyday" credible. She testified she is required to write as part of her job duties. Moreover, she answers calls using a mouse, switches tabs using another mouse, and controls the radio using a third mouse. While she is using the mouse with her right hand, as she advised Dr. Li, her left hand, it can reasonably be inferred, is quiescent or operates a radio. Therefore, her testimony she types constantly all day every day is simply not credible.

Further, there is credible evidence in the record that other factors could have caused Petitioner's condition. Petitioner herself attributed the numbness and tingling in the left hand to COVID on both December 8 and December 20, 2020. Dr. Li testified that due to the temporal relationship between COVID and her symptoms, and the inflammatory nature of the viral infection, he would associate her condition with COVID. Dr. Wottowa's opinion that her condition was not caused by COVID was based on his understanding Petitioner had symptoms before COVID. However, Petitioner's "Active Problems" in the Springfield Clinic records on November 9 and November 12, 2020, do not reference left hand/wrist problems thus undercutting Dr. Wottowa's opinion. (RX10, RX11)

Dr. Li testified Petitioner had risk factors for the development of carpal tunnel syndrome, such as smoking, her age of 44 years, and an elevated BMI. Consistent with this opinion, Dr. Wottowa likewise testified that the fact Petitioner is a female, in her mid-40s, who might be a little heavy and is a smoker puts her at a higher risk for developing the condition, regardless of her activities. (PX4, T. 22) He testified, "[S]he fits the classic demographic for carpal tunnel, yes." (PX4, T. 22)

Based on the above, the Commission finds that Petitioner has failed to sustain her burden of proving by a preponderance of the credible evidence that she suffered accidental injuries arising out of and in the course of her employment on or about December 31, 2020, under a repetitive trauma theory, and that her condition is causally related to her job duties.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's award dated August 22, 2022, is vacated and Petitioner's claim for compensation 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.

January 8, 2024

o-11/7/23
KAD/jsf

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

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

DISSENT

After carefully considering the totality of the evidence, I respectfully dissent from the opinion of the majority and would affirm the Decision of the Arbitrator.

Petitioner served the public as a telecommunicator for over 20 years. T. 7. This required her to operate two keyboards and three mice for the entirety of her shift. T. 8-9, 11. The typing was constant, "all day everyday." T. 11. Out of the three workstations she used daily, two were broken for over two years, and they were no longer adjustable. T. 20-21.

Petitioner's treating physician, Dr. Wottowa, credibly testified that the cause of carpal tunnel syndrome is elusive and multi-factorial, but that her symptoms were aggravated to a significant degree by her work. T. 118. Whereas Respondent's Section 12 Examiner, Dr. Li, associated the development of carpal tunnel with her COVID-19 infection, "simply because of the temporal relationship." T. 186-187. He also testified that the medical literature did not support a causal relationship, but did not cite to any specific studies. T. 187. Finally, he opined that while extreme extension and flexion of the wrist can cause carpal tunnel syndrome, it was his understanding that Petitioner's workstation was a sit-to-stand desk where the desk moved. *Id*. He was provided photographs of an employee working in the proper position. T. 188. Both physicians testified that there are no medical studies regarding COVID-19 and its relationship to carpal tunnel syndrome. T. 113, 190.

Illinois law has recognized that repetitive data entry may be the basis of a workers' compensation claim since at least the Supreme Court's decision in *Durand v. Industrial Comm'n*, 224 Ill. 2d 53 (2006). See *Jocelyn Cahill v. City of Chicago*, 21 IWCC 0517. In *Cahill,* Petitioner

established that the overwhelming majority of her job duties consisted of repetitive typing for 15 years as a 911 operator. The Commission acknowledged that the literature demonstrated ongoing scientific disagreement over the causal connection between repetitive keyboard usage and carpal tunnel syndrome, but that the specific facts of the case, "high dose exposure" to keyboarding, led to the conclusion that it was a cause of her condition. It is also worth noting that in *Cahill*, the Commission found that adopting the opinion of the Section 12 Examiner would have required it to ignore the uncontroverted evidence regarding a broken workstation that the doctor was not made aware of.

In addition to *Cahill*, the Commission has consistently ruled that work as a telecommunicator contributes to the development of carpal tunnel syndrome. See *Jennifer Williams v. City of Mt. Vernon*, 07 WC 37493 (telecommunicator performed data entry and/or keyboarding four to five hours a day 1998-2007); *Katina Weller v. Macoupin County 911*, 13 IWCC 0168 (repetitive use of upper extremities as a telecommunicator for eight years, ten hours per day, four days per week); *Peggy Cooper v. State of Ill., Ill. State Police*, 14 IWCC 0569 (telecommunicator keyboarding five to six hours per day, five days per week, for 30 years).

The instant matter is similar to the above cases, especially *Cahill*, since Dr. Li was also not provided accurate information regarding the broken workstations. For the above reasons, I would have affirmed the Arbitrator's conclusion that Petitioner's work as a telecommunicator for over 20 years was a contributing cause to the development of her bilateral carpal tunnel syndrome.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC008275
Case Name	Renee Searcy v. Sangamon County
Consolidated Cases	
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	Edward Lee, Arbitrator

Petitioner Attorney	Alex Rabin
Respondent Attorney	R. Mark Cosimini

DATE FILED: 8/22/2022

/s/Edward Lee, Arbitrator

Signature

INTEREST RATE WEEK OF AUGUST 22, 2022 3.02%

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

RENEE SEARCY
Employee/Petitioner

v.

SANGAMON COUNTY
Employer/Respondent

Case # **21** WC **008275**

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 **SPRINGFIELD**, on **June 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 **12/31/2020**, 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 $**82,507.85**; the average weekly wage was $**1,586.69**.

On the date of accident, Petitioner was **44** 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 $ for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $.

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

ORDER

The nature and extent of Petitioner's injuries are 10% of the right hand and 5% of the left hand.

Having considered the evidence and testimony before the Commission, **IT IS ORDERED:**

RESPONDENT SHALL PAY 10% PERMANENT PARTIAL DISABILITY FOR THE RIGHT HAND AND 5% PERMANENT PARTIAL DISABILITY FOR THE LEFT HAND.

RESPONDENT SHALL PAY THE COSTS INCURRED AS A RESULT OF ALL CARPTAL TUNNEL RELEASE SURGURIES PERFORMED ON PETITIONER

RESPONDENT SHALL PAY PETITIONER TEMPORARY TOTAL DISABILITY BENEFITS OF 6 WEEKS AND 3 DAYS BECAUSE THE INJURIES SUSTAINED CAUSED TEMPORARY TOTAL DISABILITY AS PROVIDED IN SECTION 8 (b) OF THE ACT.

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

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

Edward Lee

Signature of Arbitrator **August 22, 2022**

STATE OF ILLINOIS)
)
COUNTY OF SANGAMON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

RENEE SEARCY,
Employee/Petitioner

v. Case No. 2021-WC-008275

SANGAMON COUNTY
Employer/Respondent

FINDING OF FACT AND CONCLUSIONS

THIS CAUSE HAS COME BEFORE THE COMMISSION on a stipulated arbitration hearing

On December 31, 2020, Petitioner RENEE SEARCY was employed by Respondent SANGAMON COUNTY as a 911 dispatcher. She worked for Respondent for approximately 20 years. Petitioner was full time with the 911 center at Sangamon County. (Arb. Tran. P.7) Petitioner testified that she frequently worked overtime. In 2022 alone, she had worked 380 hours of overtime from January through June. (Arb. Tran. P.8) Petitioner testified that she has six computer screens to watch at one time at her workstations. There are two keyboards and three mouses. The workstation rotated everyday depending on the position assignment for that day. (Arb. Tran. P.9)

The telephone system is integrated into a keypad and headset at the Sangamon County 911 dispatch center. Renee Searcy testified that, in addition to the computer, mouses, and monitors, physical writing is required for the job. (Arb. Tran. P.10) On cross-examination by Respondent's attorney, Petitioner testified that two out of the three workstations she regularly used were broken so that the two levels on the desks were not able to raise or lower. Petitioner testified that they handle all calls to 911. This includes all non-emergency lines for Springfield, Sangamon County, Fire Department, and villages such as Leland Grove, Rochester, Etc. This includes traffic stops, running warrants, asking for tows, and emergency calls. (Arb. Tran. P.22) The 911 dispatcher is required to type in all details of the call. (Arb. Tran. P.25)

The dispatcher also dispatches police officers to calls when they are on the primary channel. That channel has constant radio traffic. Petitioner testified that when a call comes in for service, they have to click on it using a mouse. Then the dispatcher has to tell the police department or fire department over the radio where they are being sent to. (Arb. Tran. P.26). All of this information is typed into the computer system. Petitioner testified that, on a good day,

they would get a half-hour lunch. Petitioner also had to run warrant checks and criminal histories whenever requested by police.

Petitioner Renee Searcy testified that she begam experiencing cramping and numbness in her finger and thumb. It would wake her up at night. The cramping and numbness got worse at work throughout the day. (Arb. Tran. P.10) The left hand had cramping right through the thumb and forefinger area, and through the wrist. The numbness was primarily in the thumb and pointer finger of the left hand. These problems were noticeable when performing work duties at Sangamon County 911. (Arb. Tran. P.11) The left-hand symptoms were the worst and started first. Petitioner testified that she started noticing symptoms in her right hand about a month later. (Arb. Tran. P.12) Petitioner is left-hand dominant.

The right hand was also going numb at night and cramping. The left hand had spasms that were prevalent in March and involved the middle finger. Petitioner stated that spasms would start in the left hand when she tried to spread the fingers. (Arb. Tran. P.12) The spasms occurred while performing work duties and affected Petitioner's ability to work. (Arb. Tran. P.13)

Dr. Christopher Wottowa, M.D. examined Renee Searcy at the Springfield Clinic on January 4, 2021. She complained of developing numbness and tingling in her thumb and index finger. The record reports her work as a dispatcher. The record states that when Renee Searcy types all day, her numbness gets worse. The symptoms increase as the use of her hand increases. No symptoms were present in the right hand at that time. Examination was positive for Phalen's and Tinel's on the left, almost instantaneously. Dr. Wottowa diagnosed carpal tunnel syndrome. Dr. Wottowa recommended surgery and did not believe a nerve test was needed for his carpal tunnel diagnosis.

Dr. Wottowa examined Renee Searcy on March 10, 2021, for numbness and tingling in the right hand and carpal tunnel syndrome of the left wrist. Renee Searcy was reported as being miserable on that date. Her symptoms had gotten worse. Her left hand was especially bothersome after working 12 hour shifts for Sangamon Central Dispatch. The left hand was difficult to use for anything after a shift. She had trouble sleeping at night. On examination, she had instantaneously positive Phalen's and Tinel's, left worse than right. Her hand was frequently shaking. The long finger was cramping and shaking, which Dr. Wottowa listed as caused by the carpal tunnel. Dr. Wottowa diagnosed bilateral carpal tunnel syndrome with the left being greater than the right. A nerve test was ordered, and Renee Searcy was held off work due to the severity of her symptoms.

Renee Searcy was examined by Dr. Wottowa on March 17, 2021. It was decided to proceed with a nerve test. On March 31, 2021, Dr. Wottowa reviewed the nerve tests, which were normal. Dr. Wottowa stated in the medical record that Renee Searcy had carpal tunnel even if the nerve test was negative. He recommended another try with conservative efforts. A Medrol dose Pak followed by anti-inflammatory medication was prescribed. It was recommended that she continue wearing splints. Renee Searcy had a follow-up appointment for her bilateral carpal tunnel syndrome with Dr. Wottowa on Jun 9, 2021. Her symptoms persisted and continued to be severe. Numbness and tingling continued along with hand cramps. Phalen's and Tinel's were positive in the left hand. Numbness was observed to the thumb and index

finger on the left hand. Dr. Wottowa diagnosed carpal tunnel syndrome and stated in the medical record that she had consistent symptoms and that the nerve test did not correlate. Carpal tunnel release surgery for the left hand was scheduled for July 6, 2021, at the Springfield Clinic Ambulatory Surgery Center.

Carpal Tunnel Release surgery on the left hand was performed by Dr. Wottowa on July 6, 2021. The postoperative diagnosis was left carpal tunnel syndrome. Renee Searcy n/k/a Patterson had her first post-operative examination with Dr. Wottowa on July 21, 2021. She was doing great with her carpal tunnel release. Her index finger was feeling normal. She had some numbness to her thumb and long finger. The incision looked good. Another appointment was scheduled for six weeks out. A note was given for Renee Searcy to return to work on August 9, 2021. (Pet Ex. 1)

Petitioner Renee Searcy testified that her left hand is 100 percent better since Dr. Wottowa performed carpal tunnel release surgery. (Arb. Tran. P.15). Petitioner did not have surgery on the right hand. She still has problems with the right hand, but not the extreme symptoms that the left hand caused before surgery. Petitioner Renee Searcy testified that she had a ganglion cyst removed form her right wrist in 2018 and 2019. The ganglion syst was on top of Petitioner's wrist, and only bothered her if she bent her wrist. (Arb. Tran. P.16) Petitioner stated that she had not had the severe symptoms and problems with her left wrist prior to the time around December 31, 2020.

Dr. Christopher Wottowa, M.D. provided evidence deposition testimony on January 10, 2022. Dr. Wottowa testified that the carpal tunnel symptoms exhibited by Petitioner Renee Searcy were classic and severe. Dr. Wottowa testified that the successful carpal tunnel surgery is diagnostically proof. In addition, Dr. Wottowa testified about his operative report showing a thick ligament and how red and unhappy the nerve was. Dr. Wottowa testified that, within a reasonable degree of medical certainty, that Renee Searcy's work duties with Sangamon County 911 aggravated and contributed to her carpal tunnel syndrome "to a significant degree". (Pet. Ex. 4) Petitioner was released without restrictions and returned to work full duty.

CONCLUSIONS OF LAW

The Arbitrator hereby finds as follows:

I. The accident arose out of the course of Petitioner's Employment with Respondent.

The evidence proves that the Petitioner's injury was caused by an accident that arose out of the course of employment. In order for an injury to arise out of employment it must have had its origin in some risk connected with, or incidental to the employment, so that there is a causal connection between the employment and the injury. *Technical Tape Corporation v. The Industrial Commission,* 58 Ill.2d 226, 230 (IL. 1974). An injury is accidental within the meaning of the Compensation Act when it is traceable to a definite time, place, and cause and occurs in the course of the employment unexpectedly and without affirmative act or design of the employee. *Matthiessen & Hegeler Zinc Co. v. Industrial Board,* 284 Ill. 378, 120 N.E. 249, 251 (1918). 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 connection between the employment and the accidental injury. *Sisbro, Inc. v. Industrial Commission,* 207 Ill.2d 193, 797 N.E.2d 665, 278 Ill.Dec. 70 (2003); *Warren v. Industrial Commission,* 61 Ill.2d 373, 335 N.E.2d 488 (1975).

In this case, Petitioner was performing repetitive motions on a consistent basis for 20 years. An injury is accidental within the meaning of the Compensation Act if "a workman's existing physical structure, whatever it may be, gives way under the stress of his usual labor." *Laclede Steel Co. v. Industrial Commission,* 6 Ill.2d 296, 128 N.E.2d 718, 720 (1955). Petitioner's existing physical structure, her left and right hands, gave way under the stress of working for Respondent. A risk is distinctly associated with employment "if, at the time of the occurrence, the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties." *Caterpillar Tractor Co. v. Industrial Commission,* 129 Ill.2d 52, 541 N.E.2d 665, 667, 133 Ill.Dec. 454 (1989).

Deposition testimony of Petitioner Renee Searcy and her treating orthopedic physician Dr. Christopher Wottowa, M.D. show that Petitioner's injuries arose out of her employment with Respondent. It has been argued by Respondent that these findings cannot demonstrate a causal connection based on a reasonable degree of medical certainty because of a COVID diagnoses and Dr. Lawrence Li, M.D. testimony and independent medical examination report. However, Dr. Li testified in his evidence deposition that he does not know of any reputable studies that have been published about COVID-19 and a relationship to carpal tunnel syndrome. Dr. Wottowa testified that he also has no knowledge of any reputable studies that published about COVID-19 and a relationship to carpal tunnel syndrome. Dr. Wottowa testified during his evidence deposition, that, with a reasonable degree of medical certainty, the repetitive motions that Petitioner performed while at work likely brought on the pain and numbness in her hands.

Based on the testimony and medical evidence submitted at arbitration, the injuries arose from and are causally connected to Petitioner's employment. The petitioner was the only person to testify, and her testimony was unrefuted. Dr. Wottowa is Petitioner's treating physician and deference is given to his expert opinion.

II. Total Disability Benefits

Petitioner was temporarily totally disabled for various periods throughout the course of her treatment totaling 6 weeks and 3 days of benefits. Respondent shall pay Petitioner the amount of money representing her total TTD benefits.

III. Petitioner's Medical Services are Reasonable and Necessary

Section 8(a) of the Illinois Workers Compensation Act requires the employer to pay for all medical services rendered by an employee that was injured during the course of employment. The medical bills submitted at Arbitration are as follows:

Exhibit 3-Springfield Clinic bills

The treatments for Petitioner's injuries are reasonable and necessary. Therefore, Respondent shall pay the scheduled amount under the Illinois Workers Compensation Act representing the reasonable expenses in the treatment of Petitioner's injuries.

IV. Nature and Extent

Section 8.1b of the Act requires reference to the five factors:

1. Level of impairment. No AMA report was submitted into evidence. Therefore, the Arbitrator gives no weight to this factor.
2. Occupation of employee. The Petitioner a 911 Dispatcher doing extensive keyboarding. The Arbitrator give substantial weight to this factor.
3. Age of employee. The Arbitrator give some weight to this factor.
4. Earnings of the employee. The Arbitrator gives no weight to this factor.
5. Evidence of disability. The records of Dr. Wottowa revealed the Petitioner underwent carpal tunnel surgery to each hand. She testified her left hand was much better, but her left hand still bothered her. The Arbitrator gives substantial weight to this factor.

Having considered the evidence and testimony before the Commission, **IT IS ORDERED:**

RESPONDENT SHALL PAY 10% PERMANENT PARTIAL DISABILITY FOR THE RIGHT HAND AND 5% PERMANENT PARTIAL DISABILITY FOR THE LEFT HAND.

RESPONDENT SHALL PAY THE COSTS INCURRED AS A RESULT OF ALL CARPTAL TUNNEL RELEASE SURGURIES PERFORMED ON PETITIONER

RESPONDENT SHALL PAY PETITIONER TEMPORARY TOTAL DISABILITY BENEFITS OF 6 WEEKS AND 3 DAYS BECAUSE THE INJURIES SUSTAINED CAUSED TEMPORARY TOTAL DISABILITY AS PROVIDED IN SECTION 8 (b) OF THE ACT.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC013946
Case Name	Richard Frye v. Brian Taylor Endeavors
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0008
Number of Pages of Decision	9
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Michael Johnson
Respondent Attorney	Stuart Pellish

DATE FILED: 1/8/2024

/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

RICHARD FRYE,
Petitioner,

vs. NO: 22 WC 13946

BRIAN TAYLOR ENDEAVORS,
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, employment relationship, causal connection, benefit rates, temporary total disability, medical expenses, and prospective 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 July 11, 2023 is hereby affirmed and adopted.

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

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

The 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.

January 8, 2024

o: 12/21/23
CMD/kcb
045

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

/s/ *Marc Parker*
Marc Parker

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC013946
Case Name	Richard Frye v. Brian Taylor Endeavors
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	7
Decision Issued By	Steven Fruth, Arbitrator

Petitioner Attorney	Michael Johnson
Respondent Attorney	Stuart Pellish

DATE FILED: 7/11/2023

THE INTEREST RATE FOR THE WEEK OF JULY 11, 2023 5.27%

/s/Steven Fruth, 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)

Richard Frye
Employee/Petitioner

Case # **22 WC 013946**

v.

Consolidated cases: _____

Brian Taylor Endeavors
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Steven Fruth**, Arbitrator of the Commission, in the city of **Chicago**, on **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, **April 26, 2022**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On 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*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**240.00**; the average weekly wage was $**12,480.00**.

On the date of accident, Petitioner was **54** 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 $**720.00** for TTD, $**0** for TPD, $**0** for maintenance, and $**1,429.71** in medical expenses, for a total credit of $**2,149.71**.

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

ORDER

Petitioner's Application for Benefits is denied.

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

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

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

_____ **JULY 11, 2023**

Signature of Arbitrator

Richard Frye v. Brian Taylor Endeavors
22 WC 13946

INTRODUCTION

This matter proceeded to hearing before Arbitrator Steven Fruth. The disputed issues were: ***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?; ***F:*** Is Petitioner's current condition of ill-being causally related to the accident?; ***G:*** What were Petitioner's earnings?; ***J:*** Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?; ***K:*** What temporary benefits are in dispute? TTD

STATEMENT OF FACTS

Petitioner Richard Frye testified he worked numerous part time jobs, one of which was with Respondent Bryan Taylor Endeavors. He worked for Karner Group as a building manager, Wet N Wild Outfitters as a fishing guide, and was also self-employed as a tile setter and finish carpenter. He testified that Brian Taylor was aware of his other jobs.

Petitioner was paid $30/hour by Respondent, sometimes working 40 hours/week and sometimes only one day a week. He that Respondent paid him in cash and by check. Petitioner testified that Respondent did not withhold income taxes or Social Security taxes. Petitioner testified he earned an average of $400/week from Karner and an average of $300/week from Wet N Wild. Petitioner further testified that due to an injury he did not earn enough in 2021 to pay taxes on.

Petitioner testified that he believed he was an employee of Brian Taylor and covered by his Workers' Compensation insurance. He identified PX #4, a text received from Brian Taylor. Petitioner also identified PX #5 and PX #6, letters from Amy Stack RN, Medical Professional for Travelers/The Phoenix Insurance Co. He had received copies of those letters. PX #4, PX #5, and PX #6 were rejected as evidence.

Petitioner testified Brian Taylor would contact him when he was looking for someone to install or dismantle equipment, in conjunction with other work Mr. Taylor had agreed to perform. Mr. Taylor would contact Petitioner by phone, asking if he was interested in this work assignment. Petitioner testified that he could not turn down a work request from Mr. Taylor but then testified that he could turn down requests if he chose.

Prior to April 26, 2022 Petitioner was contacted by Mr. Taylor to see if he was interested in working on April 26. The assignment would entail assisting a moving company in the disassembly of a piece of medical equipment at RUSH hospital.

Petitioner testified that he was under the direct supervision of Brian Taylor at the time of his accident. He also testified that Mr. Taylor was not on site at the time of his accident. He testified that Mr. Taylor did not provide any tools or equipment for the work at RUSH. He would take directions from the moving company when on site.

Petitioner testified Mr Taylor told him not begin disassembling the hospital equipment until the moving company (Reebie) showed up to assist because the medical equipment was very heavy. On the morning of April 26, Petitioner received a phone call from Mr. Taylor, telling him the moving company would be late in arriving to the hospital. Petitioner was told to get a cup of coffee or a soft drink and wait until the moving company arrived before beginning to dismantle the medical equipment.

Prior to the arrival of the moving company, Petitioner began disassembling the hospital equipment. He described the machine as very heavy. He started removing one of the legs of the medical equipment when it collapsed onto his head, hand, and legs. He was transported by ambulance to RUSH ER. Petitioner was treated in the ER and then was referred to Midwest Orthopaedics at RUSH. He testified that he was diagnosed with a fractured tibia and a sheared ligament.

Petitioner followed with Midwest Orthopaedics and was cleared for surgery on May 20, 2022 by Dr. Ari Narsinghani. Dr. Daniel Bohl of Midwest Orthopaedics at RUSH performed an open reduction with internal fixation of the right lateral malleolus, an open reduction with internal fixation of the syndesmosis, and deltoid ligament repair on May 25, 2022. The preoperative and postoperative diagnosis were displaced fracture lateral malleolus of fibula, rupture of syndesmosis of ankle, and rupture of deltoid ligament of ankle. Petitioner received postoperative physical therapy at Vista Ambulatory Care Center.

Petitioner consulted his primary physician Dr. Jennifer Bellucci-Jackson on June 10, 2022 for his right ankle surgery and left ankle sprain. Petitioner also complained of continuing significant neck pain. He was referred for chiropractic care from Lakeside Chiropractic/Absolute Wellness Ltd for his neck complaints.

Petitioner testified that he had been released to sedentary work by Dr. Bohl on November 29, 2022. He testified that there was no sedentary work available with any of his employers.

CONCLUSIONS OF LAW

B: *Was there an employee-employer relationship?*

The Arbitrator finds that Petitioner failed to prove that an employee-employer relationship existed with Respondent on the date of injury.

Petitioner testified that he believed he was an employee of Respondent at the time of his accident. Petitioner's state of mind is irrelevant in determining whether an employee-employer relationship existed. That determination is based on the facts in evidence.

Many factors are considered to determine whether an employment relationship existed at the time of the claimed injury:

1) the right to control the manner in which the work is performed;
2) the right to discharge;
3) the method of payment;
4)) the deduction of withholding income taxes, Social Security taxes, Medicare taxes, etc.;
5) the skills required to perform the work;
6) the ownership of tools, materials, and equipment used in the work; and
7) the relationship of the work performed to the employer's purpose.

The employer's right to control the manner of the employee's work is the single greatest determining factor, even where other factors may conflict.

Petitioner testified that he used his own tools when for Respondent. He did not testify that any special skills were essential to performing the work for Respondent. No taxes were withheld from Petitioner's pay. Petitioner was paid in cash and by check. Payment in cash is suggestive of a lack of an employee-employer relationship. The Arbitrator assumes Respondent had the right to discharge Petitioner in that Respondent may choose to not hire Petitioner for a particular job. However, in this case Petitioner had the right, and had exercised that right, to refuse jobs.

The Arbitrator that Petitioner failed to prove that Respondent had control over his work. Petitioner testified that Brian Taylor had direct control over his work. However, Petitioner testified that the movers directed his work on site. Further, Petitioner testified that Mr. Taylor was not on site. The Arbitrator finds it is highly unlikely that Mr. Taylor could control Petitioner's work when he was not present at the worksite. There was no evidence that Mr. Taylor gave any direction to Petitioner other than wait for the movers before dissembling the medical equipment to be moved. There was no evidence that Mr. Taylor gave any specific instructions to Petitioner about the manner or method to dissemble the medical equipment.

The Arbitrator adds the observation that Petitioner had questionable credibility. Although there was no direct impeachment of Petitioner, the entirety of his testimony stretched credulity. Petitioner's testimony that he did not earn enough money to be liable to file a tax return did not align with his testimony regarding his earnings, particularly the testimony about cash payments for his work. He offered no corroborating evidence to support his tax filing claim. Someone with the complexity of Petitioner's claimed work history would normally have records of earnings, cost of supplies, and other deductions. Nothing of this nature was offered in evidence.

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

The Arbitrator has found that Petitioner failed to prove that there was an employee-employer relationship with Respondent. It then follows from that finding that there could not have been an accident that arose out of and in the course of employment by Respondent. This issue is mooted.

F: *Is Petitioner's current condition of ill-being causally related to the accident?*

There is no dispute that Petitioner was injured on April 26, 2022. However, in light of Petitioner's failure to prove that an employee-employer relationship with Respondent existed and his failure to prove a causal connection, this issue is mooted.

G: *What were Petitioner's earnings?*

In light of Petitioner's failure to prove that an employee-employer relationship with Respondent existed and his failure to prove a causal connection, this issue is mooted.

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?*

There is no dispute that Petitioner's required significant medical care, including surgery. However, in light of Petitioner's failure to prove that an employee-employer relationship with Respondent existed and his failure to prove a causal connection, this issue is mooted.

K: What temporary benefits are in dispute? TTD

In light of Petitioner's failure to prove that an employee-employer relationship with Respondent existed and his failure to prove a causal connection, this issue is mooted.

Steven J. Fruth, Arbitrator — Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC031489
Case Name	Tom Perjenski v. Knight Hawk Coal
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0009
Number of Pages of Decision	21
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Roman Kuppart, Steven Hanagan
Respondent Attorney	Kenneth Werts, Julie Webb

DATE FILED: 1/9/2024

/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

TOM PERJENSKI,

Petitioner,

vs. NO: 19 WC 31489

KNIGHT HAWK COAL,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of whether the Petitioner's alleged occupational disease arose out of and in the course of his employment and permanent partial disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed February 7, 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 Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

The bond requirement in Section 19(f)(2) of the Act is only applicable when the Commission has entered an award for the payment of money. Therefore, no bond is set by the Commission. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

January 9, 2024

CAH/tdm
d: 12/21/23
052

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

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

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC031489
Case Name	Tom Perjenski v. Knight Hawk Coal
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	18
Decision Issued By	William Gallagher, Arbitrator

Petitioner Attorney	Roman Kuppart, Steven Hanagan
Respondent Attorney	Kenneth Werts

DATE FILED: 2/7/2023

THE INTEREST RATE FOR THE WEEK OF FEBRUARY 7, 2023 4.75%

/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

Tom Perjenski
Employee/Petitioner

v.

Knight Hawk Coal
Employer/Respondent

Case # 19 WC 31489

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Collinsville, on December 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 Sections 1(d)-(f) of the Occupational Diseases Act

FINDINGSFS

On February 28, 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 $68,521.96; the average weekly wage was $1,317.73.

On the date of accident, Petitioner was 67 years of age, married with 0 dependent child(ren).

Petitioner claims no medical.

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

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

ORDER

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

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

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

William R. Gallagher

FEBRUARY 7, 2023

William R. Gallagher, Arbitrator
ICArbDec p. 2

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an occupational disease to his lungs and/or heart. The Application alleged a date of last exposure of February 28, 2018, and that Petitioner sustained the occupational disease as a result of inhalation of coal mine dust including but not limited to coal dust, rock dust, fumes & vapors for a period in excess of 42 years.

At the time of trial, Petitioner was 71 years old. Petition was a high school graduate and had a few college classes in welding and hydraulics. Petitioner worked in the coal mines for a little over 40 years with all of that time being underground. Petitioner testified that during the course of his work in the coal mines, he was regularly exposed to coal dust and rock dust. Petitioner testified that he did not have exposure to fumes, smoke or chemicals while working in the mine. He testified that he was exposed to diesel fumes. He testified that diesel fumes did not cause him any issues breathing wise. Petitioner's date of last employment in the coal mines for Respondent was February 28, 2018. His job classification was maintenance foreman. In that job he took care of all the units, all the outby and belt drives. Petitioner testified that inby is the working section of the mine where the coal is loaded. The outby is belt drives which are away from the face of the mine. Petitioner's job as maintenance foreman included changing out the gear cases and hanging cable and curtains. Petitioner testified that he left his employment at Respondent in February 2018 because of a retirement that was planned a year ahead of time, and did not have anything to do with his breathing issues.

Petitioner was employed by the railroad and in farming from 1969 through 1977. Petitioner worked at Ziegler Coal from 1977 to 1979 where he worked with the long air docks where he would shoot coal down with compressed air. He testified that he was exposed to quite a bit of coal and rock dust. Petitioner worked for Old Ben Coal as a repairman from 1979 through 1984. This work was performed at the face of the mine. Petitioner was employed by Kerr McGee from 1984 through 2008. Petitioner was employed by Respondent as a maintenance foreman from 2008 to 2018.

Petitioner testified that while working for Respondent his job involved bending and stooping, which at times caused him breathing problems. Petitioner testified that he had breathing problems when he had to walk in ankle deep to knee deep water. Petitioner testified at trial he had a breathing problem. He testified that he first noticed breathing problems several years ago when he started working with Kerr McGee. He testified that when he was exposed to the diesel fumes, his chest would hurt when he got home. He testified that it was hard to breathe with the diesel fumes around. Petitioner testified that he would cough up black stuff.

Petitioner testified that he was able to walk less than half a mile at a normal pace on level ground. He testified that from the onset of the breathing problems until the time of trial, his condition had gotten worse. He testified his breathing problems do not affect him in his daily activities. He testified that if he starts breathing really hard, he just stops for a while. Petitioner testified that he is able to mow his own yard with a push mower and a riding mower. He testified that he starts breathing hard when he starts pushing the lawnmower and the longer he pushes the harder it is to breathe so he just quits. He testified that he has to take breaks when he uses the push mower. He testified that he does not weed eat much but when he does, it does not really bother him. He testified

that he does not have any issues grocery shopping as far as his breathing. He testified that he is the cart pusher. Petitioner testified his hobbies include golf, fishing and deer hunting. He testified that he uses a cart when he golfs and does not really have any breathing problems.

He testified that while working for Respondent toward the end of his employment, he sometimes would have to stop and take breaks from the work he was doing because of breathing issues. Petitioner testified that he started smoking in his 20s and quit five or six years later. He testified that he smoked a half a pack to a pack per day when he was smoking. Petitioner testified that as far as his last job with Respondent, it would be fair to say that he was able to complete his job every day, but it got harder toward the end of his career due to his breathing. Petitioner testified that as of trial, he would not be able to do his last coal mining job due to his breathing.

Petitioner testified that he signed up for Social Security the year before he retired. He was already on Medicare by the time of his retirement. Upon retirement, he also began collecting money from his 401(k) and pension. Petitioner testified that once he retired, he did not look for work and did not work again. Petitioner's personal care physician for many years was Dr. Evelyn Yu and then he switched over to Dr. Shrestha. Petitioner testified that he was always honest with his primary care providers in regard to the symptoms he had or did not have.

Petitioner testified that he had not golfed in a couple years, but he still hits balls in the yard two or three times a week. He testified that he had not deer hunted since 2020. He testified that he fishes every day. He testified that he does not have a boat anymore and fishes from the bank. He testified that in addition to fishing he does woodworking at the house and remodels every time his wife wants it remodeled.

Dr. Suhail Istanbouly specializes in pulmonary, critical care and sleep medicine (Petitioner's Exhibit 1, p 5). Dr. Istanbouly practiced in Southern Illinois from April 2003 until March 2019. At that time he took a position at Hines VA in Maywood, Illinois (Petitioner's Exhibit 1, pp 5-6). Dr. Istanbouly testified that in Southern Illinois he was a community physician seeing all kinds of cases related to his specialty. He testified that being a pulmonologist practicing in Southern Illinois gave him good exposure to black lung cases which accounted for 30 to 40% of the patients he saw on a daily basis for 16 years. Dr. Istanbouly still has a clinic in Southern Illinois where he goes once a month so he is still in touch with black lung cases (Petitioner's Exhibit 1, p 6). Dr. Istanbouly used to be affiliated with the Respiratory Disease Clinic in Southern Illinois and was the Medical Director of the Pulmonary Department at Herrin Hospital from 2005 to March 2019. He was the Director of the Intensive Care Unit at Carbondale Memorial Hospital for eight years (Petitioner's Exhibit 1, p 7).

Dr. Istanbouly saw Petitioner one time on August 17, 2020, for an evaluation in his state black lung claim (Petitioner's Exhibit 1, p 8). Dr. Istanbouly testified that for many years he would do five to seven such examinations a month. These examinations were always performed at the request of a claimant attorney (Petitioner's Exhibit 1, pp 20-21).

Dr. Istanbouly noted that Petitioner worked as a coal miner for 47 years with all of that time being underground. Petitioner's last month of employment in the coal mine was February, 2018. Petitioner left the coal mine due to planned retirement. In the last year of employment, Petitioner

was a maintenance/repairman foreman. Petitioner was an ex-smoker having quit smoking 30 years prior. He smoked a pack a day for a total of 10 years. Petitioner reported a chronic daily cough for 10 to 15 years, mild to moderate in intensity, occasionally productive of mild clear yellowish sputum. He complained of exertional dyspnea. He would get short of breath by walking half a block (Petitioner's Exhibit 1, p 9).

Dr. Istanbouly testified that physical examination of Petitioner's chest was within normal limits (Petitioner's Exhibit 1, p 10). Dr. Istanbouly testified that the pulmonary function test he performed on Petitioner was valid. He testified that the results of Petitioner's pulmonary function study revealed a non-specific ventilatory limitation (Petitioner's Exhibit 1, pp 10-11). Dr. Istanbouly testified that he was familiar with the *AMA Guides to Evaluation of Permanent Disability, Sixth Edition*, Table 5-4. Dr. Istanbouly testified that Petitioner would fall under Class 2 impairment on that table (Petitioner's Exhibit 1, p 11). Dr. Istanbouly reviewed a chest x-ray from Harrisburg Medical Center dated September 24, 2019. Dr. Istanbouly diagnosed coal workers' pneumoconiosis which was caused by his long term coal dust inhalation (Petitioner's Exhibit 1, pp 13, 15).

Dr. Istanbouly testified that the American Thoracic Society's definition of chronic bronchitis is persistent daily cough or mucous production at least three months in a year in two consecutive years. Dr. Istanbouly testified that Petitioner met the criteria for chronic bronchitis. Dr. Istanbouly testified that although Petitioner's chronic bronchitis was multifactorial in nature, long term coal dust inhalation was a significant contributor to his chronic bronchitis in addition to other possibilities like allergic rhinitis and acid reflux disease (Petitioner's Exhibit 1, pp 15-16).

Dr. Istanbouly testified that the disease process of coal workers' pneumoconiosis is caused by fine particles being inhaled and reaching the deep parts of the airways ending in the alveoli creating a local irritation or inflammation that will end up with tiny scars which are the small round opacities seen on the x-ray. Dr. Istanbouly testified that the tiny scars will replace normal lung tissue and will affect the gas exchange through the vascular parenchymal barrier. Dr. Istanbouly testified that not every coal miner who is exposed to coal dust gets coal workers' pneumoconiosis. Dr. Istanbouly testified that the scarring and fibrosis of pneumoconiosis are permanent and cannot carry on the function of normal healthy lung tissue. He testified that by definition if one has coal workers' pneumoconiosis, he would have an impairment of the function of the lung at least at the site of the scar or fibrosis (Petitioner's Exhibit 1, pp 16-17). Dr. Istanbouly testified that Petitioner had clinically significant pulmonary impairment based upon cough, sputum production and exertional dyspnea (Petitioner's Exhibit 1, p 18). He testified that Petitioner has an environmental impairment in terms of being precluded from safely returning to the environment of the coal mine because of his coal workers' pneumoconiosis and chronic bronchitis. He testified that it was advisable for Petitioner to not have any further coal dust exposure to prevent the progression of his pulmonary disease (Petitioner's Exhibit 1, p 19).

Dr. Istanbouly testified that Petitioner related to him mild to moderate daily cough occasionally productive. Petitioner could not identify a trigger for his cough including smoke, dust or fumes. Petitioner was not taking any breathing medications at the time Dr. Istanbouly saw him and based upon the history Dr. Istanbouly obtained, he had not done so in the past (Petitioner's Exhibit 1, pp 21-22). He was taking Loratadine which would have been for allergies (Petitioner's Exhibit 1, p 22). Petitioner did not tell Dr. Istanbouly that he left the coal mine because of a breathing problem

or an inability to perform his job. Dr. Istanbouly testified that there are causes of exertional dyspnea other than respiratory disease. These would include heart disease and deconditioning. At the time of Dr. Istanbouly's examination, Petitioner had a BMI of 34 which was obese. Dr. Istanbouly did not know what Petitioner had done since he had retired to stay in shape (Petitioner's Exhibit 1, p 23). Dr. Istanbouly did not review any treatment records regarding Petitioner (Petitioner's Exhibit 1, pp 23-24).

In the spirometry that Dr. Istanbouly performed, Petitioner had a normal FEV1/FVC ratio. Dr. Istanbouly testified that Petitioner's FEV1/FVC ratio actually exceeded what was predicted for him (Petitioner's Exhibit 1, p 24). Dr. Istanbouly testified that there was a concomitant reduction in Petitioner's FEV1 and FVC. Dr. Istanbouly testified that he was familiar with the ATS/ERS task force standardization of lung function testing. He agreed that in that statement it provides that special attention must be paid when FEV1 and FVC are concomitantly decreased and FEV1/FVC ratio is normal or almost normal. Dr. Istanbouly agreed that the task force goes on to state that this pattern most frequently reflects failure of the patient to inhale or exhale completely (Petitioner's Exhibit 1, pp 24-25). Dr. Istanbouly testified that the scarring that results from coal workers' pneumoconiosis is permanent. The decline that is associated with that scarring in pulmonary function is also permanent (Petitioner's Exhibit 1, pp 25-26).

Dr. Istanbouly testified that when he met with Petitioner he was presented with the chest x-ray of September 24, 2019, along with Dr. Henry K. Smith's interpretation of same. He testified that he has not seen any other chest imaging or interpretations of chest imaging for Petitioner. Dr. Istanbouly testified that he does not provide profusion ratings on the films he interprets for black lung. When he interprets a film for black lung, he determines whether the film is positive or negative and if positive, he classifies what he sees as mild or early, moderate or severe pneumoconiosis. He classified what he saw on Petitioner's film as mild or early pneumoconiosis. He indicated in his interpretation of the chest x-ray that he saw bilateral interstitial changes more prominent in the mid and lower lung zones. Dr. Istanbouly testified that according to Dr. Smith's report, he did not see any interstitial changes in the bilateral upper lung zones (Petitioner's Exhibit 1, pp 26-27). Dr. Istanbouly testified that he is neither an A or B-reader of films. He did not do a side by side reading of Petitioner's chest x-ray with the standard ILO films. Dr. Istanbouly could not say whether the film he reviewed had 1/0 or 0/1 profusion. Dr. Istanbouly testified that one must be a susceptible host to develop coal workers' pneumoconiosis. He testified that not all coal miners develop coal workers' pneumoconiosis (Petitioner's Exhibit 1, pp 27-28).

Dr. Henry K. Smith is a diagnostic radiologist (Petitioner's Exhibit 2, p 3). Dr. Smith has been board certified in radiology since 1973. He took the B-reading exam for the first time in 1987 and has been continuously certified as a B-reader since that time (Petitioner's Exhibit 2, p 11). Dr. Smith testified that being awarded a B-reader certification is "an actual additional feather in your cap" (Petitioner's Exhibit 2, p 18). Dr. Smith testified that he failed the B-reading recert exam twice somewhere around 1999. He testified that he failed because of overreading films. He was finding more disease than was present on the standard film (Petitioner's Exhibit 2, pp 48-49). Dr. Smith received his Doctor of Osteopathic Medicine in 1968 from Kirksville College of Osteopathic Medicine (Petitioner's Exhibit 2; Deposition Exhibit 1, p 6). Dr. Smith did a rotating general internship at Carson City Hospital in Carson City, Michigan, and a radiology residency at Memorial Osteopathic Hospital in York, Pennsylvania (Petitioner's Exhibit 2, p 7). Dr. Smith operated his

own private radiology practice from 1988 to 2016. Since leaving his practice, he has been doing consulting work in the field of radiology including a lot of B-readings (Petitioner's Exhibit 2, pp 9-10).

Dr. Smith testified that in performing the B-reading, he starts with determining the quality of the film. The next step is to determine if there are small opacities present. If opacities are present, he determines if there are enough to be called pneumoconiosis. If so, then he determines whether they are round or linear opacities and categorizes them by size (Petitioner's Exhibit 2, pp 19-20). Dr. Smith testified that with coal workers' pneumoconiosis the preponderance of the small opacities are round. He testified that with other kinds of pneumoconiosis, such as asbestos-related, they are linear or irregular opacities. In coal workers' pneumoconiosis, opacities occur primarily in the upper to mid lung zones (Petitioner's Exhibit 2, p 21). Dr. Smith next considers the profusion which is the concentration or density of the findings in the lungs (Petitioner's Exhibit 2, p 22). Dr. Smith testified that the profusion tells the reader what degree of involvement is present (Petitioner's Exhibit 2, p 23). Dr. Smith testified that the last thing included in completing the B-reading form are the obligatory findings which are things which need to be recorded other than the findings of black lung (Petitioner's Exhibit 2, p 25). Dr. Smith testified that mottle on a film is a pixel-y type of look. Mottle may make the film look like there is disease present, but in fact the reader is getting a false sense of opacities being present because of the mottled appearance. Dr. Smith described an opacity as a small abnormal density one would not see on a normal chest x-ray. It is often seen in people who have occupational disease or pneumoconiosis (Petitioner's Exhibit 2, pp 28-29). Dr. Smith testified that reading films for pneumoconiosis is an art (Petitioner's Exhibit 2, p 34).

At the request of Petitioner's counsel, Dr. Smith reviewed a chest x-ray of Petitioner dated September 24, 2019. He testified that the film was of diagnostic quality. Dr. Smith testified that he did not find improper positioning due to scapular overlay, mottle or edge enhancement on the film. He testified that if he would have found those on the film, he would have noted those in his report (Petitioner's Exhibit 2, p 36). Dr. Smith testified that scapular overlay might add to the density of the chest making the reader think there is some disease there when really it is due to overlying bony structure (Petitioner's Exhibit 2, pp 36-37). Dr. Smith testified that if a film has a really hard edge enhancement, it may show everything black and white while the reader wants to see more grays in a diagnostic film for coal workers' pneumoconiosis (Petitioner's Exhibit 2, p 37). Dr. Smith interpreted the chest x-ray as having interstitial fibrosis classification p/p in the mid and lower lung zones bilaterally of profusion 1/0. He also noted mild thickened interlobar fissure. Dr. Smith testified that Petitioner had coal workers' pneumoconiosis and as a result of same he had damage to his lungs (Petitioner's Exhibit 2, p 38).

From 1988 to 2016, Smith Radiology was a freestanding diagnostic walk-in medical facility (Petitioner's Exhibit 2, p 51). Dr. Smith testified that Smith Radiology made 1.25 million dollars in annual income after expenses. Of that income maybe 5% was for medical/legal exams or interpretations (Petitioner's Exhibits No. 2, pp 52-53). Dr. Smith testified that over the years he has interpreted chest x-rays for black lung for over 20 law firms. He testified that over 80% of those firms represented claimants (Petitioner's Exhibit 2, p 53). Dr. Smith testified that he presently is reviewing films for black lung for five firms that represent claimants. Dr. Smith testified that one of those firms was Petitioner's counsel. He also reviewed films for Culley & Wissore. He testified that he has read more than 345 films for Culley & Wissore or Petitioner's counsel (Petitioner's Exhibit

2, pp 55-56). Dr. Smith testified that when he received films from Culley & Wissore he would get two or three films at a time on a frequency of twice a month. He might receive a tiny bit more than that from Petitioner's counsel (Petitioner's Exhibit 2, pp 58). Dr. Smith testified that at his peak he was interpreting 2,000 films a year for law firms. Presently he is interpreting about 1,500 films per year (Petitioner's Exhibit 2, p 59).

Dr. Smith has never sat on any committee with NIOSH or held any office with the College of Osteopathic Medicine or the Osteopathic Board of Radiology (Petitioner's Exhibit 2, p 61). Dr. Smith testified that the syllabus that he uses to study for the B-reading exam he pretty much takes as gospel. He testified that the panel who puts that together are the peers that he aspires to be. He testified that he respects them highly. He testified that the leaders in the field have been chosen to put the syllabus together. Dr. Smith testified that a new syllabus has been authored for NIOSH and that Dr. Cris Meyer was one of the authors of that syllabus (Petitioner's Exhibit 2, pp 62-63). Dr. Smith testified that he agrees with the current B-reading syllabus that small opacities associated with exposure to silica and coal dust are usually rounded (Petitioner's Exhibit 2, p 64). Dr. Smith agreed with the B-reading syllabus that small round opacities usually involve the upper lung zones first and as the dust exposure continues, all of the lung zones may become involved (Petitioner's Exhibit 2, p 66). Dr. Smith agreed that simple pneumoconiosis is unlikely to progress once the exposure ceases. Dr. Smith testified that pulmonary impairment is determined by appropriate pulmonary function testing and not by chest x-ray. Dr. Smith testified that if one wants to know whether there is any functional impairment and if present, the degree of same, he would want to have valid pulmonary function testing (Petitioner's Exhibit 2, p 67).

Dr. Smith did not know if the monitors he uses for interpreting chest x-rays were in compliance with the guidelines that are set forth in the Code of Federal Regulations. He did not know whether the equipment complied with the DICOM standard that is set forth in the Code of Federal Regulations (Petitioner's Exhibit 2, p 68-69).

Dr. Smith testified that adoption of profusion ratings was done to avoid imprecise descriptive terms of what was seen on the films such as early, moderate or severe pneumoconiosis (Petitioner's Exhibit 2, p 69). Dr. Smith testified that any A or B-reader knows what is meant by 1/0 profusion. He testified that describing 1/0 profusion is something different than saying early because what is early to one person may not be early to another (Petitioner's Exhibit 2, pp 70-71).

Dr. Cristopher Meyer reviewed a chest x-ray of Petitioner dated September 24, 2019. Dr. Meyer testified that the film was of diagnostic quality. He read it as quality 2 for improper positioning due to scapula overlap. He testified that there was some edge enhancement and mottle (Respondent's Exhibit 1, p 40). Dr. Meyer testified that mottle makes the film look grainy, very similar to photographs that used a 400 ASA would have kind of little polka dot look to them. He testified that mottle can simulate small opacities (Respondent's Exhibit 1, p 27). Dr. Meyer's impression was no findings of coal workers' pneumoconiosis and the lungs were clear (Respondent's Exhibit 1, p 40). Dr. Meyer testified that mottle and edge enhancement often simulate small opacities (Respondent's Exhibit 1, p 57). He testified that if an individual is interpreting films on monitors or other processing type of equipment that does not meet the federal guidelines, it could impede the reader from seeing the presence of mottle or edge enhancement (Respondent's Exhibit 1, p 66).

Dr. Meyer has been board certified in radiology since 1992 (Respondent's Exhibit 1, p 7). Dr. Meyer has been a B-reader since 1999 (Respondent's Exhibit 1, p 19). Dr. Meyer was asked to take the B-reading exam by Dr. Jerome Wiot who was part of the original committee that designed the teaching course which was called the B-reader program (Respondent's Exhibit 1, pp 19-21). Dr. Meyer testified that there are several ways to study for the B-reader examination. There is a course module that contains a whole series of films that NIOSH will send to the physician or the American College of Radiology runs a B-reading course. Dr. Meyer testified that he had participated in the course previously while studying for the examination and was recently asked to have a more active academic role in creating the new syllabus and designing the new B-reader exam. Dr. Meyer is currently co-director of the ACR B-Reader Course (Respondent's Exhibit 1, pp 31-32). Dr. Meyer was a member of the ACR Pneumoconiosis Task Force which completed a new syllabus for the course as well as a test that was delivered to NIOSH in 2017 (Respondent's Exhibit 1, p 32). Dr. Meyer testified that the B-reader training course was a day and a half course in which there were a series of lectures describing the B-reading classification system and going through some standard examples of the various components of the B-reading system. The course participants would then review a series of practice examples with mentors overseeing the practice examples. Dr. Meyer testified that the faculty for the B-reading course is typically experienced senior level B-readers who have been involved in the process for quite some time (Respondent's Exhibit 1, pp 32-33).

Dr. Meyer testified that typically after one takes the course, the individual will take the B-reading exam. Dr. Meyer testified that the old certifying exam was six hours long with 120 chest x-rays to be categorized. The pass rate for the examination ran roughly 60%.The current exam is 24 multiple choice questions and 72 cases in five hours (Respondent's Exhibit 1, p 33). Dr. Meyer testified that radiologists have about a 10% higher pass rate on the B-reading exam than other specialties. In Dr. Meyer's opinion radiologists have a better sense of what the variation of normal is (Respondent's Exhibit 1, pp 33-34). Dr. Meyer testified that one of the most important parts of the B-reading training and examination is making the distinction between a 0/1 and 1/0 film. Dr. Meyer testified that this distinction is an emphasis in the B-reading course as well as on the examination (Respondent's Exhibit 1, pp 34-35).

Dr. Meyer testified that the B-reader looks at the lungs to decide whether there are any small nodular opacities and based on the size and appearance of the small opacities they are given a letter score (Respondent's Exhibit 1, p 22). Dr. Meyer testified that specific occupational lung diseases are described by specific opacity types. Coal workers' pneumoconiosis is characteristically described by small round opacities. Diseases that cause pulmonary fibrosis, like asbestosis, would be described by small linear opacities (Respondent's Exhibit 1, p 28). The distribution of the opacities is also described because different pneumoconioses are seen in different regions of the lung. Coal workers' pneumoconiosis is typically an upper lung zone predominant process. Idiopathic pulmonary fibrosis or asbestosis is a basilar or linear process. The last component of the interpretation is the extent of the lung involvement or the so-called profusion (Respondent' Exhibit 2, pp 22-23). Dr. Meyer testified that the profusion is basically trying to describe the density of the small opacities in the lung (Respondent's Exhibit 1, p 30). Dr. Meyer testified that although he read the chest x-ray as negative, Petitioner could still have coal workers' pneumoconiosis on a pathological level (Respondent's Exhibit 1, p 51). Dr. Meyer testified that simple pneumoconiosis typically will not progress once exposure ceases (Respondent's Exhibit 1, p 60).

Dr. Meyer did not pass the B-reading test the first time he took it. He testified that he was two years out of his residency, around 1994, when his commanding officer at the hospital told him he was to go and take the B-reading exam. He had no idea that he was actually supposed to study for the exam so he showed up on a weekend, took the American College of Radiology course and sat for the examination. Dr. Meyer testified that he became certified as a B-reader in 1999 and has not failed the B-reader exam since then (Respondent's Exhibit 1, pp 65-66).

Dr. Meyer testified that in an article by Cohen & Velho from 2002, the author cited a study that revealed that with coal workers' pneumoconiosis, round opacities were most commonly seen and indicated that 69% of subjects had such opacities. Dr. Meyer testified that same was in accord with his experience. Dr. Meyer testified that there was an article by Remy-Jardin a few years ago correlating CTs and chest x-rays that had also demonstrated small round opacities with a clear upper zone predominance in coal workers' pneumoconiosis. In the Cohen, et al article from 2008, the authors stated that the classic feature of coal workers' pneumoconiosis is nodular opacities predominantly in the upper lung zones on chest x-ray. Dr. Meyer testified that this has been his experience (Respondent's Exhibit 1, pp 64-65).

At the request of Respondent's counsel, Dr. James Lockey reviewed medical records and chest imaging of Petitioner (Respondent's Exhibit 2, p 16). Dr. Lockey is a physician at the University of Cincinnati Medical Center (Respondent's Exhibit 2, p 4). Dr. Lockey completed a pulmonary fellowship in 1978. He is board certified in internal medicine as well as in pulmonary and occupational medicine. Dr. Lockey has been certified as a B-reader continuously since 1988 (Respondent's Exhibit 2, p 5). Dr. Lockey is on the American College of Radiology Task Force for redoing the B-reading training program using the ILO system. That committee updated the training films and the B-reader instruction pamphlet and also updated the training course and exam (Respondent's Exhibit 2, p 6). Dr. Lockey was recruited to the University of Cincinnati to run the Division of Occupational and Environmental Medicine starting in 1986. He has been heavily involved in research in occupational lung disease. He has treated individuals with pneumoconiosis (Respondent's Exhibit 2, pp 7-8).

Dr. Lockey reviewed a chest x-ray of Petitioner of September 24, 2019, and provided a B-reading for same (Respondent's Exhibit 2, p 17). Dr. Lockey testified that when he performs a B-reading for a film, he uses the ILO standard films. He compares the standard films to the subject films. He testified that he puts up the target film and then goes back and forth between the ILO films to decide where the target film falls (Respondent's Exhibit 2, pp 19-20). Dr. Lockey interpreted the chest x-ray of Petitioner as negative for pneumoconiosis. He found the film to be quality 2 due to scapula overlay (Respondent's Exhibit 2; Deposition Exhibit B).

Dr. Lockey testified that for a proper reading of a chest x-ray for pneumoconiosis one must evaluate the film for quality. Then the reader evaluates the film for interstitial changes, either round or irregular opacities consistent with pneumoconiosis. If opacities are present, then the reader looks at the various lung fields for profusion, which is how many opacities are in any one area of the lung. Dr. Lockey testified that from a clinical perspective a film that is 1/0 would be considered positive for pneumoconiosis. A film that is 0/1 would be considered negative for pneumoconiosis (Respondent's Exhibit 2, pp 18-19). Dr. Lockey testified that there is a very fine distinction between 0/1 and 1/0 profusion. He testified that this distinction is a point of emphasis in the B-reading

syllabus, the course as well as the examination that is given to be certified as a B-reader (Respondent's Exhibit 2, p 19).

Dr. Lockey testified that it is very unlikely for simple pneumoconiosis to progress once the exposure ceases. Dr. Lockey agreed with the position of the American Thoracic Society that an older worker with a mild pneumoconiosis may be at low risk for working in currently permissible dust levels in the mine until he reaches retirement age (Respondent's Exhibit 2, p 21). Dr. Lockey testified that he is familiar with the *AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition*, Chapter 5, The Pulmonary System. He testified that according to the *Guides*, chest imaging is not a factor, let alone a key factor, in the determination of impairment. Dr. Lockey testified that there is not any clinical significance to subradiographic pneumoconiosis (Respondent's Exhibit 2, pp 21-22). Dr. Lockey testified that Petitioner's diffusion capacity of 86% indicates that there is no fibrosis present involving the alveolar capillary membrane that would interfere with gas exchange. Dr. Lockey testified that when an individual develops scarring of the lung due to dust exposure, it affects the alveolar capillary membrane (Respondent's Exhibit 2, p 22). Dr. Lockey testified that one must be a susceptible host to develop coal workers' pneumoconiosis because the majority of people exposed to coal dust do not develop coal workers' pneumoconiosis (Respondent's Exhibit 2, p 23).

Dr. Lockey testified that with regard to the pulmonary function testing that was last performed on Petitioner, same was normal whether the predictives used were Knudson/Cotes or NHANES III. Dr. Lockey testified that based on the results from that spirometry, employing NHANES III predictives, and applying Table 5-4 of the *Guides*, Petitioner falls in Class 0 impairment. Dr. Lockey testified that from a respiratory standpoint, Petitioner is capable of heavy manual labor (Respondent's Exhibit 2, pp 23-24). Dr. Lockey testified that when impairment in pulmonary function occurs as a result of scarring of the lung from inhalation of dust or vapors, that impairment is permanent. He testified that Petitioner's spirometry performed on October 5, 2020, was significantly better than that performed two months earlier on August 17, 2020. Dr. Lockey testified that the results from the spirometry last performed on Petitioner revealed no evidence of obstruction. Dr. Lockey testified that Petitioner's lung volumes measured in October, 2020, were normal (Respondent's Exhibit 2, p 24). Dr. Lockey testified that a normal total lung capacity indicated that Petitioner had no restrictive changes in his pulmonary function. Dr. Lockey testified that according to the *AMA Guides*, to fall in Class 0 impairment an individual's FEV1/FVC ratio must be greater than the lower limit of normal and/or 75% of predicted. Petitioner had an FEV1/FVC ratio on October 5, 2020, testing both above the lower limit normal and 75% of predicted regardless of whether his height was 70 inches or 72 inches and regardless of whether Knudson/Cotes predictives or NHANES III predictives were used (Respondent's Exhibit 2, p 25).

Dr. Lockey testified that cough is not considered an objective determinant of pulmonary impairment. He testified that it is a non-specific symptom and is associated with various types of upper and lower airway abnormalities as well as other abnormalities such as gastroesophageal reflux disease. It is also associated with rhinosinusitis which is a disease common to the general population. Dr. Lockey testified that based on his medical records, Petitioner had a long history of allergic rhinosinusitis with perennial and seasonal flares that were manifested by intermittent post nasal drainage at times associated with cough as well as sinusitis. Dr. Lockey testified that Petitioner's respiratory symptoms were consistent with rhinosinusitis (Respondent's Exhibit 2, p

26). Dr. Lockey testified that Petitioner did not suffer any permanent aggravation of that disease as a consequence of his workplace exposure. Dr. Lockey testified that chronic bronchitis is a persistent cough, usually four or more days a week, with sputum production for three consecutive months, for two consecutive years. Dr. Lockey testified that the history that Dr. Istanbouly took from Petitioner of daily cough, mild to moderate in intensity, occasionally productive was a borderline definition or a symptom recording by Dr. Istanbouly. Dr. Lockey testified that based on the medical records, Petitioner's cough was due to his seasonal allergic rhinitis. Dr. Lockey testified that the medical records he reviewed did not contain the diagnosis of chronic bronchitis (Respondent's Exhibit 2, p 27).

Dr. Lockey testified that, at times, Petitioner would also experience episodes of coughing associated with heartburn (GERD). Dr. Lockey testified that Dr. Smith's findings on the chest film of September 24, 2019, indicating minimal small round opacities of profusion category 1/0 involving the middle and lower lung fields bilaterally were not seen by him and were not the typical location of early changes consistent with coal and/or rock dust exposure. Dr. Lockey testified that the pulmonary function results and diffusion capacity studies from October 5, 2020, were within normal limits. Dr. Lockey testified that Petitioner's history of intermittent cough was associated with his history of allergic rhinosinusitis and post nasal drip as well as recurrent gastroesophageal reflux disease (Respondent's Exhibit 2, pp 28-29).

Dr. Lockey testified that in susceptible individuals exposure to chronic dust over time can cause changes in the bronchial tree, leading to a chronic bronchity condition. He testified that in susceptible individuals, coal workers' pneumoconiosis is an interstitial lung disease. He testified that in certain individuals along with the disease process of coal workers' pneumoconiosis one can see scarring and fibrosis. Dr. Lockey testified that if the scar tissue interferes with the alveolar capillary membrane it will interfere with the exchange of oxygen and carbon dioxide (Respondent's Exhibit 2, pp 31-33). Dr. Lockey testified that the scarring and fibrosis related to coal workers' pneumoconiosis is permanent in nature (Respondent's Exhibit 2, p 33). Dr. Lockey testified Petitioner could have coal macules in his lungs and have a negative chest x-ray (Respondent's Exhibit 2, p 44).

Dr. Lockey testified that according to the pulmonary function study performed by Dr. Istanbouly, Petitioner had a restrictive defect. On that testing both his FVC and FEV1 were reduced and his ratio was normal which would be consistent with a restrictive pattern. Dr. Lockey testified that it was possible that Petitioner's obesity was a factor in his restrictive disease. Dr. Lockey testified that the only time he has seen coal dust cause restrictive defect is in someone who had complicated coal workers' pneumoconiosis (Respondent's Exhibit 2, pp 50-51). Dr. Lockey testified that if one has disease from coal workers' pneumoconiosis, the disease is permanent and the pulmonary function tests do not change. Dr. Lockey testified that there was a marked increase in Petitioner's pulmonary function testing results from August 17, 2020, to October 5, 2020. He testified that one does not see that type of increase if the patient has coal workers' pneumoconiosis (Respondent's Exhibit 2, pp 54-55). He attributed the change to the fact that in the testing of October 5, 2020, Petitioner had a better inspiratory effort (Respondent's Exhibit 2, p 62). Dr. Lockey testified that the way to determine whether restriction is present is to look at the FEV1 and FVC, but one also would do lung volume studies. He testified that lung volumes are the gold standard to determine whether a restriction is present. Petitioner did not have lung volumes performed on August 17, 2020. Lung

volumes performed in October, 2020, were normal which rules out restriction (Respondent's Exhibit 2, pp 60-61).

Medical records of Dr. Evelyn Yu were admitted into evidence. Petitioner was seen on September 26, 2007, regarding weight control. In review of systems respiratory, Petitioner related frequent coughing. Physical examination of the chest revealed clear breath sounds. He chewed tobacco. He related outdoor and indoor allergies. He was taking Nasonex for his allergies. Assessment was hypertension, GERD and allergic rhinitis (Respondent's Exhibit 4, pp 76-78). Petitioner was seen on August 5, 2008, with swollen right elbow. His lungs clear to auscultation with no wheezes, no dullness (Respondent's Exhibit 4, p 73). Petitioner was seen on September 8, 2008. His lungs were clear to auscultation with no wheezes Petitioner was noted to be suffering from allergic rhinosinusitis. He was taking Cetirizine for same (Respondent's Exhibit 4, p 70). Petitioner was seen on October 6, 2008. Examination of the chest revealed the lungs clear to auscultation. Allergies were listed in the assessment (Respondent's Exhibit 4, p 69).

Petitioner was seen on January 9, 2009, with complaint of swelling under his eyes. Physical examination of the chest revealed lungs clear with no wheeze, no dullness. His medication list included Singular (Respondent's Exhibit 4, p 68). Petitioner was seen on February 17, 2009, with complaint of severe heartburn. Physical examination of the chest revealed the lungs to be clear with no wheeze, no dullness. The assessment was acute reflux esophagitis and allergies (Respondent's Exhibit 4, p 67). Petitioner was seen on April 8, 2009, in follow up for his heartburn and allergies. His lungs were clear to auscultation with no wheeze, no dullness. The assessment included GERD and allergic rhinitis (Respondent's Exhibit 4, p 66). Petitioner's chest examination revealed lungs clear to auscultation with no wheeze, no dullness on visits from July 13, 2009 through November 4, 2009. On October 7, 2009, the assessment included allergies (Respondent's Exhibit 4, pp 60-65). Petitioner was seen on December 4, 2009, suffering from acute sinusitis and bronchitis. Physical examination of the chest revealed harsh breath sounds. He also complained of sore throat, congestion, cough and chills (Respondent's Exhibit 4, p 58).

Petitioner was seen on February 25, 2010, for upper respiratory complaints. His lungs were clear to auscultation with no wheeze, no dullness. He did suffer congestion with nasal drainage and cough. The assessment was upper respiratory infection/sinusitis (Respondent's Exhibit 4, p 57). Petitioner was seen on March 12, 2010, with complaint of cough and sinus drainage. His lungs were clear to auscultation with no wheeze, no dullness. The assessment was acute sinusitis (Respondent's Exhibit 5, p 56). Petitioner's lungs were clear with no wheeze, no dullness when seen on April 13, 2010, and July 13, 2010 (Respondent's Exhibit 4, pp 54-55). Petitioner was seen on October 18, 2010, suffering nasal congestion associated with ear pain. The lungs were clear to auscultation with no wheeze, no dullness. The assessment was allergic rhinitis and GERD. He was taking Nasonex for his allergies (Respondent's Exhibit 4, p 53). Petitioner was seen on January 17, 2011, with complaint of cough and sinus congestion of two weeks duration. He also had some ear pain and headache. His lungs were clear with no wheeze, no dullness. The assessment included acute sinusitis (Respondent's Exhibit 4, p 52). On January 31, 2011, Petitioner's sinusitis had improved. His lungs were clear to auscultation with no wheeze, no dullness. Assessment still included allergies (Respondent's Exhibit 4, p 51). Petitioner was seen on March 1, 2011. He was sneezing and suffering some nasal drip. Lungs were clear to auscultation. Assessment was allergic rhinosinusitis (Respondent's Exhibit 4, p 50). Petitioner was seen on April 1, 2011, for a checkup. It was noted

that his allergies were stable (Respondent's Exhibit 1, p 49). Petitioner was seen on August 15, 2011, at which time he complained regarding his allergies. He had a cough. His lungs were clear to auscultation with no wheeze, no dullness. Assessment included GERD and allergies (Respondent's Exhibit 4, p 47).

Petitioner was seen on January 19, 2012, at which time he complained of some sinus drainage and headache. His lungs were clear to auscultation with no wheeze, no dullness. The assessment was acute sinusitis (Respondent's Exhibit 4, p 45). Petitioner's lungs were clear to auscultation with no wheeze, no dullness from May 2, 2012, June 4, 2012, August 7, 2012, and September 10, 2012 (Respondent's Exhibit 4, pp 41-44). Petitioner was seen on January 11, 2013, complaining of some sniffling and congestion. His lungs were clear to auscultation with no wheeze, no dullness (Respondent's Exhibit 4, p 40). Petitioner was seen on February 8, 2013, for pre-op surgical clearance for cataract surgery. Review of systems was negative except for allergies. His lungs were clear to auscultation with no wheeze, no dullness (Respondent's Exhibit 4, p 39). Petitioner was seen on August 19, 2013, with symptoms of rhinorrhea and sneezing. His lungs were clear to auscultation with no wheeze, no dullness. Assessment included GERD and allergies (Respondent's Exhibit 4, p 35). On September 30, 2013, Petitioner related symptoms consistent with sleep apnea. His lungs were clear to auscultation (Respondent's Exhibit 4, p 34).

Petitioner was seen on January 27, 2014, relating a feeling of fullness in both ears. His lungs were clear to auscultation with no wheeze, no dullness. The assessment was acute sinusitis (Respondent's Exhibit 4, p 29). Petitioner was seen on September 8, 2014. His lungs were clear to auscultation. Assessment included allergies (perennial and seasonal flares) and shortness of breath rule out asthma (Respondent's Exhibit 4, p 26).

Petitioner was seen on January 23, 2015. The assessment included chronic allergies-rhinosinusitis. His lungs were clear to auscultation with no wheeze, no dullness (Respondent's Exhibit 4, p 24). Petitioner was seen on April 20, 2015 with upper respiratory infection. His lungs were clear to auscultation (Respondent's Exhibit 4, p 22).

Petitioner was seen on February 1, 2016. His lungs were clear to auscultation with no dullness. The assessment included reflux esophagitis and allergies (Respondent's Exhibit 4, p 17). Petitioner was seen on June 27, 2016, June 30, 2016, July 14, 2016, and September 19, 2016, his lungs were clear to auscultation with no wheeze, no dullness (Respondent's Exhibit 4, pp 13-16). On December 22, 2016, Petitioner complained of cough and acid reflux. Lungs were clear to auscultation with no wheeze. Assessment included acute sinusitis and GERD (Respondent's Exhibit 4, p 12).

Petitioner was seen on May 22, 2017, complaining of being congested. He also related shortness of breath with cough. Physical examination of the chest revealed occasional wheeze. The assessment was chronic cough with acute pharyngitis (Respondent's Exhibit 4, p 11). On August 1, 2017, Petitioner's lungs were clear to auscultation with no wheeze, no dullness (Respondent's Exhibit 1, p 10). Petitioner's lungs were clear to auscultation with no wheeze, no dullness on September 15, 2017, October 16, 2017, and November 20, 2017 (Respondent's Exhibit 4, pp 6-7, 9). On December 18, 2017, Petitioner's lungs were clear to auscultation with no wheeze. ProAir was listed as one of his medications (Respondent's Exhibit 4, p 5).

Petitioner was seen on January 22, 2018. His lungs were clear to auscultation with no wheeze, no dullness. Assessment included allergic rhinosinusitis (Respondent's Exhibit 4, p 4). Petitioner was seen on February 22, 2018. His lungs were clear to auscultation with no wheeze, no dullness (Respondent's Exhibit 4, p 3). Petitioner was seen on August 23, 2018. His lungs were clear to auscultation with no wheeze, no dullness (Respondent's Exhibit 4, p 2).

Medical records of Dr. Niranjan Shrestha were admitted into evidence. Petitioner was seen on December 3, 2018, to establish as a new patient. Review of systems respiratory was negative for cough, congestion or shortness of breath. His past medical history was significant for allergic rhinitis. Physical examination of the chest revealed equal breath sounds with no additional sounds (Respondent's Exhibit 5, pp 102-103). Petitioner was seen on March 18, 2019. Review of systems respiratory was negative for cough, congestion or shortness of breath. Physical examination of the chest revealed equal breath sounds with no additional sounds (Respondent's Exhibit 5, pp 97-98). Petitioner's review of systems respiratory was negative for cough, congestion or shortness of breath and his physical examination of the chest revealed equal breath sounds with no additional sounds on both May 21, 2019 and July 2, 2019 (Respondent's Exhibit 5, pp 92-96). Petitioner was seen on September 23, 2019, complaining of sinus congestion and stuffiness off and on. Review of systems respiratory was negative for cough, congestion or shortness of breath. Examination of the chest revealed equal breath sounds with no additional sounds (Respondent's Exhibit 5, pp 89-91). Petitioner was seen on December 23, 2019. His review of systems respiratory was negative for cough, congestion or shortness of breath. Physical examination of the chest revealed equal breath sounds with no additional sounds (Respondent's Exhibit 5, pp 87-88).

Throughout the numerous office visits in 2020, Petitioner's review of systems respiratory was negative for cough, congestion or shortness of breath on exertion. Each office visit physical examination of the chest revealed equal breath sounds with no additional sounds (Respondent's Exhibit 5, pp 57-74, 77-78, 81-85).

Petitioner was seen on February 23, 2021, for review of lab work. He was not properly exercising. Review of systems respiratory was negative for cough, congestion or shortness of breath. Examination of the chest revealed equal breath sounds with no additional sounds (Respondent's Exhibit 5, pp 54-56). When seen on April 26, 2021, June 21, 2021 and August 16, 2021, Petitioner's review of systems respiratory was negative and his lungs were clear to auscultation (Respondent's Exhibit 5, pp 39-47). Petitioner was seen on October 11, 2021, complaining of some swelling of the right lower leg and ankles. Petitioner denied shortness of breath. His review of systems respiratory was negative. Examination of the chest revealed the lungs clear to auscultation bilaterally without wheezing, rales, rubs, or rhonchi. It was charted that Petitioner had smoked two packs a day for five years having quit in the 1980s (Respondent's Exhibit 5, pp 32-34). Petitioner underwent an EKG on October 13, 2021, which revealed a right bundle branch block. A chest x-ray was performed on the same date and was interpreted as revealing no evidence of pulmonary disease (Respondent's Exhibit 5, p 30-31). Petitioner was seen on October 25, 2021. Review of systems respiratory was negative. His lungs were clear to auscultation without wheezing, rales, rubs, or rhonchi (Respondent's Exhibit 5, pp 28-29). Petitioner was seen on November 4, 2021. He denied chest pain or shortness of breath. His review of systems respiratory was normal. Physical examination of the chest revealed lungs clear to auscultation without wheezing, rales, rubs, or rhonchi (Respondent's Exhibit 5, pp 25-27). Petitioner underwent an echocardiogram on November 10, 2021, with the indication for same being

shortness of breath. Same revealed a dilated right ventricle otherwise it was normal (Respondent's Exhibit 5, pp 22-24).

Petitioner was seen on January 25, 2022. He denied having significant shortness of breath. Review of systems respiratory was negative. Lungs were clear to auscultation with no without wheezing, rales, rubs, or rhonchi (Respondent's Exhibit 5, pp 18-21). Petitioner underwent a CT of the chest on February 1, 2022. Indication for same was shortness of breath. His lungs were noted to be hyperinflated with mild emphysema. There was a tiny 5-6 millimeter ground glass nodular opacity within the posterior left lobe (Respondent's Exhibit 5, p 17). Petitioner was seen on March 21, 2022. He denied shortness of breath but had some mild swelling of the lower legs. Review of systems respiratory was negative. His lungs were clear to auscultation bilaterally with without wheezing, rales, rubs, or rhonchi. The assessment was mild emphysema, pulmonary nodule, dilated right ventricle likely pulmonary hypertension, mild edema lower legs and obesity (Respondent's Exhibit 5, pp 13-16). Petitioner was seen on May 2, 2022. Review of systems cardiovascular revealed mild shortness of breath. Lungs were clear to auscultation bilaterally with no without wheezing, rales, rubs, or rhonchi (Respondent's Exhibit 5, pp 10-12). Petitioner was seen on July 25, 2022. He related sinus congestion, sneezing and sniffling off and on for a long time. He denied cough or congestion. He reported that over the counter allergy medication was not helping. Review of system cardiovascular revealed occasional mild shortness of breath on exertion. Lungs were clear to auscultation bilaterally with no without wheezing, rales, rubs, or rhonchi. Assessment included allergic rhinitis (Respondent's Exhibit 5, pp 6-8). CT of the chest was performed on August 10, 2022. The study was interpreted as revealing resolution of nodule previously seen with no new nodules. Petitioner had pulmonary emphysema (Respondent's Exhibit 5, p 5). Petitioner was seen on September 15, 2022. Review of systems respiratory was negative. Lungs were clear to auscultation with no without wheezing, rales, rubs, or rhonchi (Respondent's Exhibit 5, pp 2-3).

Conclusions of Law

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

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

In support of these conclusions the Arbitrator notes the following:

All of the retained physicians interpreted the chest x-ray of Petitioner dated September 24, 2019. Dr. Smith and Dr. Lockey described the protocol for a proper reading of a chest x-ray for pneumoconiosis. Dr. Smith testified that profusion is the concentration or density of the findings in the lungs. Dr. Lockey testified that profusion is the determination of whether or not the x-ray is positive or negative for pneumoconiosis. Dr. Istanbouly did not follow this protocol and did not know the profusion of the film that he reviewed.

Dr. Lockey reviewed medical records and the x-rays of September 24, 2019, and opined that x-ray was negative for pneumoconiosis.

Dr. Meyer opined that x-ray of September 24, 2019, did not reveal any evidence of pneumoconiosis. He also noted it was of quality 2 because of improper positioning due to scapula overlap and there was also edge enhancements and mottle. He testified mottle can make the film look grainy and simulate small capacities. Dr. Meyer testified to the training and examination required to become a B-reader.

Dr. Istanbouly is not an A or B-reader of films. Although one does not have to be a B-reader to interpret films for the presence of coal workers' pneumoconiosis, such certification lends credibility to a physician's interpretation. Dr. Istanbouly testified that when he interprets a film for black lung, he determines whether it is positive or negative and if it is positive he classifies it as mild, moderate or severe pneumoconiosis. In this case he classified what he saw on Petitioner's chest x-ray as mild or early pneumoconiosis. Dr. Smith testified that the adoption of profusion ratings was done to avoid imprecise descriptive terms of what was seen on a film such as early, moderate or severe pneumoconiosis. Dr. Smith testified that any A or B-reader knows what is meant by 1/0 profusion. He testified that what early pneumoconiosis means to one person may or may not be what early pneumoconiosis means to another.

Dr. Smith reviewed the chest x-ray of September 24, 2019, and opined it was positive for pneumoconiosis with a profusion of 1/0. He opined that scapular overlay might add to the density of the chest which could make the reader think there were some disease is present when that was really and over lying bony structure.

Based upon the preceding the Arbitrator finds the opinions of Dr. Meyer and Dr. Lockey to be more persuasive than those of Dr. Istanbouly and Dr. Smith.

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

William R. Gallagher, Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC027089
Case Name	Jacob Casali v. Daniel Mfg., Inc.
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0010
Number of Pages of Decision	8
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Damon Young
Respondent Attorney	Ilir Imeri

DATE FILED: 1/10/2024

/s/Maria Portela, 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

Jacob Casali,

Petitioner,

vs. NO: 22 WC 027089

Daniel MFG., Inc.,

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 nature and extent, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 11, 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 $9,300.00. 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.

January 10, 2024
o121223
MEP/yp

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC027089
Case Name	Jacob Casali v. Daniel Mfg., Inc.
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	5
Decision Issued By	Bradley Gillespie, Arbitrator

Petitioner Attorney	Damon Young
Respondent Attorney	Ilir Imeri

DATE FILED: 7/11/2023

THE INTEREST RATE FOR THE WEEK OF JULY 11, 2023 5.27%

/s/Bradley Gillespie, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

JACOB CASALI
Employee/Petitioner

v.

DANIEL MFG., INC.
Employer/Respondent

Case # **22** WC **027089**

Consolidated cases: _____

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gillespie**, Arbitrator of the Commission, in the city of **Bloomington**, on **June 29, 2023**. By stipulation, the parties agree:

On the date of accident, **09-13-2022**, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the 17 weeks preceding the injury, Petitioner earned $**17,410.21**, and the average weekly wage was $**1,024.13**.

At the time of injury, Petitioner was **34** years of age, ***single*** with **0** dependent children.

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

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

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

ORDER

Respondent shall pay Petitioner the sum of $**614.48**/week for a further period of **15** weeks, as provided in Section **8 (c)** of the Act, because the injuries sustained caused **15 weeks of disfigurement**.

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

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

Bradley D. Gillespie **JULY 11, 2023**

Signature of Arbitrator

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JACOB CASALI,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 22 WC 027089**
	)	
DANIEL MANUFACTURING, INC.,	)	
	)	
Respondent.	)	

NATURE AND EXTENT DECISION OF ARBITRATOR

The Issues

The parties proceeded to trial on June 29, 2023, in Bloomington, Illinois. The only issue in dispute was the nature and extent of Petitioner's injuries.

Findings of Fact

Jacob Casali [hereinafter "Petitioner"] is a 34-year-old male who was employed by Daniel Manufacturing, Inc. [hereinafter "Respondent"] as a Sandblaster. Petitioner's job duties as a sandblaster involved utilizing a hose, the size of a firefighter's hose, to blast sand particles at handrails, straight rails, and other similar items.

Petitioner testified that he was sandblasting a handrail on September 14, 2022, which required him to hold the top of the handrail in position with his left hand while using his right hand to guide the sandblaster. Petitioner testified that as he was shooting the sand at the handrail with the sandblaster, the handrail started to fall. Petitioner instinctively attempted to catch the handrail with his left hand in order to keep it from falling to the ground. Unfortunately, this resulted in his left hand getting hit by the stream of sand from the sandblaster.

Petitioner testified that he was wearing protective gloves at the time of the accident. However, the force from the sandblaster was so strong that it pulled his glove right off. As a result of this accident, parts of Petitioner's skin were ripped off the top of his left hand.

Although Petitioner testified that this was painful, he did not seek any treatment for his injury. Instead, Petitioner simply cleaned up his hand, wrapped it up, and then went back to work. Petitioner testified that he never sought any formal medical treatment for his injuries, and no medical records were introduced by Petitioner which would indicate that he had received any type of medical treatment for this injury.

Petitioner testified that he continued to work following the accident and that he did not miss any time off of work as a result of this accident. In fact, Petitioner was able to return back to work the next day and work his regular schedule without issue.

Petitioner testified that as it currently stands, he has some sensitivity and scarring on top of the left hand as a result of the accident. The scaring in question is located on the top of his left hand in the area immediately behind his thumb and index finger. Pictures of the area in question were introduced into evidence by Petitioner. Petitioner testified that he took those pictures himself on June 22, 2023, that he was holding his cell phone approximately a foot away from his left hand at the time that he took the pictures, and that the pictures accurately reflected his injury to his hand.

The Arbitrator was able to view Petitioner's left hand at the time of the hearing in addition to having viewed the pictures of the left hand submitted by Petitioner.

Conclusion of Law

As to issue (L), the nature and extent of the Petitioner's injury, the Arbitrator finds and concludes as follows:

The Arbitrator incorporates the findings of fact outlined above. The Arbitrator notes that since this claim involves an allegation of disfigurement rather than disability, the Arbitrator's analysis must be based on Section 8(c) rather than the five factors outlined in Section 8.1(b). Accordingly, the Arbitrator makes the following conclusions of law.

The Arbitrator finds that Petitioner did not seek any medical treatment, did not miss any time off of work, and did not otherwise suffer any type of loss of income. Despite this, however, the Arbitrator was able to visually observe the top of Petitioner's left hand, i.e., the area which Petitioner alleges to have had a scar as a result of his injury, from at least 6 feet away. At the time of this viewing, the alleged scar was older than 6 months.

The Arbitrator notes there were very light visible scars on the Petitioner's left hand. The predominant feature of his scarring was visible was a patch of discolored and rough texture that went from the thumb to the index finger in a pie shape. This was an area of approximately two inches in length at the thumb and index finger and narrows to about an inch or less as it goes into the wrist. The Arbitrator found the discoloration to be discernable from six feet away in comparison to the rest of Petitioner's hand. The Arbitrator notes that the pictures that Petitioner submitted into evidence are a close-up of the area in question and accurately reflect the affected area.

Based on the facts above, and taking the record as a whole, the Arbitrator finds and concludes, pursuant to Section 8(c) of the Act that Petitioner sustained a disfigurement of 15 weeks due to the work-related discoloration and rough texture found on the back of his left hand.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC004349
Case Name	Victor Gandia v. Sherwin Williams
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0011
Number of Pages of Decision	14
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Haris Huskic
Respondent Attorney	Randall Stark, Scott Webber

DATE FILED: 1/11/2024

/s/ Deborah Simpson, Commissioner

Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Victor Gandia,
Petitioner,

vs. NO: 20 WC 4349

Sherwin Williams,
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, chain of referral, fee schedule 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 March 8, 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 $51,000.00. 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.

January 11, 2024

o12/13/23
DLS/rm
046

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC004349
Case Name	Victor Gandia v. Sherwin Williams
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	Jessica Hegarty, Arbitrator

Petitioner Attorney	Haris Huskic
Respondent Attorney	Randall Stark

DATE FILED: 3/8/2023

THE INTEREST RATE FOR THE WEEK OF MARCH 7, 2023 4.97%

/s/ Jessica Hegarty, Arbitrator

Signature

STATE OF ILLINOIS)
)
COUNTY OF **Joliet**)

☐ 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

Victor Gandia
Employee/Petitioner
v.
Sherwin Williams
Employer/Respondent

Case #**20** WC **004349**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jessica Hegarty** Arbitrator of the Commission, in the city of **Joliet**, on **January 6, 2023.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Section 8(a)-Medical Chain of Referral**

FINDINGS

On **2/17/20** 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 ***$42,019.64*** the average weekly wage was ***$808.07*.**

On the date of accident, Petitioner was **44** years of age, ***married*** with **2** dependent children.

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

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

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

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

ORDER

- The Arbitrator finds that Petitioner is entitled to PPD to the extent of **20% loss of use of a person** (*See attached Addendum for the Arbitrator's analysis pursuant to Section 8.1(b) of the Act*).

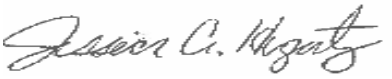
- Respondent shall pay Petitioner TTD benefits of $538.71 per week for the following periods: February 18, 2020, through March 2, 2020; March 9, 2020, through March 17, 2020; December 30, 2020, through January 5, 2021.

- Respondent is liable for all disputed medical bills from February 17, 2020, through February 16, 2021. All medical bills related to treatment after February 16, 2021, are denied.

- Petitioner did not exceed his choice of physicians pursuant to Section 8(a).

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 8, 2023

ICArbDec p. 2

ADDENDUM TO THE DECISION OF THE ARBITRATOR

FINDINGS OF FACT

This matter proceeded to hearing on January 6, 2023, in Joliet, Illinois. (Arb. 1). The disputed issues are causal connection, Respondent's liability outstanding medical bills, Petitioner's entitlement to TTD, the nature and extent of Petitioner's injuries and, whether Petitioner exceeded his choice of physicians pursuant to Section 8(a) of the Act. (Id.) The Respondent does not dispute that Petitioner was injured in a work-related accident on February 17, 2020. (Id.)

The Petitioner testified that on February 17, 2020, he had been employed by Respondent for the past two years as a warehouse technician. (TX., p. 6) His duties included picking orders, loading and unloading trailers, and operating a sit-down forklift. (Id.) He is left-handed. (Id.)

Regarding his accident, Petitioner testified that he was operating a sit-down forklift while unloading scrap pallets inside of an empty trailer when the trailer unexpectedly pulled away from the loading dock causing Petitioner, and the forklift to fall backward 5-6 feet onto the parking lot pavement. (Id. p. 7). Petitioner testified he felt pain in his left shoulder, neck, lower back, right thumb, left wrist, and ribs immediately after the accident. (Id., p. 8-9)

According to his testimony, he had no problems with these body parts and was in good health before this accident. (Id., p. 9)

Petitioner was treated at Physicians Immediate Care in Bolingbrook, Illinois, a few hours after the accident where he complained of pain in his neck, bilateral shoulders, upper back, and left thigh following a work accident earlier that day. (PX.1, p. 4) Petitioner reportedly was operating a sit-down forklift inside of a trailer when he fell 5 feet off a loading dock after the trailer unexpectedly pulled away from the dock. Petitioner was treated, released with sedentary work restrictions, and instructed to follow up in two days. (Id., 9) Petitioner called Physicians Immediate Care on February 19, 2020, reporting that he would continue treatment with his primary care physician. (Id., p. 9)

On February 19, 2020, Petitioner presented to his primary care physician, Dr. Asif Hussain, at the Dreyer Clinic in Oswego, Illinois. (TX. p. 15; PX 7) Petitioner's description of the work accident was consistent with his testimony. His complaints of pain in his left upper back, left arm, right thoracolumbar, and right hand were noted by Dr. Hussain. On exam, tenderness to palpation over the left upper trapezius area, left arm, right thoracolumbar region, and right thumb area was noted. Dr. Hussain ordered various x-rays, prescribed medications, and took Petitioner off of work until February 24, 2020. (Id., p. 86-88)

On February 24, 2020, Dr. Hussain noted Petitoner's report of worsening left upper back pain now radiating down his left arm. Dr. Hussain prescribed physical therapy, a Medrol Dosepak and Norco for pain, and kept Petitioner off work. (Id., p. 66-68)

On February 27, 2020, Petitioner presented for his initial physical therapy consult at the Dreyer Clinic after his visit with Dr. Hussain. (Id.) The therapist's assessment noted Petitioner had limited range of cervical and left shoulder motion and was unable to lift or reach overhead or to the side without pain. The therapist suspected injury to Petitioner's left rotator cuff. (Id., p. 57)

On March 3, 2020, Petitioner presented to Dr. Hussain with complaints of right low back and left shoulder pain. (Id., p. 46) Petitioner reportedly returned to full-duty work, which included lifting up to 4000 pounds, which aggravated his right low back and left shoulder pain. (Id.) Dr. Hussain prescribed a muscle relaxant, ordered physical therapy for Petitioner's lumbar back, and took Petitioner off of work for one week, noting that his office would inquire whether light-duty work would be available starting the next week. (Id.)

On March 9, 2020, Dr. Hussain noted Petitioner's report of improving left shoulder and right low back pain. Petitioner asked the doctor whether he could return to work next week with restrictions. Petitioner reportedly experienced spasms in his bilateral hands which improved after taking a muscle relaxant. Dr. Hussain kept Petitioner off of work until March 16, 2020, noting that a release to work with restrictions would be issued if Petitioner's condition continued to improve. (Id, p. 34). When Petitioner returned to Dr. Hussain on March 16, 2020, he reported that his shoulder pain was much better but his low back pain persisted. (Id., p. 21) Dr. Hussain noted Petitioner did not feel ready to return to work and his physical therapist agreed. The doctor kept Petitioner off of work pending his next visit in one week. (Id, p. 23).

On March 23, 2020, Dr. Hussain noted Petitioner followed up via telephone, due to the pandemic, at which time Petitioner reported having "similar" shoulder and back pain. Petitioner's physical therapy sessions were canceled due to the pandemic. (Id., 17) Dr. Hussain noted Petitioner was off work, nonetheless, for 2 weeks because of the shelter-in-place order from the State of Illinois. (Id.)

According to Petitioner's testimony, when he next followed up at Dreyer Clinic, Dr. Hussain was unavailable due to sickness. (TX. p. 26) Petitioner tried to get a "doctor's note" from Dr. Hussain's office to no avail. (Id) Petitioner then called his lawyer and explained that he couldn't see his doctor and needed a doctor's note for his job, at which time his attorney referred him to Midwest Anesthesia & Pain Specialists. (Id.)

On April 7, 2020, Petitioner presented for initial consult to Midwest Anesthesia & Pain Specialists (MAPS) with a history of pain in his neck, low back, and bilateral shoulders following a work accident consistent with his testimony at the hearing. (PX.2, p. 53) Petitioner reportedly had undergone physical therapy which yielded minimal pain relief. Petitioner reported to P.A. Genco that he experienced the most pain in his low back and localized pain in the anterior lateral aspect of his left shoulder which radiated down to his left elbow. His shoulder pain increased with overhead or lifting activities. He also complained of neck pain that increased with extension and rotation of his cervical spine. Petitioner reportedly had been taking Norco and Flexeril as prescribed by his primary care physician, which provided good relief from his pain complaints. P.A. Genco noted a diagnosis of low back, left shoulder, and neck pain due to a work injury. P.A. Genco noted that Petitioner's left shoulder pain was consistent with rotator cuff pathology. MRIs of Petitioner's left shoulder, neck, and lumbar back were ordered, and Petitioner was kept off work. (Id, p. 56-57)

On April 16, 2020, Petitioner underwent an MRI of his cervical spine that showed mild cervical spondylosis and disc desiccation, borderline C3-4 spinal canal narrowing with mild left greater than right neural foraminal encroachment due to disc bulge with superimposed shallow central protrusion. (PX.6, p.232-233) Petitioner followed up at MAPS where a cervical facet joint injection was recommended along with physical therapy and off-work restrictions. (PX. 2, p. 67-68)

On May 13, 2020, Petitioner underwent an MRI of the left shoulder that showed a superior labrum anterior to posterior (SLAP) tear extending into the superior anterior quadrant, less than 50% bursal surface partial tear involving the posterior half of the supraspinatus tendon, and mild to moderate degenerative changes in the AC joint. (Id., p.229-230)

On May 19, 2020, Petitioner followed up at MAPS where Dr. Mark Farag noted complaints of low back, left shoulder, and neck pain. (PX. 2, p. 71). His left shoulder pain was localized to the anterior lateral aspect, radiating to his elbow. (Id.) On exam, Dr. Farag noted the empty can, Neer's, Hawkin's, and Speed's tests were positive. (Id.) The doctor restricted Petitioner from work and referred him to an orthopedic surgeon for evaluation of his left shoulder. (Id., p. 79).

On May 26, 2020, Petitioner underwent an MRI of his lumbar spine that showed a dorsal annular tear at the left foraminal zone and mild neural foraminal narrowing bilaterally at L4-L5 and at L5-S1, mild bilateral neural foraminal narrowing. (Id., p.226-227).

Regarding his left shoulder, Petitioner testified that MAPS referred him to Dr. Chandrasekhar Sompalli, an orthopedic surgeon at Elite Ortho and Sports Medicine where he presented for initial consult on May 30, 2020. (PX.5, p.178; TX.36; PX.2 p. 75) Petitioner complained of constant, sharp, shooting, and throbbing pain in his left shoulder. (PX 5, p. 176) Petitioner had been in physical therapy for 6 weeks with minimal improvement in range of motion. (Id.). Pursuant to his exam and review of the recent MRI, Dr. Sompalli noted a partial rotator cuff and SLAP tear with impingement and recommended left shoulder surgery consisting of rotator cuff repair, debridement, and arthroscopic tenodesis. (Id., p.180-181)

Petitioner testified he wanted a second opinion so he began doing online research and asked his physical therapist who told him the doctors at Rush Copley were "good". (TX. 38-39). Petitioner testified, "So I went online and I started searching and I just went down the line. I think I called 3 guys. Some of these guys didn't take workmen's comp. I finally got an appointment with Dr. Forsythe". (Id., 3).

On June 16, 2020, Petitioner presented to Dr. Brian Forsythe at Midwest Orthopedics at Rush who noted complaints of persistent anterior and lateral left shoulder pain at a 7-8/10. (PX 10, p. 813) On exam, the doctor noted positive Neer's, Hawkin's, Speed's, and O'Briens tests, as well as positive valgus shear, and cross-body adduction. (Id.) Pursuant to his review of the left shoulder MRI, the doctor noted a complex SLAP tear with interstitial biceps tendinosis versus longitudinal split tearing, moderate to severe AC joint edema, and subacromial bursitis. (Id., p. 813). Dr. Forsythe noted Petitioner sustained an acute left shoulder injury resulting from his February 17, 2020, work accident. Further, the doctor noted Petitioner failed conservative measures including multiple weeks of therapy and anti-inflammatories. (Id.) Dr. Forsythe recommended surgery and on June 26, 2020, Petitioner underwent a left shoulder arthroscopic ½ SLAP tear debridement, distal clavicle excision, mini-open

subpectoral biceps tendinosis, and subacromial decompression, performed by Dr. Forsythe at Munster Specialty Surgery Center. (PX.10, p. 813, 837) Postoperatively, Petitioner followed up with Dr. Forsythe who prescribed physical therapy and ordered Petitioner to remain off work. (Id., p. 807)

On July 14, 2020, Petitioner followed up at MAPS with Dr. Mark Faraj who recommended a right L4-S1 facet joint injection. (PX2, p. 94).

On September 1, 2020, Dr. Forsythe released Petitioner to sedentary desk duties with no lifting greater than 5 pounds. Petitioner testified that he did not return back to work as Respondent did not have desk duty work available. (PX10, p.801)

Petitioner was seen by Dr. Faraj at MAPS on September 29, 2020. (PX2, p. 115) Dr. Faraj again recommended the right-sided L4-S1 facet joint steroid injection and released Petitioner back to work per Dr. Forsythe's restrictions. *(Id*, p. 118)

On October 27, 2020, Petitioner followed up with Dr. Forsythe. (PX10, p.795) Dr. Forsythe recommended that Petitioner continue with physical therapy for two weeks followed by two weeks of work conditioning and continued his prior work restrictions. (Id.) Later that day, Petitioner followed up with Dr. Faraj. (PX2, p. 121) Petitioner reported that his low back continued to bother him on a regular basis, and it affected his ability to do housework and that it hurt especially when he did frequent bending. Again, Dr. Faraj placed recommended a right-sided L4-S1 facet joint injection and instructed Petitioner to get a referral from Dr. Forsythe for pain management to address his ongoing low back complaints. (Id, p. 124)

On November 16, 2020, a work conditioning/work hardening evaluation form was completed at Athletico Physical Therapy noting Petitioner met 4 out of 12 reported job demands required to function as a warehouse tech. Petitioner was able to occasionally lift 45 pounds with two hands to the waist level and 12 pounds to the shoulder level. Petitioner was reportedly required to lift up to 60 pounds in order to perform the full job duties required as a warehouse tech. Petitioner was instructed to attend work conditioning sessions three times per week for the next two weeks in order to focus on strength and mobility. (RX 7)

Petitioner followed up with Dr. Forsythe on November 24, 2020. (PX10, p.792) Following a physical examination, Dr. Forsythe instructed Petitioner to continue with work conditioning and to remain off work. In December 2020 Dr. Forsythe administered a left AC joint injection and ordered Petitioner to continue with work conditioning 4 times per week for 2 weeks. (Id., p.789)

On January 4, 2021, a functional capacity evaluation ("FCE") was conducted at Athletico that concluded Petitioner met 100% of his job demands required to function as a warehouse tech and all required job duties in order to return to work without restrictions. (RX7)

On January 5, 2021, Dr. Forsythe allowed Petitioner to return to full-duty work without restrictions on a trial basis. On February 16, 2021, Dr. Forsythe released Petitioner to full-duty work noting he was at maximum medical improvement. (PX10, p. 783-786)

Petitioner returned to work for Respondent at his pre-accident job for approximately five weeks but felt he needed restrictions.

On February 23, 2021, Petitioner returned to Dr. Sompalli with complaints of left shoulder pain at a 6 out of 10. Petitioner informed Dr. Sompalli that the pain remained even though he had completed formal physical therapy and work conditioning after surgery. (PX5, p.184) Petitioner reportedly had returned to work and was having issues with lifting, reaching overhead, and reaching behind. Dr. Sompalli ordered a left shoulder MRI and took Petitioner off work. (Id, p. 186-187) Petitioner returned to Dr. Sompalli on March 26, 2021, at which time the doctor noted Petitioner's recent MRI arthrogram revealed bicep tenodesis. (Id., p. 188) Dr. Sompalli diagnosed Petitioner with left shoulder impingement syndrome for which he recommended left shoulder diagnostic arthroscopy, possible debridement, and possible revision. Petitioner's off-work restrictions were continued until May 6 at which time light duty restrictions were noted. (Id, p. 190-192)

Petitioner was unable to return back to work as Respondent did not offer light duty work. On July 2, 2021, Petitioner returned to Dr. Sompalli who released him back to full-duty work effective July 6, 2021, noting he was at maximum medical improvement. (Id.).

On October 12, 2022, Dr. Mark Levin examined Petitioner at the Respondent's request pursuant to Section 12 of the Act. (RX 1) Dr. Levin's narrative report reflects his opinion, based on Petitioner's history, physical exam, radiographic studies, and medical records, that Petitioner sustained an injury on February 17, 2021, "where he had neck and lumbar discomfort and at least aggravated, if not caused, the left shoulder SLAP tear". (Id.) Dr. Levin further opined that Petitioner underwent appropriate physical therapy modalities and surgical intervention for his left shoulder and required no further treatment. Dr. Levin opined that Petitioner is capable of working full duty and has been working full duty. (Id.) Dr. Levin also performed a PPI rating based on AMA Guides to Evaluation of Permanent Impairment, Sixth Edition. Dr. Levin's PPI rating was 0% upper extremity impairment and 0% whole person impairment. (Id.)

Respondent submitted two Utilization Reviews: Medinsights, report dated December 30, 2022. (RX 2) and CareReview, report dated December 21, 2022 (RX 3). The Medinsights report concludes physical therapy treatment at Elite Physical Therapy from 2021 and that only the initial prescription of NSAIDs and muscle relaxants for up to six weeks from the date of injury were appropriate. Other prescription medications, including compound creams, were unreasonable and unnecessary to the extent of the injuries that were sustained. (Id.) CareReview Utilization Review also concluded that the work conditioning/work hardening completed through January 4, 2021, was not indicated for the injuries that were sustained and further that, other than the initial use of prescription NSAIDs and muscle relaxers up to six weeks form the date of injury, no further prescription medications, including compound creams or other topical medications, were reasonable or necessary to the extent of the injuries that were sustained. (RX 3)

Regarding his current condition, Petitioner testified he continues to experience issues with his left shoulder, neck, and low back. During the hearing, Petitioner stood up from his seat and relocated to a different chair due to stiffness in his low back and legs. (TX. p. 57) Petitioner testified that he is still experiencing ongoing chronic pain in his left shoulder and lower back. (Id., 57-58) He takes Ibuprofen, Aleve, and uses massage guns to relieve the pain. (Id., 58) Regarding his work activities, Petitioner testified, "When I go to work it's like I have to practically become

a right-handed person." (Id., 59) Because his job requires frequent lifting, Petitioner finds the job more challenging due to his left arm pain and limitations. (Id., 60-61)

CONCLUSIONS OF LAW

F. Causal Connection

Petitioner's testimony, the treating medical records and opinions contained therein, the opinions of Respondent's Section 12 examiner, and the chain of events, all support a finding that the current condition of ill-being in Petitioner's left shoulder, lumbar spine, and cervical spine are causally related to his February 17, 2020, work accident.

Petitioner's testimony that he had no problems with his left shoulder, cervical spine, or lumbar spine, prior to his February 17, 2020, work accident is unrebutted. He worked a physically demanding job that required frequent and heavy lifting for two years before his work accident and was unable to do so after.

The treating medical records document Petitioner's persistent and consistent complaints of pain regarding his left shoulder, neck, and lumbar back beginning immediately after his accident on February 17, 2020, continuing through his treatment with multiple providers including Dr. Hussain, the physicians and providers at MAPS, various physical therapists, as well as Dr. Sompalli and Dr. Forsythe. Respondent's Section 12 examiner, Dr. Levin, opined that Petitioner's accident was causally related to his neck and lumbar discomfort and at least aggravated, if not caused, his left shoulder SLAP tear.

Accordingly, the Arbitrator finds Petitioner has established a causal connection between his work accident and the current condition of ill-being of his left shoulder, lumbar spine, and cervical spine.

J. Medical Bills

Section 8(a) of the Act provides for the reasonable and necessary medical treatment designed to cure or relieve a claimant from the effects of an injury. The Arbitrator finds that not all medical care received by Petitioner was "reasonable and necessary" as defined by Section 8(a) of the Act.

The Arbitrator finds that Petitioner has proven that his medical treatment and bills from the accident date through February 16, 2021, was reasonable and necessary. This is based on the preponderance of evidence contained in the record including the treating medical records and the opinions of Dr. Levin.

Petitioner has failed to prove that any medical treatment he received after February 16, 2021, was reasonable or necessary. Petitioner chose Dr. Forsythe, over Dr. Sompali, to perform his surgery. The treating medical records of Dr. Forsythe document an 8-month-long doctor-patient relationship, during which, Dr. Forsythe performed surgery on Petitioner's upper left extremity and then managed his extensive post-surgical course of treatment. The Arbitrator finds the opinions of Dr. Forsythe well-reasoned and credible and places more weight on his opinions than those of Dr. Somali.

Accordingly, the Arbitrator finds that Respondent is liable for medical bills from the accident date through February 16, 2021.

K. TTD

The Arbitrator finds that Petitioner is entitled to TTD for the following periods: February 18, 2020, through March 2, 2020; March 9, 2020, through March 17, 2020; December 30, 2020, through January 5, 2021.

The Arbitrator denies Petitioner's request for benefits covering temporary total disability benefits from February 23, 2021, to July 5, 2021.

In support of these conclusions, the Arbitrator relies upon the January 4, 2021, FCE which found Petitioner met 100% of his job demands that were required to function as a warehouse technician and the medical opinions of Dr. Forsythe who released Petitioner at MMI on February 16, 2021.

L. Nature and Extent of the Injury

The Arbitrator is required to consider the following factors and criteria set forth in Section 8.1(b) of the Act in determining Petitioner's PPD: the level of impairment set forth in an AMA Impairment Rating, the occupation of the injured worker, the age of the injured worker, the future earning capacity of the injured worker, and evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b(b) (West 2014). 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) 150311W.*

Level of Impairment under the AMA Guides

Respondent entered into evidence an AMA Impairment Rating performed by Dr. Jay Levin who concluded that Petitioner had a 0% AMA Impairment Rating of the upper extremity and a 0% Impairment Rating of the whole person. (RX1) The rating is based on the AMA Guides to Evaluation of Permanent Impairment, Sixth Edition. This factor alone does not preclude an award for permanent partial disability. The Arbitrator accords this factor moderate weight in determining PPD.

Occupation of Petitioner

At the time of the accident, Petitioner worked for Respondent for approximately 2 years as a warehouse technician. Petitioner continues in that capacity without restrictions. The Arbitrator accords significant weight to this factor in determining PPD.

Age of Petitioner

At the time of the accident, Petitioner was 44 years old. He must live with the ongoing symptoms he experiences in his left shoulder, low back, and neck for the rest of his life. The Arbitrator places significant weight on this factor in favor in determining PPD.

Future Earning Capacity

At the time of the accident, Petitioner worked for Respondent as a warehouse technician. Petitioner continues in that capacity without restrictions. There is no evidence that his future earning capacity has been impaired. The Arbitrator accords no weight to this factor in determining PPD.

Evidence of Disability Corroborated by the Treating Medical records

Petitioner was diagnosed with a left shoulder SLAP tear, left shoulder acromioclavicular joint arthrosis, left shoulder biceps tendinosis, and left shoulder subacromial impingement, which required physical therapy, activity modifications, injections and ultimately left shoulder arthroscopy on June 26, 2020. Petitioner was also diagnosed with cervical spondylosis, for which injections were ordered; and spondylopathy of the lumbar spine for which facet joint injections were ordered. Although the Petitioner received surgical and therapeutic care for his injuries, he continues to experience ongoing chronic pain and weakness in his dominant left arm, lower back, and neck. He finds his job more challenging due to his left arm symptoms and tends to overcompensate for his left arm difficulties with his right arm. He testified that he experiences weather-related stiffness in his neck and back. His daily activities, including household chores have been affected. The Arbitrator places significant weight on this factor in determining PPD.

After considering the above five factors and the entirety of the evidence, the Arbitrator finds that several of the Section 8.1b(b) factors heavily weighed in favor of Petitioner. The Arbitrator finds Petitioner sustained PPD to the extent of **20% person as a whole.**

(M): Other issues: Section 8(a) Chain of Referral

Under Section 8(a), an employer's liability to pay for medical services is limited to (1) first aid and emergency treatment plus (2) two additional doctors chosen by the employee and (3) any additional providers and services recommended by the two physicians selected by the employee. 820 ILCS 305/8(a). Thereafter, an employee may not select a provider of medical services at the employer's expense unless the employer agrees to such a selection.

Following Petitioner's initial treatment at Physicians Immediate Care, he elected to treat with his primary physician, Dr. Hussain at the Dreyer Clinic beginning on February 19, 2020. Dr. Hussain regularly examined Petitioner, prescribed medications, issued work restrictions, and ordered physical therapy until March 23, 2020, when the doctor kept Petitioner off work due to his left shoulder and low back complaints. (Id.) The medical records in evidence show that Petitioner's next visit to Dr. Hussain is approximately 3 months later on June 19, 2020. According to Petitioner's testimony, when he next followed up with Dr. Hussain, following his March 23, 2020, visit, Dr. Hussain was unavailable due to sickness. (TX. p. 26) Petitioner testified he tried to get a note documenting his work restrictions from Dr. Hussain's office but they would not give him one. (Id.) Petitioner testified:

> I needed to get a doctor's note, right? They wouldn't give me one, right? For work because he wasn't there. And I had to see him. And that's what the usual routine was any time he give me off work, I would come

> back to see him and he would do a physical on me and tell me how I'm feeling and I would explain to him. He would give me time off and sent me therapy appointments because done all there. (Id.).

Petitioner then called his lawyer and explained that he couldn't see his doctor and needed a doctor's note for his job, at which time his attorney referred him to MAPS. (Id.)

The Arbitrator finds sufficient evidence, including Petitoner's testimony and the medical records in evidence, that Dr. Hussein, was unavailable or unable to refer Petitioner to a physician or practice that could provide the necessary treatment. The Arbitrator finds that MAPS would be considered Petitioner's first choice of doctor. The records from MAPS show that Petitioner was referred to Dr. Sompalli for further management of the left shoulder and to Athletico for physical therapy. Thus, Dr. Sompalli/Elite Ortho would not be considered a second (choice) provider.

Regarding Dr. Forsythe, although Petitioner testified that his physical therapist told him Rush Copley Medical Center had "good doctors there," this is not a specific referral to Dr. Forsythe by a medical provider. (Id., 42) Petitioner testified that he called various physicians to determine if they would accept workers' compensation coverage. (Id.) Petitioner set the appointment with Dr. Forsythe on his own. (Id.) Dr. Forsythe and his clinic represent Petitioner's second choice of physician.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC027170
Case Name	Kathy Weiss v. State of Illinois - Murray Developmental Center
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0012
Number of Pages of Decision	14
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	Kenton Owens

DATE FILED: 1/11/2024

/s/ Kathryn Doerries, Commissioner

Signature

24IWCC0012

STATE OF ILLINOIS)
) SS.
COUNTY OF)
JEFFERSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KATHY WEISS,

Petitioner,

vs. NO: 21 WC 027170

STATE OF IL/MURRAY CENTER,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission affirms and adopts the Arbitrator's Decision except with respect to the nature and extent of Petitioner's injury and the Arbitrator's award of permanent partial disability. The Commission views the evidence differently than the Arbitrator and modifies the Arbitrator's Conclusions of Law and Order with respect to Issue L, the nature and extent of the Petitioner's injury solely with respect to Section 8.1b(b)(v), the evidence of disability corroborated by treating medical records. Therefore, the Commission strikes the last two sentences under this section, beginning on page 7, with the words "The Arbitrator puts" and ending on page 8 with the words, "as it pertains to Petitioner's head and neck." The Commission substitutes the following two paragraphs:

Dr. Rutz saw Petitioner for the last time on May 31, 2022. (PX7) He notes that Petitioner returns four months status post cervical fusion. Her preoperative arm pain is gone. She reported she has some soreness in her neck. Seven views of her cervical spine under x-ray demonstrates her hardware at C5-6 to be in good position with no signs of loosening. Under his Plan, Dr. Rutz

notes that he believed she has gone on to a solid fusion. He noted her residual neck discomfort is secondary to her degenerative changes in her neck and her scoliosis. Dr. Rutz further noted Petitioner is at MMI for her neck injury and has no permanent restrictions. (PX7, 63-64) The Commission assigns this factor significant weight.

Therefore, the Commission finds that Petitioner's permanent partial disability to be 20% loss of use of the person as a whole as it pertains to the Petitioner's head and neck.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed on February 9, 2023, is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $630.40 per week for a period of 100 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused 20% loss of use of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the reasonable and necessary medical services outlined in Petitioner's Exhibit One, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner compensation that has accrued from May 31, 2022, through September 14, 2022, and shall pay the remainder of the award, if any, in weekly payments.

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

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

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

January 11, 2024

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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	21WC027170
Case Name	Kathy Weiss v. State of IL/Murray Center
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	11
Decision Issued By	Jeanne AuBuchon, Arbitrator

Petitioner Attorney	Thomas Rich
Respondent Attorney	Kenton Owens

DATE FILED: 2/9/2023

THE INTEREST RATE FOR THE WEEK OF FEBRUARY 7, 2023 4.75%

/s/ Jeanne AuBuchon, Arbitrator
Signature

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

February 9, 2023

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation Commission

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

KATHY WEISS
Employee/Petitioner

v.

STATE OF IL / MURRAY CENTER
Employer/Respondent

Case # **21** WC **27170**

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 **MT. VERNON, ILLINOIS**, on **SEPTEMBER 14, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **5/23/2021**, 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 $**54,634.82**; the average weekly wage was $**1,050.67**.

On the date of accident, Petitioner was **57** years of age, ***married*** with **0** dependent children.

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

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

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

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

ORDER

Respondent shall pay the reasonable and necessary medical services outlined in Petitioner's Exhibit, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner compensation that has accrued from 5/31/2022 through 9/14/2022, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall pay Petitioner permanent partial disability benefits of $630.40/week for 112.5 weeks, because the injuries sustained caused the 22.5% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Jeanne L. AuBuchon

Signature of Arbitrator

FEBRUARY 9, 2023

PROCEDURAL HISTORY

This matter proceeded to trial on September 14, 2022, on all disputed issues. The issues in dispute are: 1) the causal connection between the accident on May 23, 2021, and the Petitioner's head and neck conditions; 2) liability for medical bills; and 3) the nature and extent of the Petitioner's injury. This case was consolidated with 21WC28237, in which injury was alleged to have occurred on October 7, 2021. At arbitration, the parties stipulated that the Respondent would pay the medical bills listed in Petitioner's Exhibit 1, and those would be paid pursuant to the fee schedule directly to the providers.

FINDINGS OF FACT

At the time of the accident, the Petitioner, who was 58 years old, was employed by the Respondent as a mental technician II. (AX1, T. 12-13) On May 23, 2021, the Petitioner was helping to restrain a patient and went to grab his legs when he kicked her on the right side of her face. (T. 13)

The Petitioner acknowledged that she was previously diagnosed with scoliosis and that she had a prior accident in 2020 for which she had therapy for her neck. (T. 22)

Immediately following the accident, the Petitioner presented to the emergency department at SSM Health St. Mary's Hospital in Centralia, Illinois, where she reported an acute headache after being kicked in the head by a resident. (PX3) A CT scan of her brain was performed, which showed no acute intracranial process. (Id.) She was taken off work for 72 hours and instructed to rest, take over the counter medications for pain and to follow up with her primary care physician. (Id.) On May 25, 2021, the Petitioner presented to Clarkson EyeCare, where she saw Dr. Troy Johnson. (PX4) Dr. Johnson noted that OD (right eye oculus dexter) had been painful, dry and watering and that she was experiencing headaches and blurred vision. (Id.) Dr. Johnson's

assessment was that Petitioner had secondary noninfectious iridocyclitis of the right eye, for which she was given a prescription for Prednisone and instructed to follow up in one week. (Id.)

On May 27, 2021, the Petitioner followed up at the office of her primary care physicians at SSM Medical Group and was referred to orthopedic surgeon Dr. Matthew Phillips at the Orthopaedic Center of Southern Illinois. (PX5, PX6) The Petitioner saw Dr. Phillips on June 8, 2021, and he examined the Petitioner and took X-rays. (PX6) He diagnosed an exacerbation of the Petitioner's cervical degenerative disc disease and right lateral epicondylitis (tennis elbow) but felt there were no obvious acute findings. (Id.) He referred the Petitioner to physical therapy for her neck, shoulders and lateral epicondylitis. (Id.)

The Petitioner returned to Dr. Johnson at Clarkson EyeCare on June 9, 2021, and reported that her right eye was better, her vision was fine and that she had no pain. (PX4) She was instructed to follow up as needed. (Id.)

The Petitioner underwent physical therapy at SSM Health St. Mary's Hospital from July 7, 2021, through August 7, 2021. (PX3) She returned to Dr. Phillips' office on August 10, 2021, and reported that therapy had helped her but she still had pain in her right shoulder and neck. (PX6) Dr. Phillips recommended additional physical therapy. (Id.) She continued physical therapy from September 7, 2021, through September 27, 2021, and reported ongoing and persistent symptoms of neck and right shoulder pain. (PX3)

The Petitioner's primary care physician made another referral to orthopedic surgeon Dr. Kevin Rutz at Orthopedic Specialists. (PX7) She saw Dr. Rutz on September 28, 2021, and reported the assault and that her pain was made worse with increased activity, lifting and straining. (Id.) Dr. Rutz noted that Petitioner had undergone some previous chiropractic care for intermittent pain in her neck, but it had not been persistent, had not radiated, and had not been at the same level

of intensity as it was after the accident. (Id.) After a physical examination and X-rays, Dr. Rutz diagnosed neck pain, cervical radiculopathy and bursitis of the right shoulder. (Id.) He ordered an MRI and gave the Petitioner a steroid injection to her right shoulder. (Id.) On October 5, 2021, Dr. Rutz read the MRI as showing a moderate-sized focal right paracentral disc herniation at C5-6 and moderate left C3-4 neural foraminal stenosis. (Id.) He ordered a cervical nerve root injection. (Id.)

On October 7, 2021, the Petitioner was injured again when restraining a patient who slapped her and hit her in the face, breaking her glasses. (T. 14) She went to Salem Township Hospital Rural Health Clinic that day and reported headache, right-sided numbness in her face and right-sided neck pain. (PX9) She was given a muscle relaxant. (Id.) She reported the new incident to Dr. Rutz's office on October 11, 2021. (PX7)

The Petitioner underwent a left C-5 nerve root block on October 13, 2021. (PX8) She returned to Dr. Rutz on December 14, 2021, and reported that her symptoms increased after the latest work incident and that the injection gave her some short-term improvement. (PX7) Dr. Rutz ordered a new MRI, which was performed on December 16, 2021, and revealed no new pathology when compared to the September 28, 2021, study. (PX8, PX7) On December 28, 2021, Dr. Rutz diagnosed a herniated disc at C5-6 and recommended surgery. (PX7)

On February 4, 2022, Dr. Rutz performed a discectomy and fusion at C5-6 (Id.) On Dr. Rutz's insurance billing forms for charges relating to Petitioner's surgery as well as other dates of service, the box that asks if Petitioner's condition is related to employment is marked "Yes." (PX1)

At her February 15, 2022 follow up visit, Petitioner reported that her arm pain was gone. (PX7) On March 29, 2022, she reported that she was doing well and had no pain in her neck. (Id.) She was returned to work full duty. (Id.) At her final appointment with Dr. Rutz on May 31,

2022, the Petitioner reported that her arm pain was gone but that she had some soreness in her neck. (Id.) Dr. Rutz felt that Petitioner had a solid fusion and that her residual neck discomfort was secondary to her degenerative changes and scoliosis. (Id.) He placed her at maximum medical improvement.

The Petitioner testified that before the surgery, she had severe pain in her neck and shoulder, radiating down her back. (T. 15) She said the surgery helped her. (Id.) She returned to work full duty and continues to work for the Respondent as a mental technician II. (T. 12, 15) She said that despite the improvement from the surgery, she still experiences neck pain when her head is in a fixed position for a long period of time and occasional headaches. (T. 15-16) She takes over-the-counter pain medication about three or four times a week. (T. 16-17) She said she hesitates when helping to restrain individuals and has not been able to restrain as strongly as she did before the injury. (T. 17) She said her neck bothers her a little when sewing and reading books. (Id.) She said the injury has made it harder to care for her daughter who has Down Syndrome. (T. 18) She said that when driving, her neck bothers her if she has to look to left or right for a length of time and sleeping in the wrong position bothers her neck. (T. 18-19)

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

CONCLUSIONS OF LAW

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

An accident need not be the sole or primary cause as long as employment is a cause of a claimant's condition. *Sisbro, Inc. v. Indus. Comm'n,* 207 Ill. 2d 193, 205, 797 N.E.2d 665, 278 Ill.Dec. 70 (2003). An employer takes its employees as it finds them. *St. Elizabeth's Hosp. v.*

Workers' Comp. Comm'n, 371 Ill.App.3d 882, 888, 864 N.E.2d 266, 309 Ill.Dec. 400 (5th Dist. 2007). A claimant with a preexisting condition may recover where employment aggravates or accelerates that condition. *Caterpillar Tractor Co. v. Industrial Comm.,* 92 Ill. 2d 30, 36, 440 N.E.2d 861, 65 Ill.Dec. 6 (1982). Employers are to take their employees as they find them. *A.C.& S. v. Industrial Comm'n*, 304 Ill.App.3d 875, 883, 710 N.E.2d 837, 238 Ill.Dec. 40 (1st Dist. 1999)

When a preexisting condition is present, a claimant must show that "a work-related accidental injury aggravated or accelerated the preexisting [condition] such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of the preexisting condition." *St. Elizabeth's Hospital*, 371 Ill.App.3d at 888.

Circumstantial evidence, especially when entirely in favor of the Petitioner, is sufficient to prove a causal nexus between an accident and the resulting injury, such as a chain of events showing a claimant's ability to perform manual duties before accident but decreased ability to still perform immediately after accident. *Pulliam Masonry v. Industrial. Comm'n*, 77 Ill. 2d 469, 471-472, 397 N.E.2d 834, 34 Ill.Dec. 162 (1979); *Gano Elec. Contracting v. Industrial Comm'n*, 260 Ill.App.3d 92, 96–97, 631 N.E.2d 724, 197 Ill.Dec. 502 (4th Dist. 1994); *International Harvester v. Industrial Com.*, 93 Ill.2d 59, 63-64, 442 N.E.2d 908, 66 Ill.Dec. 347 (1982).

The Petitioner had pre-existing scoliosis and degenerative changes in her cervical spine. She had prior treatment but did not have symptoms like those she had after the assault. Although Dr. Rutz did not give a causation opinion, he treated the injury as a work-related injury as shown on his insurance billing statement. Furthermore, the circumstantial evidence points to the Petitioner's injuries being caused by the assault. There were no opinions to the contrary.

As to whether the second accident on October 7, 2021, broke the causal connection between the May 23, 2021, incident and the Petitioner's cervical spine condition, the MRIs showed there was no pathologic change in the Petitioner's cervical spine. Thus, the Arbitrator finds the October 7, 2021, assault was a temporary aggravation of the Petitioner's condition and did not break the causal chain. As to the injuries to the Petitioner's eye and face, these were clearly caused by the May 23, 2021, assault.

Therefore, the Arbitrator finds that the Petitioner has met her burden of proving by a preponderance of the evidence that the accident of May 23, 2021, was a cause of her head and neck injuries.

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, 327 Ill.Dec. 883 (2009). A claimant is entitled to recover reasonable medical expenses that are causally related to the accident and that are determined to be required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 325 Ill. App. 3d 527, 534, 758 N.E.2d 18, 259 Ill.Dec. 173 (1st Dist. 2001).

Based on the findings above regarding causation and the Respondent's stipulation to pay the medical bills, the Arbitrator finds that the treatment was reasonable and necessary, and the Respondent has not paid the bills for this treatment. Therefore, the Respondent is ordered to pay the medical expenses contained in Petitioner's Exhibit 1 pursuant to Section 8(a) of the Act and in accordance with medical fee schedules.

Issue L: What is the nature and extent of the Petitioner's injury?

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

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

(ii) **Occupation.** The Petitioner still works for the Respondent as a mental health technician and faces the same physical challenges. The Arbitrator places significant weight on this factor.

(iii) **Age.** The Petitioner was 58 years old at the time of the injury and has many work years left during which time she will need to deal with the residual effects of the injury. The Arbitrator places some weight on this factor.

(iv) **Earning Capacity.** There was no evidence of limitation of the Petitioner's earning capacity. Therefore, the Arbitrator places no weight on this factor.

(v) **Disability.** The Petitioner testified that still experiences neck pain and occasional headaches. She takes over-the-counter pain medication about three or four times a week. She said she hesitates when helping to restrain individuals and has not been able to restrain as strongly as she did before the injury. She said her neck bothers her when performing hobbies, caring for her

special-needs daughter and when driving. She is working full duty without restrictions and made a good recovery. The Arbitrator puts some weight on this factor.

Therefore, the Arbitrator finds the Petitioner's permanent partial disability to be 22½ percent of the body as a whole as it pertains to the Petitioner's head and neck.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC006561
Case Name	Molly Wyman v. Caterpillar Inc
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0013
Number of Pages of Decision	12
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Michael Brandow
Respondent Attorney	Jessica Bell

DATE FILED: 1/12/2024

/s/ Deborah Simpson, 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: Causal Connection	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MOLLY WYMAN,

Petitioner,

vs. NO: 20 WC 6561

CATERPILLAR INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary total disability benefits, and permanent partial disability benefits, and being advised of the facts and law, reverses the Decision of the Arbitrator, finds that that Petitioner sustained her burden of proving that the stipulated accident on December 14, 2019 caused her current condition of ill-being of left lateral epicondylitis, and awards benefits.

Findings of Fact - Testimony

Petitioner testified on December 14, 2019, she worked for Respondent and had since November 13, 2017. She started as a machine operator and on December 14, 2019 she moved to be an assembler. Her job included "a lot of twerking, a lot of air hammering, a lot of bolts, nuts, constant – Your hands didn't stop moving all day." It appears that she testified that Respondent had gotten new machines which increased her workload. On December 14, 2019, she was using an air hammer on a bearing on a shaft. The shaft on the air hammer broke. The new hammers did not shut off automatically like the old ones did. "So when it broke it just kept hammering up [her] arm, because [she] lost control of it when it broke."

Petitioner felt immediate pain mostly in the left hand, wrist, and thumb. She was sent to medical where bandages were put on and she was returned to work. She continued to have problems with her left hand/wrist and went to Respondent's medical office on January 6, 2020. She was given a wrist support. She had an MRI on January 28, 2020, after which Respondent's doctor, Dr. Miller, referred her to Midwest Orthopedics. There, Dr. Williams administered a cortisone injection in her elbow and wrist. Respondent was able to accommodate work restrictions.

Later, Dr. Williams ordered an MRI of the elbow, and took Petitioner off work on March 3, 2020. She had the MRI on March 13, 2020 and she was referred to physical therapy. She had six weeks of physical therapy, but it didn't help. Dr. Williams then prescribed a long arm cast to immobilize the left arm. Petitioner testified that she recalled her "elbow locking up" and making "a lot of popping noises" prior to April 20, 2020. After he removed the cast, Dr. Williams ordered an EMG.

Thereafter, Dr. Williams recommended surgery on her elbow, which was performed on October 6, 2020. Dr. Williams took her off work until March 1, 2021, at which time he released her from treatment. Petitioner returned to work, but her left hand "was still hurting really bad." She returned to Dr. Williams on April 22, 2021. He ordered another MRI of the left elbow. They discussed treatment options and decided that she wear a brace. Dr. Williams advised her to find another job other than assembler. She had not seen Dr. Williams since. Petitioner now worked as machine operator. Her current job was "still physical" but "not as repetitive" as her job as assembler. Petitioner testified that normally, she did not notice her hand/wrist/elbow "too much," but she can tell when she did "too much with it;" because "it won't straighten all the way." She takes over-the-counter Ibuprofen and still had the braces she used when necessary, which she did a couple of months previously. She believed the need for the braces was associated with overuse.

On cross examination, Petitioner agreed that she saw Dr. Phillips for a Section 12 medical examination on August 20, 2020. She told him she was right-handed, she was a smoker, and used to ride a motorcycle. She treated through Caterpillar Medical on multiple occasions until she was referred to Dr. Williams. She complained to Caterpillar Medical about pain in her left wrist, thumb, and forearm. The air hammer did not "actually strike" her left elbow. She continued to work until the Christmas shutdown on December 21st. She was off until January 6, 2020. When she returned thereafter she had increased pain in her left thumb. She received group disability benefits when Dr. Williams took her off work in March of 2020. She agreed that in her job as assembler she earned $19.48 an hour and she currently earned $24.86 an hour. She also agreed that Dr. Williams released her to work without restrictions.

On redirect examination, Petitioner testified that between her accident and her first seeing Dr. Williams she did not have any other accidents affecting her left arm. She did not have any accidents during the Christmas shutdown and her pain actually progressively got worse after her surgery. She still had a motorcycle but does not use it very often because she worked too much.

Findings of Fact – Medical/Documentary Records

In a handwritten largely illegible incident report dated December 14, 2019, Petitioner indicated she was putting a bearing on a shaft and the air hammer broke. It began to dry fire going down her hand before it stopped hammering. She injured her left hand and her "finger hit on table" in the incident. In the initial medical report, a nurse from Caterpillar medical noted that Petitioner presented complaining of left hand pain and contusion. An air hammer broke and hit her hand. Ice was applied for 10 minutes, but Petitioner reported it worsened the pain. It also appears that abrasions were cleaned.

On December 17, 2019, Petitioner presented to RN Smith at Caterpillar medical with complaints of left hand pain and contusion since December 14th when an air hammer broke and hit her hand. Two abrasions were noted in the area with no redness, swelling, or signs of infection. Range-of-motion was within normal range. Ice was applied for 10 minutes which Petitioner indicated made the pain worse. Abrasions were cleaned and bandages applied. Petitioner was off work the previous day. She was instructed that if she developed pain while working she should return for evaluation, and in any event to return for recheck on Monday. Petitioner's pain diagram identified only the left thumb area.

Petitioner presented to Dr. Miller on January 6, 2020, noting she was off work since December 20th. She reported her thumb hurt when she was playing cards and her wrist hurt when resting her palm on a table. She was still able to perform her job without complications, but was concerned about intermittent pain. She was on regular duty and was not asking for restrictions. He provided her a rigid brace and ordered x-rays, which were negative.

On January 22, 2020, Petitioner reported some persistent soreness in the wrist. She requested an MRI, which was scheduled. The MRI of the left wrist taken on January 27, 2020, showed an area of bone bruise/contusion of the radial dorsal base on the 4th metacarpal and delaminating tear of the extensor *carpi ulnaris* tendon. On January 30, 2020, Petitioner presented to Dr. Miller to review the MRI results. He noted that she needed orthopedic evaluation/treatment. Petitioner opted to treat at Midwest Orthopedic Group. Petitioner wanted no restrictions on her work. A week later, Petitioner called to inform them that she was seeing Dr. Williams and he put work restrictions of five pounds with no use of air hammers.

On February 6, 2020, Petitioner presented to Dr. Williams, at The Midwest Orthopedic Center, with pain in the left wrist/thumb with swelling. She suffered an injury to her left wrist/thumb when an air hammer she was using broke about two months previously. An MRI taken January 28th showed a bone bruise/contusion in the radial dorsal base of the 4th metacarpal and delaminating tear of the ECU tendon. Dr. Williams diagnosed lateral epicondylitis of the left elbow and left wrist pain. Dr. Williams advised Petitioner that surgery is rarely indicated for the condition and recommended conservative treatment. He explained that rest was the most important factor in healing of the arm and prescribed physical therapy and anti-inflammatories.

On February 10, 2020, Dr. Miller noted that Dr. Williams was treating Petitioner for left wrist pain and lateral epicondylitis with Medrol Dosepak and restrictions. Respondent was accommodating her restrictions and she was training another employee. She asked if she could also be seen for her left shoulder, which was not previously part of her claim. It began to bother her in early January and she denied trauma. His examination of the left shoulder appears to have been normal. He deferred examination of the elbow/wrist to orthopedics and advised the adjuster about the new shoulder claim.

A week later, presented to RN Franciskovich at Caterpillar and reported her hand was worse since not using it with increased pain, from 4/10 to 7/10. Her shoulder was now hurting more than the hand/elbow, but she was still able to perform activities of daily living such as showering/dressing.

On February 27, 2020, Petitioner returned to Dr. Williams with 5/10 pain in the left wrist/elbow with swelling. She was prescribed Medrol Dosepak at the last visit. After his examination, Dr. Williams now diagnosed left lateral epicondylitis and left CTS. He discussed treatment options with Petitioner and she wanted to proceed with Medrol Dosepak injections in the carpal tunnel and left condyle. The injections were administered.

The next day, Petitioner returned to Dr. Miller and reported she had a steroid injection in the wrist/elbow and her arm was too sore to use. That restriction limited the examination. She also reported Dr. Williams took her off work until March 2nd and that at that time the prior restrictions would apply. He also thought she might have a frozen shoulder.

Petitioner returned to Dr. Williams on March 4, 2020 for 3/10 left-wrist pain. She had a cortisone injection in the left carpal tunnel and left lateral condyle. After his examination, Dr. Williams diagnosed lateral epicondylitis of the left elbow. If surgery was deemed necessary he would normally get an MRI prior to surgery. Petitioner wanted to proceed with the MRI. Dr. Williams took Petitioner off work, ordered an MRI, and referred her to physical therapy.

On June 11, 2020, Dr. Williams noted that Petitioner had ongoing symptoms for five months and surgery might be necessary. He opined that Petitioner symptoms were aggravated by her work duties. Petitioner wanted to proceed with an EMG for her carpal tunnel syndrome. About six weeks later, Petitioner returned for the EMG results, which were normal. Dr. Williams indicated that Petitioner was doing well and opined that her symptoms were from the injury she sustained at work seven months previously. He noted that she had no issues prior to the accident. He believed she had now failed conservative treatment and recommended surgery.

On June 12, 2020, Dr. Miller noted that Petitioner told Dr. Williams that nothing was helping, he ordered an EMG, and reduced her weight restriction to two pounds. She would follow up with Dr. Williams after the EMG. On October 6, 2020, Dr. Williams performed left elbow lateral epicondylectomy and debridement for left elbow lateral epicondylitis.

On February 24, 2021, Occupational Therapist, Schussler, noted that Petitioner wanted to return to work ASAP and anticipated she would be ready at the next doctor visit. She was now able to complete a physical therapy session without her arm shaking and had 3/10 pain. Her grip strength was above average even in her operated hand. Continued physical therapy was recommended until her next doctor visit.

On March 1, 2021, five months postop, Dr. Williams noted that her grip strength was up to 80 on the left as compared to 85 on the right "which actually is really good." He released her to work full duty despite her still having a lot of soreness. He gave her Tramadol for her discomfort. He released her from treatment *prn*. The next day, Caterpillar medical cleared her to work at full duty.

An MRI of the left elbow taken on April 28, 2021, showed signal alteration common extensor tendon origin consistent with postop changes and interstitial delamination, mild peritendinitis consistent with epicondylitis, and fraying/delamination of common origin of the radial collateral and lateral ulnar collateral ligaments.

On April 29, 2021, Petitioner returned to Dr. Williams with a lot of soreness in her elbow. She had been back to work for 6-7 weeks and doing her normal activities. She had an MRI the previous day which did not show any new or ligament tearing. There was some fraying which was normal with minimal inflammation or peritendinitis. There was no arthritis, loose bodies, or fractures. His alternate treatment options were a steroid injection, a PRP injection, or to do nothing. Petitioner wanted to try bracing. Petitioner indicted that her problems all started when she began the job as assembler, she will be moved to machine operator, which Dr. Williams believed would be very beneficial for her left arm.

Findings of Fact – Doctor Depositions

Dr. Williams testified he was a board-certified orthopedic surgeon with a certification of additional qualification in hands/upper extremities. As of the previous year, he saw over 7,000 patients, performed more than 1,000 surgical procedures, and performed about 150 IMEs/record reviews, about 90% of which were for defendants. He frequently saw patients with elbow problems including lateral epicondylitis.

Dr. Williams first saw Petitioner on February 6, 2020. Off hand, he did not recall who referred Petitioner to him, but Dr. Miller at Caterpillar referred patients to him occasionally. Petitioner complained of left wrist/thumb pain after an air hammer she was using two months earlier broke. She had swelling and pain with griping/applying pressure. She had prior treatment which included an MRI and bracing. She also complained of pain in the right elbow (should have been left elbow) with swelling/tenderness. The MRI showed a delaminating tear of the extensor *carpi ulnaris* tendon and a bone bruise/contusion of the base of the ring finger metacarpal.

Based on his clinical examination, Dr. Williams diagnosed lateral epicondylitis, which was consistent with her complaints. They discussed alternative treatment options, and they decided to first try Medrol Dosepak; Petitioner wanted to avoid an injection. He restricted her to five-pound lifting with the left arm.

Petitioner did not improve with the Medrol Dosepak so Dr. Williams administered steroid injections in the left wrist and elbow because he thought the majority of her problems arose from tendonitis-type issues in the wrist and elbow. Petitioner also developed carpal tunnel syndrome ("CTS") symptoms. Petitioner had not improved after the injections and Dr. Williams ordered an MRI of the left elbow. This MRI "showed evidence of hypertrophic and frayed extensor tendon origin consistent with lateral epicondylitis of the left elbow." These findings were consistent with his clinical findings. He ordered physical therapy for the lateral epicondylitis.

When Petitioner returned she reported her elbow began to lock up, which started when she was in physical therapy. That was not a common symptom for lateral epicondylitis. He put her in a long arm cast to completely immobilize the arm. He continued the same restrictions. She was not in physical therapy while she was in the cast. After about three weeks, on May 11, 2020, he took the cast off Petitioner; he wanted her to use her arm a little to see if the casting had worked. When she returned a month later, she was still having difficulty with her left elbow. She had had symptoms for over five months and Dr. Williams believed she had failed conservative treatment. He wanted to determine the cause of her numbness/tingling and ordered an EMG. It was completely normal with no evidence of CTS or cubital tunnel syndrome ("CUTS"). However, on examination she still showed symptoms of CTS and lateral epicondylitis. He now recommended surgery on the elbow, which was delayed due to COVID and was eventually performed on August 10, 2020.

Intra-operatively, Dr. Williams noted some tearing of the *extensor carpi radialis brevis,* which he excised. He then superficially roughed up the bone to promote bleeding/healing. He took her off work completely postop; he "wouldn't want her near the workplace with the splint on." He last saw Petitioner on August 19, 2020, but is scheduled to see her the following week. He would normally begin strengthening physical therapy at that time. Dr. Williams opined that Petitioner suffered a contusion to the wrist/hand as well as an injury to the left elbow lateral condyle when the air hammer broke. He noted that she did not have any prior injuries to the left hand, wrist, or elbow. He anticipated her doing well postop.

On cross examination, Dr. Williams agreed that when he first saw Petitioner it was about two months after the accident. He believed Petitioner was holding the air hammer in both hands when it broke. The only other medical record he reviewed was the MRI. He knew that Dr. Miller treated her left wrist, but he had no idea whether he treated Petitioner for her elbow prior to her visit to him. Dr. Williams agreed that he did not see any condition that would indicate surgery in the MRI. Dr. Williams noted that often patients complain of hand symptoms, the pain was actually radiating from their elbow due to the number of tendons extending to the wrist/fingers.

On the second visit, she exhibited symptoms consistent with CTS, however, that could be the result of using her hands differently after the injury. He did not believe that condition was "a direct result of the injury." He acknowledged that the radiologist's report noted no substantive peritendinitis or active left lateral epicondylitis. He disagreed with that interpretation because he thought there was tearing of the extensor tendon which was hypertrophic which meant it was enlarged and inflamed. The radiologist even noted tearing of the extensor tendon origin, which by definition is lateral epicondylitis.

Dr. Williams was directed to the initial physical therapy evaluation, in which the therapist noted that a doctor believed she was starting to develop frozen shoulder. He responded that would not have been him because he never examined her shoulder. He also did not treat Petitioner's hand or wrist. On redirect, Dr. Williams testified the questions on cross did not change any of his opinions expressed on direct.

Dr. Phillips testified by deposition on June 2, 2021, that 99.9% of his practice involves treatment of the upper extremity, from the shoulder to fingertips. He saw 130 to 140 patients, performed about 15 surgeries, and performed maybe two or three Section 12 medical examinations per week. Dr. Phillips performed an IME on Petitioner on August 10, 2020, reviewed her medical records, and issued a report. Petitioner reported working for Respondent for three years, the first as machine operator, and then as assembler. She was injured at work when an air hammer she was using broke and it hammered against the dorsal aspect of her left hand, wrist, and distal forearm. She reported the accident, went to the company nurse, was sent back to work without restrictions, and continued to work her normal 70-hour work week.

The next Monday she saw Dr. Miller, a company doctor, who according to Petitioner kept her working full duty. Petitioner was referred to orthopedics and saw Dr. Williams in late January or early February. He ordered an MRI and told Petitioner she had a bone bruise and partially torn tendon. Dr. Williams took her off work. She stated that while off work she noticed that her elbows were bothering her more. She reported she had chronic pain in the elbows for about a year, which she attributed to the nature of her work. She believed it was because when she went back to work she was using more of her elbow than her hand, which did not make sense to Dr. Phillips. Thereafter, Dr. Williams placed restrictions on her that Respondent could not accommodate.

Dr. Phillips noted that Dr. Williams administered an injection in the elbow that provided no benefit. He then ordered an MRI of the elbow and informed Petitioner she had tendon issues in the elbow. She had physical therapy which helped numbness/tingling in her hand but not the elbow. An EMG was normal. Petitioner then developed shoulder pain around the parascapular area. Physical therapy for her shoulder was included with her physical therapy for her hand/elbow. After physical therapy, her shoulder pain improved significantly. Dr. Williams had recommended surgery on her left elbow.

On examination, Petitioner reported diffuse elbow pain that radiated proximally and distally. She could not lift a pan but it was not because of pain. She had a hard time doing dishes.

Her elbow popped all the time, but she denied nighttime elbow symptoms. Petitioner also reported pain in the thumb and index finger, but overall her hand was much better. At rest she had 0/10 pain but when pushing it reached 5-6/10.

As an assembler, Petitioner built transmissions. She used an air gun which weighed 10 pounds. She reported using the air gun was the most difficult part of her job. Petitioner was right-hand dominant but used it with both her right and left hands about the same. She had to follow 130 steps in building each transmission. She performed multiple different activities in her shift.

Petitioner owned a motorcycle. She rode it for eight years but had not ridden it for two years because of concerns about her left arm. She had no history of arthritis, inflammatory arthropathy, anxiety/depression, or fibromyalgia. She was not postmenopausal but smoked a pack of cigarettes a day since 2009. Dr. Phillips was asked about an entry in the Caterpillar medical records that Petitioner described the accident as "she was putting bearings on the shaft and the air hammer broke. The gun dry fired, so it went down on the hand before it stopped and she injured her left hand." Dr. Miller noted that she had two abrasions on the left of her left hand.

Dr. Phillips reviewed imaging. He noted that she had mild basilar joint arthritis in the base of the left thumb. She also had osteopenia around the MP joints of the index, middle, ring, and small left fingers. Osteopenia could represent an underlying inflammatory condition such as gout. Dr. Phillips believed it was significant that in elbow flexion testing she reported tingling in all five fingers, which was not concordant with epicondylitis; it should have been limited to the 5th and ½ of the ring finger. Her excellent grip strength was also non-concordant with a diagnosis of lateral epicondylitis. His diagnoses of Petitioner's condition were resolved contusions of the left hand/wrist/distal dorsal forearm. The examination was suspicious for left CTS. She sustained a contusion to the left hand/wrist/distal forearm in the work accident, which had since resolved. None of her current symptoms related to her work accident. He noted that she was not contused anywhere near her elbow, she told him that her elbow condition preceded her accident, and it felt worse when she was off work. She was at maximum medical improvement for her work-related condition, did not need prospective treatment, and could return to work without restrictions.

On cross examination, Dr. Phillips reiterated that her symptoms were not concordant with a diagnosis of lateral epicondylitis at the time of his examination. He agreed that the condition can change over time. He disagreed with Dr. Williams' recommendation for surgery. He did not know how many Section 12 examinations he performed on behalf of Respondent, but he might perform one every couple of months. He did not provide Petitioner a copy of his recitation of her history to ensure accuracy. He had no idea the size of Petitioner's motorcycle. Petitioner went to Caterpillar Medical for four or five days in a row in December of 2019. There are multiple causes of lateral epicondylitis, which is inflammation of the tendon. Degeneration is the most common cause, but activities can play a role in the condition in younger people.

Petitioner was struck on the top of her left hand with the air hammer. He assumed that there was "some force" when it struck her hand but she did not initially report any elbow complaints. Petitioner reported at the time of his examination that her left shoulder was fine. He did not believe she had any shoulder issues. He agreed that he did not see the actual MRI of her elbow and he relied on the radiologist's report. He absolutely disagreed that her shoulder complaints could have been caused by overuse syndrome. He did not believe her symptoms were "structural and therefore unrelated to any overuse, potential overuse." In addition, she was off work when she developed the shoulder symptoms.

On redirect, Dr. Phillips testified that Petitioner's history would not be consistent with the type of trauma that could cause lateral epicondylitis. He also noted that the complaints developed months after the incident. He explained that the MRI didn't show any tears. They do not perform surgery for tendonitis, because it does not work. They perform surgery to repair tears. When he makes diagnoses, the patient's symptoms, diagnostic imaging, and examination results have to correlate. They did not correlate to her developing epicondylitis from the injury.

On re-cross examination, Dr. Phillips agreed that there was no gap in Petitioner's treatment from the date of the accident through her treatment with Dr. Williams. On re-redirect examination, Dr. Phillips noted that Petitioner's complaints regarding her hand and wrist were consistent and consistent with it being from the work injury.

Conclusions of Law

The Arbitrator found that Petitioner proved the contusions on her left hand, wrist, and distal forearm were caused by the stipulated accident, but that she did not prove that her condition of lateral epicondylitis was. He noted that Petitioner testified that the air hammer did not strike her elbow and that was confirmed by the medical records. He also cited the testimony of Dr. Phillips that the mechanism of injury was not consistent with developing lateral epicondylitis. He also cited the testimony of Dr. Phillips that Petitioner did not initially complain of left elbow symptoms after the accident, and that she was able to work at full duty without elbow complaints from December 14, 2019 through March 2, 2020.

Petitioner argues that the Arbitrator erred in finding Petitioner did not prover her lateral epicondylitis was caused by the accident. She stresses that her elbow did not need to be struck for her to develop lateral epicondylitis. She postulates that "clearly this was a quickly developing incident and it is quite probable that her wrist could had very well been forced [into] a hyper flexed position." She also notes that her treater, Dr. Williams testified that her lateral epicondylitis was "clearly related" to the work accident.

The Commission affirms the Decision of the Arbitrator that Petitioner proved that the contusions to her left hand, left wrist, and forearm were causally related to her stipulated accident.

We also affirm his award of 10.25 weeks of permanent partial disability representing loss of the use of 5% of the left hand. However, we reverse the Decision of the Arbitrator on the issue of causal connection of Petitioner's lateral epicondylitis and find that Petitioner sustained her burden of proving that such condition of ill-being was caused by her accident.

Unlike the Arbitrator, the Commission finds the causation opinions of Petitioner's treater, Dr. Williams, more persuasive than those of Respondent's Section 12 medical examiner, Dr. Phillips. In this regard, we note that Dr. Williams appears to have greater specialization in elbow conditions than Dr. Phillips and he testified that Caterpillar's doctor, Dr. Miller, often referred patients to him. Dr. Williams also frequently performed Section 12 medical examination, overwhelmingly on behalf of employers, dispelling any notion of his being predisposed towards claimants. In addition, Dr. Williams diagnosed Petitioner with lateral epicondylitis on her first visit and at every subsequent visit he noted swelling/tenderness in the lateral condyle as well as his clinical findings which also support the diagnosis of lateral epicondylitis.

On the other hand, Dr. Phillips appeared to question whether Petitioner actually had lateral epicondylitis. That qualification diminishes his persuasiveness because it appears to be at odds with the MRI findings of fraying of the extensor tendon origin, which Dr. Williams testified is by definition lateral epicondylitis. In addition, Dr. Williams confirmed the condition intra-operatively. Finally, Dr. Williams explained that patients with elbow pathology can often feel symptoms referred to their hands/fingers, which could account for Petitioner's delay in reporting elbow symptoms.

The diagnosis of lateral epicondylitis is not affected by normal EMG findings because as Dr. Williams noted lateral epicondylitis is a tendon issue and not a nerve issue. Our conclusion that Petitioner sustained her burden of proving causation of her epicondylitis is also bolstered by the chain of events analysis which indicates that Petitioner was able to work and there is no evidence of prior treatment for her elbow before the accident. However, after the accident she needed treatment and she was limited in her ability to work because of her elbow condition.

Finally, regarding the mechanism of injury, Petitioner conceded that her elbow was not struck by the broken air hammer. However, that is certainly not conclusive in findings no causation because it is clearly possible that as the air hammer was "dry firing" Petitioner's elbow could have been paced in a very awkward position, which Dr. Phillips conceded would be a mechanism of injury consistent with development of lateral epicondylitis.

In assessing permanency, as noted above the Commission affirms the permanency award the Arbitrator of loss of 5% of the left hand. On the issue of permanency for Petitioner's epicondylitis, the Commission notes there was no impairment rating submitted under AMA Guides. The Commission gives some weight to her age 33, which indicates she would live with the condition for many years to come. The Commission gives greater weight to Petitioner's returning to a somewhat less strenuous job at an increased salary. Finally, the Commission gives greater weight of evidence of impairment in the record, noting she needed surgery for her condition

and her testimony about her continued limitations. We conclude that an award of 31.625 weeks of PPD benefits representing loss of the use of 12.5% of the left arm is appropriate for Petitioner's operated lateral epicondylitis.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 16, 2022, is reversed regarding the finding that Petitioner failed to prove her condition of ill-being of left lateral epicondylitis was caused by the stipulated accident on October 11, 2020.

IT IS FURTHER ORDERED BY THE COMISSION that Respondent shall pay to the Petitioner the sum of $525.41 per week for a period of 52 weeks commencing March 3, 2020 through March 1, 2021, that being the period of temporary total incapacity for work under §8(b).

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay medical expenses incurred for treatment of Petitioner's left upper extremity submitted into evidence except for any treatment incurred for treatment of her left shoulder under §8(a), subject to the applicable medical fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $472.87 or a period of 41.875 weeks as the work-related injuries resulted in the loss of the use of 5% of the left hand and the loss of the use of 12.5% of the left arm.

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.

January 12, 2024

DLS/dw
O-11/15/23
46

/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	19WC020090
Case Name	Diane Steele v. Macy's Inc
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0014
Number of Pages of Decision	15
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Bruce Rafalson
Respondent Attorney	Robert Smith

DATE FILED: 1/17/2024

/s/Kathryn Doerries, Commissioner

Signature

24IWCC0014

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

DIANE STEELE,

Petitioner,

vs. NO: 19 WC 20090

MACY'S INC.,

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

The Commission corrects a scrivener's error in the Arbitrator's decision, in the section entitled, Arbitrator's Credibility Assessment, second and fourth lines, and strikes "2020," and replaces it with "2019."

The Commission corrects a scrivener's error in the Arbitrator's decision, in the Conclusions of Law section, second to last paragraph, and strikes "1/18/21," and replaces it with "1/18/20."

The Commission corrects a scrivener's error in the Arbitrator's decision, in the nature and extent section, fifth paragraph, and strikes "1/18/21" and replaces it with "1/18/20."

Also in the nature and extent section, the Commission strikes in its entirety the fourth to last paragraph which states, "There is no record of Petitioner visiting a doctor after September 24, 2020, for a medical condition regarding the work incident of July 3, 2019, until October 26, 2021,

when Petitioner was discharged from Dr. Sompalli's care."

The Commission corrects a scrivener's error in the Arbitrator's decision, in the nature and extent section, third to last paragraph, and strikes "10/26/21" and replaces it with "12/11/20," and also strikes the word "thereafter" in the last sentence of the same paragraph.

The Commission corrects factor (v) in the nature and extent section of the Arbitrator's decision, and adds the following sentence, "Therefore, this factor is given substantial weight."

The Commission corrects the scrivener's error in the Arbitrator's decision, in the medical services section, and strikes "Preferred Open MRI," and replaces it with "Premier Open MRI."

The Commission, in the Arbitrator's Findings section, adds Petitioner's earnings for the year preceding the date of injury as "$30,581.20."

The Commission corrects scrivener's errors in the Arbitrator's decision, the Order section, paragraph one, and strikes "$4,284.7," and replaces it with "$4,284.70." The Commission adds "2/9/20-3/31/20" for the dates TTD benefits were awarded. The Commission strikes "7-2/7 weeks," and replaces it with "7-3/7 weeks."

The Commission corrects a scrivener's error in the Arbitrator's decision, in the Findings section regarding credit for TTD paid, and strikes "$0" and replaces it with "$10,529.88," as stipulated to by the parties, for the period of TTD paid from 7/6/19 to 8/26/19 and from 4/1/20 to 8/26/20, for a total number of 28-4/7 weeks.

The Commission adds to the Order section the number of weeks awarded as "91.19 total weeks" for the permanent partial disability.

The Commission corrects scrivener's errors in the Arbitrator's decision, in the Order section regarding medical expenses awarded, and strikes "$7,186.00," and replaces it with "$7,185.00," and strikes "Enterprise Victory, Inc.," and replaces it with "Victory Enterprises II, Inc."

All else is affirmed and adopted.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $392.06 per week for a period of 7-3/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $352.86 per week for a period of 91.19 total weeks, as provided in §8(e)(12), §8(e)(11), and §8(e)(10) of the Act, for the reason that the injuries sustained caused the 35% loss of use of her left leg (75.25 weeks), 5% loss of use of her left foot (8.35 weeks), and 3% loss of use of her

left arm (7.59 weeks).

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $7,185.00 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 $31,900.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

January 17, 2024
o-11/21/23
KAD/jsf

/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	19WC020090
Case Name	STEELE, DIANE v. MACY'S, INC
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	11
Decision Issued By	Charles Watts, Arbitrator

Petitioner Attorney	Bruce Rafalson
Respondent Attorney	Robert Smith

DATE FILED: 12/13/2022

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

/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

DIANE STEELE
Employee/Petitioner

v.

MACY'S, INC
Employer/Respondent

Case # **19** WC **20090**

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 **Charles Watts**, Arbitrator of the Commission, in the city of **Chicago**, on **June 17, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **July 3, 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 $; the average weekly wage was $**588.10**.

On the date of accident, Petitioner was **57** years of age, ***single*** with **0** dependent children.

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

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

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

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

ORDER

Petitioner has established the right to receive TTD benefits at the rate $392.06 for a period of 7 and 2/7 weeks, an amount totaling $4,284.7.

Petitioner established disability in the amount of 35% loss of use of the left leg, 5% loss of use of the left foot, and 3% loss of use of the left arm. Petitioner established an entitlement to receive $352.86 per week.

The arbitrator finds that Petitioner has established that the following unpaid medical expenses are reasonable, necessary and related to the work-related accident of July 3, 2019:
1. Advanced Urgent Care $4,490.00.
2. Enterprises Victory Inc. $2,495.00.
3. Molecular Imaging of Chicago $200.

The arbitrator awards medical expenses to Petitioner totaling $7,186.00, subject to the fee schedule.

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, 2022

_____

Signature of Arbitrator

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Diana Steele, Petitioner,	)	
vs.	)	No. 19 WC 20090
Macy's Inc., Respondent.	)	Arb. Charles Watts

ARBITRATOR'S FINDINGS OF FACT

The parties agree that Petitioner sustained an accident and injury on July 3, 2019, while she was working as a clerk for Respondent. The disputed issues include the nature and extent of Petitioner's injury, whether Petitioner is entitled to a disputed period of TTD benefits, and lack of payment for certain medical expenses. (Arb. Exhibit 1).

Petitioner testified that she had worked for Macy's for approximately 13 years at the time of her injury. She testified that she was working at Respondent's store located at Orland Square Mall. Petitioner testified that she worked as a clerk in both the "Intimates" and "Junior's" department.

On July 3, 2019, Petitioner arrived at the store at approximately 9:45 AM. (P. 8). She testified that her first duty was to handle online orders, which requires her to walk to the Junior's department. After collecting the required items, she began walking back to her station, which required her to walk over carpet that, unknown to her, was wet due to a recent cleaning. (P. 9-10) Petitioner stepped off the carpet onto a tile floor. Due to her shoes being wet from the carpet, Petitioner's left foot slipped. (P. 10). Upon slipping, Petitioner's body went up in the air; her knee, ankle, elbow, and shoulder hit the tile floor upon landing. (P. 11). Petitioner denied loss of consciousness but felt immediate pain in her knee and ankle on her left side. (P. 12). Petitioner was initially unable to stand and crawled over to a ladder and made unsuccessful attempts to pull herself up to her feet. (P. 12-13). Eventually with the assistance of a customer, Petitioner was able to walk back to the Intimates department. At that point, Petitioner called the store manager; a person named "Pat C.", to whom the incident was reported. (P. 13).

Petitioner was directed to seek medical attention at Advanced Urgent Care which was located across the parking lot from Macy's. (P. 14). At that facility she saw Mohamad R. Alzein, MD, who noted a history of a slip and fall while working at Macy's due to a wet floor and carpet. Petitioner complained of pain in her left knee, ankle, foot, shoulder, elbow and back. (Pet. Ex. 2). The initial assessment of Plaintiff was: 1. Left elbow swelling; 2. Left anterior knee pain; 3. Left foot pain; 4. Fall initial encounter. Petitioner continued visit Advanced Urgent Care until February

2020 to receive treatment and medication for her injuries to her left knee, ankle, and elbow.

Petitioner also saw Fred Turk, DC at Advanced Urgent Care. Dr. Turk treated Petitioner for the injuries to her left elbow, left knee and left ankle. On July 9, 2019, Dr. Turk diagnosed Petitioner with 1). Left elbow synovitis; 2). Left elbow sprain; 3). Left knee meniscus tear; 4). Left knee sprain. (Pet. Ex. 1). Dr. Turk ordered diagnostic testing, provided therapy services for Petitioner. Dr. Turk saw Petitioner from July 9, 2019, through March 3, 2020.

When Petitioner returned to Advanced Urgent Care on July 9, 2019, she reported she had pain in the left knee, neck, and left wrist. An examination of the back showed no muscle atrophy, no tenderness, and no spasm. The assessment was swelling of the left elbow, left anterior knee pain, and left foot pain. (PX 2). Petitioner received two injections to the buttock for left foot pain and was to follow up in 2-3 days. (PX 2).

Dr. Turk also referred Petitioner to Podiatrist, Nick Andriacchi, OD, who first saw Petitioner on July 22, 2019. (Pet. Ex. 2). Dr. Andriacchi noted pain and swelling in the left ankle. He prescribed an MRI which was positive for "posttraumatic soft tissue bruising with a small associated tibiotalar effusion". On August 14, 2019, Petitioner was fitted for custom orthotics. She was later placed in a walking boot and an ankle brace. On September 9 Petitioner was limited to no more than 4 hours per day of standing or walking. An MRI was performed on Petitioner's left knee on July 11, 2019 which revealed 1. Degenerative joint disease in the medial compartment with a small medial meniscus tear and 2. Degenerative joint disease in the patella-femoral compartment.

On September 24, 2019, Petitioner went to Illinois Orthopedics and ultimately Elite Orthopedics. Petitioner was initially treated by Eugen Lipov, MD. A pain management physician. Dr. Lipov's examination revealed that Petitioner had positive medial joint line tenderness and negative lateral joint line tenderness. Dr. Lipov opined that the MRI of July 11, 2019, revealed a small medial meniscus tear and degenerative joint disease of the patellofemoral compartment with an association joint fusion. Dr. Lipov recommended continued physical therapy and a steroid injection was administered into the left knee. Petitioner was placed on a "sit only" work restriction. *Id.*

Dr, Lipov referred Petitioner to orthopedic surgeon, Kevin Tu, MD. Dr. Tu's reading of the left knee MRI demonstrated significant degenerative changes of the patellofemoral and medial compartment. The assessment was degenerative changes of the medial and patellofemoral compartment and left knee medial meniscus tear. A total knee arthroplasty was recommended. The Petitioner was released to work with restrictions, which included no prolonged walking or standing, and no kneeling, no squatting activities, and no lifting greater than 10 pounds. *Id.* Dr. Tu referred Petitioner to Chandrasekhar Sompalli, MD who first examined Petitioner on October 29, 2019. On exam, she reported her knee pain as 10/10 and described it as constant, sore, and achy at rest, increasing to sharp and shooting with movement. Petitioner denied back problems. She was diagnosed with left knee pain, effusion in the left knee, and instability. She was to undergo an MRI, perform a home exercise program, obtain x-rays, an injection for the knee condition, and total knee replacement were recommended, and she could return to light duty work/sedentary work only. *Id.*

At the request of Respondent, an Independent Medical Exam was performed on Petitioner by Brian

Cole, MD on January 6, 2020. (Pet. Ex. 13). In addition to conducting a physical examination of Petitioner, Dr. Cole reviewed the relevant medical records and imaging studies. The primary purpose of the IME was to assess the condition of Petitioner's left knee, including but not limited to; 1. The necessity for future care and treatment; 2. The causal relationship between the condition of Petitioner's right knee and the work-related accident sustained by Petitioner on July 3, 2019. In his report, Dr. Cole opined that Petitioner had advanced osteoarthritis in her right knee as well as a degenerative medial meniscus tear. He opined that Petitioner had undergone all reasonable forms of conservative treatment including cortisone injections, physical therapy and oral medication which proved to be unsuccessful. Dr. Cole further opined the following:

> "A causality standpoint, her fall at work certainly did not cause the osteoarthritis, but likely brought on the need for total knee replacement sooner than otherwise would have been necessary. On a more likely than not basis, she was headed for total knee, even absent of this fall, but the timing of said total knee replacement is indeterminate. It is my opinion that, on a more likely than not basis, she has arrived at a need for definitive care with total knee replacement sooner than otherwise would have been necessary absent of the fall on July 3, 2019." (Pet. Ex. 13).

Petitioner was seen at Advanced Urgent Care on January 18, 2020, for right knee pain and swelling that started three days prior. She reported surgery was scheduled for her left knee. The examination of the back revealed no muscle atrophy or tenderness and no spasm. The assessment was left knee pain and lumbar radicular pain. She was to start prednisone and was given a Toradol injection for her lumbar radicular pain. (PX 2).

Petitioner returned to Advanced Urgent Care on February 6, 2020, complaining of a lot of pain in her left knee/leg. She had been undergoing physical therapy. The examination of the back revealed no muscle atrophy or tenderness and no spasm. The assessment was left leg pain, left leg numbness, and lumbar radiculopathy. An MRI of the lumbosacral spine was ordered, and Petitioner was given a Toradol injection and was to start prednisone. (PX 2).

After conservative treatment failed, a total left knee replacement was performed by Chandrasekhar Sompalli, MD on April 1, 2020. The operative report contained the following:

> "**Indications:** This is a patient who injured her left knee at work on July 3, 2019. She had injured her knee and developed severe pain. She did have arthritis in the past, but it was asymptomatic until the injury happened. She does have severe pain in her knee, failed cortisone injection therapy, anti-inflammatories, requested a total knee arthroplasty." (Pet. Ex. 15).

Following her knee replacement surgery, Petitioner was admitted to Harmony nursing facility for a period of one week. (P. 25). After her release, she was prescribed a portable intermittent compression device. (P.27). Along with the prescription, Dr. Sompalli provided a letter of medical necessity. (Pet. Ex 10). Respondent has not paid for the cost of this device. Petitioner continued oral anti-inflammatories and engaged in physical therapy at ATI from April 30, 2020, through August 28, 2020. (Pet. Ex. 16). Petitioner was kept off work until she showed significant improvement and was released back to work on October 16, 2020, with the restriction of no standing for prolonged periods of time. She was later released to full duty without restriction on

December 20, 2020. On that date Petitioner did continue to complain of the onset of swelling after prolonged standing.

A second IME was performed by Dr. Cole on September 24, 2020, almost six months after her left total knee replacement. Dr. Cole noted that Petitioner was happy with the results of her surgery and had improved significantly. He placed Petitioner at MMI. Dr. Cole opined that Petitioner had an impairment rating of 21-25 %. (Pet. Ex 13). Dr, Cole noted that Petitioner has not returned to work. She has what Dr. Cole characterized as mild to moderate limitation with her activities.

ARBITRATOR'S CREDIBILITY ASSESSMENT

Petitioner was a credible witness. Her testimony was unimpeached and her version of the facts of the July 3, 2020, were corroborated throughout the medical records admitted into evidence. Petitioner admitted in her testimony that she had been diagnosed with arthritis in her left knee prior to July 3, 2020. The opinions offered by Brian Cole, MD., the Independent Medical Examiner, indicate that Petitioner was truthful and credible during the examination process. The Arbitrator found the Petitioner's testimony to be credible.

CONCLUSIONS OF LAW

In connection with the Arbitrator's Decision regarding Issue (F), whether Petitioner's current condition of ill-being is causally related to the alleged incident, the Arbitrator concludes as follows:

The Arbitrator concludes that the Petitioner has failed to prove by a preponderance of the evidence that Petitioner's current condition of ill-being regarding the lower back is causally related to the July 3, 2019, work incident.

It is well established that a Petitioner carries the burden of proving his case by a preponderance of the evidence. The preponderance of the evidence standard dictates the evidence which is of greater weight or more convincing than the evidence offered in opposition to it; it is evidence which as a whole shows that the fact to be proved is more probable than not. Parro v. Industrial Commission, 260 Ill. App. 3d 551 (1st Dist. 1993); Central Rug & Carpet v. Industrial Commission, 361 Ill. App. 3d 684 (1st Dist. 2005).

Among the factors to be considered in determining whether a claimant has sufficiently carried his burden is his credibility. *See,* Parro, supra. 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 witness's demeanor and any external inconsistencies with testimony.

The Commission is not required to find for a claimant merely because there is some testimony which, if it stood alone and undisputed, might warrant such a finding. Burgess v. Industrial Commission, 169 Ill. App. 3d 370 (1st Dist. 1988). The mere existence of testimony does not require its acceptance, U.S. Steel Corporation v. Industrial Commission, 8 Ill. 2d 407 (1956).

To determine whether a claimant has met her requisite burden of proof by a "preponderance of credible evidence," it is necessary for the Arbitrator to look for consistency and corroboration

between a witness' testimony, conduct, and other documentary evidence to determine the truth of the matter. Where that other evidence tends to impeach or undermine a claimant's testimony, there may be sufficient cause to find that a claimant has failed to meet her requisite burden.

Concerning the alleged medical condition regarding the back, the Arbitrator concludes that Petitioner failed to prove that her current condition of ill-being is causally related to the work incident of July 3, 2019. The claimed condition is not supported by the medical record evidence or by Petitioner's testimony.

Petitioner was working for Respondent on July 3, 2019, when she suffered an injury to her left knee. Petitioner saw a physician on July 3, 2019, but did not report any issue regarding her back. Petitioner only mentioned having prior lower back issues.

Petitioner testified that an injection was administered on July 3, 2019, to her bottom. (Tr. 37). The medical records showed that Petitioner received an injection for left foot complaint. (PX 2). As there was no record of more than one injection received on this date of treatment, Petitioner's treatments were directed to her left foot.

The medical records do not indicate that there was a causal relationship between the work incident of July 3, 2019, and Petitioner's diagnosis regarding the lower back on January 18, 2021. Petitioner's diagnosis regarding the lower back was a little over six months after the work incident. Petitioner herself consistently denied any medical issues regarding her back.

Applying the applicable case law to the above-captioned matter, based on the totality of the circumstances, and weighing the evidence; the Arbitrator concludes that the Petitioner failed to sustain her burden of proof by a preponderance of evidence that her alleged back condition is causally related to the work incident of July 3, 2019.

What is the nature and extent of the injury? The Arbitrator concludes as follows:

It is well established that a Petitioner carries the burden of proving his or her case by a preponderance of the evidence. The preponderance of the evidence standard dictates the evidence which is of greater weight, or more convincing, than the evidence offered in opposition to it; it is evidence which as a whole shows that the fact to be proved is more probable than not. Parro v. Industrial Commission, 260 Ill. App. 3d 551 (1st Dist. 1993); Central Rug & Carpet v. Industrial Commission, 361 Ill. App. 3d 684 (1st Dist. 2005).

Based on the testimony presented at hearing and the exhibits admitted into evidence, it is the decision of the arbitrator that Petitioner has established that the undisputed work accident of July 3, 2019 caused an aggravation of her pre-existing osteoarthritis condition in her left knee, which created the necessity for a total knee replacement, performed on April 1, 2020.

Petitioner admitted to having past knee pain, and further admitted to having been diagnosed with osteoarthritis in her left knee. Petitioner testified that she had not had any treatment for at least one year prior to July 3, 2019. The mechanism of injury, as described by Petitioner, is consistent with causing an aggravation of her arthritic condition. Her testimony and the medical records admitted into evidence support the position that Petitioner's left knee injury of 2019 was the result of the July 3 work related accident.

All the exhibit's admitted into evidence, including the report of the Independent Medical Examiner submitted by Respondent, indicate that Petitioner did not respond to conservative treatment. The treatment records and IME report indicate that the total knee replacement was reasonable and necessary, and related to the July 3, 2019 work related accident. The Arbitrator has considered all the facts, including the impairment rating contained in the September 24, 2020 IME performed by Brian Cole, MD. The records also indicate that Petitioner suffered an injury to her left ankle which caused her continued pain and inability to walk or stand for long periods of time.

However, the medical records do not indicate that there was a causal relationship between the work incident of July 3, 2019, and Petitioner's diagnosis regarding the lower back on January 18, 2021. Petitioner's diagnosis regarding the lower back was a little over six months after the work incident. Petitioner herself consistently denied any medical issues regarding her back.

Pursuant to the findings above, the Arbitrator concludes that Petitioner has failed to prove a compensable accident involving her lower back.

Because the accident occurred after September 1, 2011, the Arbitrator looks to Section 8.1b of the Act for guidance in assessing permanency. This section sets forth five factors to be considered in determining the nature and extent of an injury, with no single factor predominating.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that the record contains, specifically attached to RX 2, an impairment rating of 21% of the lower extremity as determined by Dr. Cole pursuant to the most current edition of the American Medical Association Guides to the Evaluation of Permanent Impairment. (RX 2). The Arbitrator also notes that there is no impairment rating regarding the elbow. The Arbitrator notes that this level of impairment does not necessarily equate to permanent partial disability under the Workers' Compensation Act, but instead is a factor to be considered in making a disability evaluation. In making his evaluation, Dr. Cole noted mild range of motion deficit in flexion, but overall good quads. The Arbitrator therefore gives some weight to this factor.

With regard to subsection (ii) of §8.lb(b), the occupation of the employee, the Arbitrator notes that Petitioner was able to return to work in a full duty capacity. Petitioner was discharged to full duty starting November 1, 2020 by Dr. Sompalli. Petitioner testified that she has returned to work. Therefore, the Arbitrator gives some weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 57 years old at the time of the accident and Petitioner has presented no evidence as to how her age might affect her future earnings. Therefore, the Arbitrator gives no weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that there was no evidence of impairment of earning capacity. Petitioner testified that she was earning $14.70 per hour at Macy's. Petitioner also testified that she was currently working with Addus Home Care earning $15.70 per hour. Petitioner did not suffer any decrease in income as a result of the work incident of July 3, 2019. Petitioner is currently earning at a higher rate than when she was working with Respondent. Therefore, the Arbitrator gives no weight to this factor.

With regard to subsection (v) of §8.lb(b), evidence of disability corroborated by the treating

medical records, the Arbitrator notes that when Petitioner presented to Dr. Cole for an examination on September 24, 2020, petitioner reported that she took pain medication as needed. Petitioner denied knee pain. Dr. Cole noted that Petitioner had +1 to 100+ range of motion in the left knee, good quads, and the left knee was neurovascularly intact. X-rays of the left knee obtained on September 24, 2020 showed no adverse findings and no complications. The physician concluded that Petitioner had reached maximum medical improvement (MMI) and could return to work full duty without restrictions. The physician also concluded that Petitioner did not require further treatment after September 24, 2020.

There is no record of Petitioner visiting a doctor after September 24, 2020, for a medical condition regarding the work incident of July 3, 2019, until October 26, 2021, when Petitioner was discharged from Dr. Sompalli's care.

Although, Petitioner testified to continued pain and discomfort in her left knee, she last saw the treating surgeon, Dr. Sompalli, in December of 2020. Petitioner was discharged from care and returned to full duty by Dr. Sompalli on October 26, 2021. Petitioner thereafter reported a 1/10 pain on December 11, 2020.

The Arbitrator notes that Petitioner's complaint of elbow pain was reported to be 8/10 on July 16, 2019, 3/10 on August 20, 2019, and 0/10 on September 3, 2019. The medical records do not contain evidence that treatments were directed to Petitioner's elbow.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 35% of the left leg, 5% of the left foot, and 3% of the left arm.

In connection with the Arbitrator's Decision regarding Issue K, what temporary total disability benefits are in dispute, the Arbitrator concludes as follows:

Petitioner is claiming temporary total disability (TTD) from February 10, 2020 through March 31, 2020.

To prove entitlement to any TTD, the employee must show not only that she did not work but that she was unable to work. Schmidgall v. Industrial Comm'n, 268 Ill.App.3d 845, 847 (4th Dist. 1984); Boker v. Industrial Comm'n, 141 Ill.App.3d 51, 55, 489 N.E.2d 913 (3d Dist. 1986).

Petitioner testified that she experienced pain and swelling in her knee and was unable to stand for the entire duration of her shifts. Petitioner's Exhibit #5, Elite Orthopedics, contains a note from January 14, 2020, returning Petitioner to work with sedentary restrictions on January 17, 2020. Petitioner testified that her employer could not accommodate the restriction. (p. 41-42). Petitioner testified that she was not paid TTD from February 10, 2020, through March 31, 2020, despite the evidence that she was unable to work during this period. These were also the two months before her surgery was to take place on April 1, 2020.

The parties agree that Petitioner's average weekly wage was $588.10. Petitioner was paid TTD beginning on April 1, 2020, the date of her knee replacement surgery. The Arbitrator finds that Petitioner is entitled to TTD benefits from February 9, 2020, through March 31, 2020.

The Arbitrator awards Petitioner 7 and 2/7 weeks of TTD benefits, an amount equal to $4,284.7.

In connection with the Arbitrator's Decision regarding 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 concludes as follows:

Section 8(a) of the Act provides that the "employer shall provide and pay … for all necessary first aid, medical and surgical services and all necessary medical, surgical and hospital services day after incurred, limited however, to that which is reasonably required to cure or relieve from the effects of the accidental injury." 820 ILCS 305/8(a) (2011). A claimant bears the burden of proving, by a preponderance of the evidence, his entitlement to an award of medical expenses under Section 8(a). Westin Hotel v. Industrial Comm'n, 372 Ill. App. 3d 527, 546 (2007).

Although Respondent paid for the cost of most Petitioner's medical expenses, Petitioner alleges that Respondent failed to pay the following medical bills which were admitted into evidence without objection:
1. Advanced Urgent Care (Pet. Ex 2) $4,490.00.
2. Preferred Open MRI (Pet. Ex. 9) $1,500.00.
3. Enterprises Victory Inc. (Pet. Ex. 10) $2,495.00.
4. Molecular Imaging of Chicago (Pet. Ex. 12) $200

The arbitrator finds that the above listed unpaid bills for Molecular Imaging of Chicago, Advanced Urgent Care, and Victory Enterprises were for treatment, testing and medical devices related to the injuries suffered by Petitioner in her work-related accident of July 3, 2019.

Petitioner underwent an MRI of her lumbosacral spine at Premier Open MRI on March 6, 2020. Petitioner also testified that she underwent an MRI for her back in March 2020. (Tr. 39-41). Petitioner did not present any tangible evidence documenting treatments to her back as related to the work incident of July 3, 2019. The treatment received at Premier Open MRI is therefore not causally related to the work incident of July 3, 2019.

The Arbitrator awards payment of Molecular Imaging of Chicago, Advanced Urgent Care, and Victory Enterprises bills by Respondent to Petitioner in the amount of $7,186.00.

The Arbitrator otherwise denies the payment of Premier Open MRI bill by Respondent to Petitioner.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC010136
Case Name	Jesus Torres v. Quality Labor Services
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0015
Number of Pages of Decision	23
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Kevin Botha
Respondent Attorney	Michael J. Danielewicz, Daniel J Levato

DATE FILED: 1/17/2024

/s/Amylee Simonovich, Commissioner

Signature

DISSENT: /s/Amylee Simonovich, Commissioner

Signature

24IWCC0015

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JESUS TORRES,

Petitioner,

vs. NO: 22 WC 10136

QUALITY LABOR SERVICES,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, prospective medical treatment, temporary total disability benefits, permanent disability, benefit rates, and average weekly wage calculation, 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. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill. 2d 327, 399 N.E.2d 1322, 35 Ill. Dec.794 (1980).

FINDINGS OF FACT

The Commission adopts the Findings of Fact in the Decision of the Arbitrator and incorporates such facts herein.

CONCLUSIONS OF LAW

A. Average Weekly Wage

The Commission modifies the average weekly wage of $927.19 which was calculated by

the Arbitrator. Determinative of this issue is whether Petitioner's overtime hours worked should be included in the calculation of his average weekly wage. The Arbitrator found that Petitioner's overtime hours should be included, as the overtime worked was regular and consistent.

§10 of the Act explicitly states that overtime is to be excluded in calculating average weekly wage. 820 ILCS 305/10 (West 2020). However, "overtime includes those hours in excess of an employee's regular weekly hours of employment that he or she is not required to work as a condition of his or her employment or which are not part of a set number of hours consistently worked each week." *Airborne Express Inc. v. Illinois Workers' Compensation Commission*, 372 Ill. App. 3d 549, 554-55 (1st Dist. 2007). In *Airborne*, the Court did not include overtime hours in the calculation of average weekly wage for the claimant because it was found the Petitioner was not required to work overtime as a condition of his employment, and although the claimant consistently worked overtime, he did not work a set number of overtime hours each week. *Id.* at 555.

Here, just as in *Airborne*, Petitioner did not work a set number of overtime hours every week. The record reflects that every week Petitioner worked, a unique amount of overtime hours were worked. *See RX 4*. Moreover, the Commission finds no credible evidence supporting a finding that overtime was mandatory or a condition of employment. When asked if overtime was required, Petitioner responded: "It seemed so, because we had to finish the whole job." *Transcript, p. 24a*. This statement indicates Petitioner himself was unsure of the overtime policy and had not been informed that overtime was mandatory or a condition of employment. The credible evidence also reflects Petitioner never informed Respondent that Geremarie required him to work overtime. Further, Luz Serrano, Respondent's Office Manager, testified that overtime at Geremarie was not mandatory. Had it been mandatory, Ms. Serrano would have had to explain this to her employees prior to assigning them to Geremarie. Ms. Serrano denied that herself nor any other supervisor had such a conversation with Petitioner.

Additionally, Ms. Serrano testified that Petitioner was not required to work everyday until his job was completed at Geremarie. She stated Petitioner never spoke to her about feeling pressured to work longer hours at Geremarie out of fear of not being called back for more work. She added that if Geremarie wanted an employee to work overtime, they would notify Respondent. Ms. Serrano testified that Geremarie never did so while Petitioner was working there. The Commission finds no credible evidence supporting a finding that Petitioner would be subject to discipline or termination if he refused to work overtime. Petitioner's testimony that the Foreman at Geremarie would get upset with workers if the workers did not want to work overtime cannot be corroborated.

Lastly, the Commission finds that nothing in the case law discusses or defines mandatory overtime as "implicit" or "constructive." Thus, Petitioner's alleged feelings of obligation to stay, or inability to leave the job site does not mean overtime was implicitly mandatory. Based on the above, the Commission finds that overtime was not mandatory or a condition of Petitioner's employment, nor was it worked consistently for a set number of hours each week. Accordingly, the Commission finds Petitioner's overtime hours shall not be included in the calculation of his average weekly wage.

Based upon the short period of employment with Geremarie prior to the injury, the Commission finds the applicable calculation of average weekly wage under §10 of the Act to be

the third calculation, which states: "Where the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee actually earned wages shall be followed." 820 ILCS 305/10. The record reflects Petitioner worked eight weeks for Geremarie, earning $600.00 each week. Thus, pursuant to the third calculation under §10 of the Act, the Commission finds Petitioner's average weekly wage to be $600.00.

B. Temporary Total Disability

In accordance with the above modification, the Commission adjusts Petitioner's temporary total disability award. The Commission awards benefits in the amount of $400.00 per week for a period of 60 & 6/7ths weeks (September 3, 2021 through January 19, 2022; and March 24, 2022 through January 4, 2023), pursuant to §8(b) of the Act.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 21, 2023, as modified above, is hereby affirmed and adopted.

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner's current right arm condition is causally related to the accident date of September 2, 2021.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the sum of $285.00 for medical expenses, as provided in §8(a) and subject to §8.2 of the Act. Respondent shall receive credit for medical expenses already paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall provide and pay for the lateral epicondylar debridement with extensor tendon origin repair as recommended by Dr. Mark Gross, as provided in §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $400.00 per week for a period of 60 & 6/7ths weeks, representing September 3, 2021 through January 19, 2022, and March 24, 2022 through January 4, 2023, those being the periods of temporary total incapacity for work under §8(b), and that as provided in §19(b), this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have a credit of $13,612.41 for temporary total disability benefits already paid.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $11,100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

January 17, 2024 /s/ *Carolyn M. Doherty*

AHS/wde

O: 12/13/23 /s/ *Deborah L. Simpson*

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DISSENT

After carefully considering the totality of the evidence, I respectfully dissent from the opinion of the majority and would affirm the Decision of the Arbitrator.

I view the evidence concerning overtime differently. When asked if he was required to work overtime hours, Petitioner testified: "It seemed so, because we had to finish the whole job. Sometimes we work between 13 and 14 hours, because we were supposed to finish the entire job. And if we didn't want to work them, it seemed like the people got bothered…The foreman got upset with the workers if the workers didn't want to work overtime." T. 24a. Petitioner was afraid that he would be fired if he did not work overtime, "Because since we work through an office, they wouldn't call us back and so you had to work – or else they would ask for other people and unless you wanted to work – unless you did work that overtime." T. 24a-25a. On cross-examination Petitioner testified, "…But every morning, we would have a meeting and were assigned work, and we would have to – we were expected to finish it…It wasn't whether or not I wanted to. We had to finish the job." T. 40a, 42a. Petitioner testified, "We didn't have a set schedule. It was until we finish the job." T. 68a.

I find Petitioner's testimony that if he did not finish the days task that he would be replaced to be credible. It is supported by the job description, which states, "Must be able to work long hours if needed." RX6.

By contrast, Ms. Serrano was employed by Respondent, the lending employer, and had no direct knowledge of Petitioner's day-to-day at Geremarie, the borrowing employer. She did not observe the job site, nor know the supervisor. T. 90a. She was not aware of the number of hours Petitioner was working for Geremarie. T. 94a. Her testimony that overtime was not mandatory is given less weight.

Based upon the above, I would affirm the Arbitrator's calculation of Petitioner's average weekly wage.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC010136
Case Name	Jesus Torres v. Quality Labor Services
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	18
Decision Issued By	Paul Seal, Arbitrator

Petitioner Attorney	Kevin Botha
Respondent Attorney	Daniel J. Levato

DATE FILED: 2/21/2023

THE INTEREST RATE FOR THE WEEK OF FEBRUARY 15, 2023 4.84%

/s/ Paul Seal, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Jesus Torres
Employee/Petitioner

v.

Quality Labor Services
Employer/Respondent

Case # **22** WC **10136**

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 **Paul Seal**, Arbitrator of the Commission, in the city of **Rockford** on **December 21, 2022** and **Woodstock** on **January 4, 2023**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **September 2, 2021**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**48,213.75;** the average weekly wage was $**927.19.**

On the date of accident, Petitioner was **50** years of age, ***married*** with **0** dependent children.

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

Respondent shall be given a credit of $**13,612.41** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**13,612.41**.

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

ORDER

- The Respondent shall pay Petitioner temporary total disability benefits of $**618.13**/week, for **60-6/7** weeks, commencing **September 3, 2021** through **January 19, 2022** and **March 24, 2022** through **January 4, 2023** pursuant to §8(b) of the Act.
- Respondent shall be given a credit of $**13,612.41** for TTD paid from **September 27, 2021** through **February 20, 2022**
- The Respondent shall pay the Petitioner medical expenses pursuant to §8(a) in the amount of $**285.00,** according to the Illinois Medical Fee Schedule. Respondent shall receive credit for medical expenses already paid.
- The Respondent shall authorize and pay for the additional reasonable, necessary and related medical treatment of the surgical recommendation by Dr. Mark Gross for a lateral epicondylar debridement with repair of the common extensor high-grade partial tear, as well as any associated temporary total, temporary partial disability benefits and other reasonable and necessary medical expenses related thereto.

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

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

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

FEBRUARY 21, 2023

Signature of Arbitrator

STATEMENT OF FACTS

Testimony of Petitioner Jesus Torres

The parties stipulated that the Petitioner sustained accidental injuries while employed by the Respondent on September 2, 2021 (Arb. Ex.1). Petitioner confirmed that he had testified before (Tr.12a). Petitioner, also known as Jesus Torres Marin (Tr.27a) or "Chuy" (Tr.29a), testified through a Spanish interpreter/translator that on September 2, 2021, he was employed by Respondent making masts (was not sure what to call them) for boats and yachts. He was using a large drill with a grip and the drill got stuck, pulling on his right elbow causing injury (Tr.14a). He worked for a temp agency and was assigned this job at Geremarie Corporation which made parts and masts for boats (Id). He sought medical treatment at Condell Immediate Care and later came under the care of Dr. Talarico on September 27, 2021, who ordered an MRI of the right elbow. He then followed up with Dr. Mark Gross at Illinois Bone & Joint Institute on November 15, 2021 (Tr.15a-17a). Dr. Gross gave Petitioner a steroid injection into his right elbow on November 15, 2021, and upon follow up on December 13, 2021, Petitioner noted some improvement as a result of the injection. During this time, Petitioner also attended physical therapy at Athletico Physical Therapy. On January 24, 2022, Petitioner followed up with Dr. Gross who released him to go back to light duty work with restrictions of sedentary work, no lifting with the right arm and no repetitive activity (Tr.18a). As of March 24, 2022, Dr. Gross took Petitioner off work completely and recommended right elbow surgery (Tr.19a).

He testified about a trip to Florida in December 2021 and planned to leave on December 12, 2021, but due to a doctor's appointment on December 13, 2021, he canceled the trip (Tr.25a). The original plan was to help a friend/neighbor (Jacob) move by driving Jacob's wife's car to Florida. Jacob and his cousin, a truck driver would be doing the moving and Petitioner planned to return to Illinois one or two days later (Tr.33a-34a).

Petitioner testified that during December 2021, January or February 2022 that he tried to shovel snow but couldn't do it because it hurt his arm. His wife did the shoveling to remove the snow from his driveway (Tr.25a-26a). Upon cross-examination, he further clarified that he only tried to shovel snow one time during January 2022 (Tr.39a).

At the time of Petitioner's testimony on December 21, 2022, he testified that his right arm got swollen and that he had a lump on the outside of his right elbow. He had pain in the right elbow and reported numbness down to his fingers as well as swelling in the fingers (Tr.26a-27a).

Petitioner testified that he has not worked or tried to work since January 20, 2022 (Tr.56a). He did testify to a conversation with Luz Serrano at Respondent only once afterwards. He testified that a buddy of his offered him something to do with driving trucks and that following his conversation with Luz, they felt that it was not in his best interest (Tr.57a-58a).

Petitioner testified to owning a Facebook account and identified himself with his arm around his wife, Yolanda in the first picture. He also identified his wife's nephews, El Tallvan Vergera and Aaron Ramirez in a picture dated January 27 (Tr.60a). He identified himself in a second screen shot picture from January 27, 2022 (Tr.62a). He explained that the nephews, Vergera and Ramirez were working and that it was their boss's party and that Petitioner was invited. Petitioner testified that he was present but was not working (Tr.63a). Petitioner also identified himself in a picture with his wife on April 24. He was not holding her with his right arm (Tr.63a-64a). He also testified to holding his grandson in a picture from September 5 who was a few months old. His grandson weighed approximately 20 or 21 lbs. Petitioner testified that his wife gave him the grandchild to hold and he was holding him in his locked right arm (Tr.64a-65a). He also testified to having pain while holding his grandson (Tr.67a).

Petitioner's Medical Treatment

Petitioner was initially seen at Condell Immediate Care on September 2, 2021 at 10:45 AM. The records indicate that at 7:45 AM, Petitioner was using a drill which got stuck and he felt a pull on his right elbow. He felt pain in both elbows but greater on the right. The drill jammed and while trying to free it, he felt a pop and pain in his right elbow and then had swelling and pain in the right elbow and could not straighten it fully (Px.1 p.45). Petitioner was provided a sling (Px.1 p.51) and was released to return to work on 9/3/2021 through 9/8/2021 with restrictions of no use of the right hand (Px.1. p.61). On September 8, 2021, he followed up with Dr. Jonathan Alexander at Condell Immediate Care, he could not lift anything with his right hand, had problems sleeping due to pain and was unable to work due to restrictions. He was resting in a sling and could not grip or lift with his right arm. He was referred to occupational therapy for evaluation and treatment (Px.1 p.19-23) and given work restrictions of no use of the right arm which was to remain in a sling (Px.1. p.36). On September 22, 2021, he followed up with Dr. Alexander at Condell with no improvement. He was released from care with light duty work restrictions of no use of the right arm and to follow-up with an orthopedic specialist (Px.1. p.3-6, 15).

He was evaluated by Dr. Marcus Talarico on September 27, 2021 for an injury sustained on September 2 at work. He had a twisting injury while using a drill. He had persistent lateral elbow pain and was wearing a sling (Px.2 p.7). On exam, he had tenderness at the lateral aspect of the distal humerus and had pain with resisted wrist extension. X-rays were negative and the assessment was lateral epicondylitis of right elbow. Dr. Talarico opined that Petitioner had a tendon disruption or lateral epicondylitis and recommended an MRI of the right elbow to evaluate the soft tissue in the elbow. He was to remain off work (Px.2 p.9).

On October 6, 2021, MRI findings from Lake Zurich Open MRI suggested lateral epicondylitis with mild amount of elbow joint effusion (Px.3 p.31).

He followed up with Dr. Talarico on October 13, 2021, who noted that he had been seen in therapy a few times, had persistent lateral elbow pain and remained in a sling. Petitioner had been off work due to his restrictions (Px.2 p.2). On exam, there was tenderness at the lateral aspect of the distal humerus and pain with resisted wrist extension. Review of the MRI demonstrated tendinopathy and an injury to the common extensor origin at the lateral epicondyle. The assessment was lateral epicondylitis of the right elbow and Dr. Talarico opined that the Petitioner's history, physical exam findings and MRI were consistent with tendinopathy and injury to the lateral elbow and common extensor origin. Dr. Talarico recommended conservative treatment of occupational therapy and work restrictions of left-handed work only (Px.2 p.4).

On October 18, 2021, Petitioner underwent an Initial PT Evaluation at Athletico Physical Therapy. The records indicated that on September 2, 2021 he was using a drill which got stuck and torqued his arm while he was working as an Assembly Operator of Towers for Quality Services. He was drilling a hole to make a tower when the drill got caught and kicked back and twisted his arm. He had the residual of a large bruise at the lateral elbow and reported severe swelling. The Athletico records indicated the lifting requirements of the job to be 45lbs bilaterally (Px.4 p.9). The plan was skilled occupational therapy twice a week for 6 weeks (Px.4 p.12).

The assessment from the Athletico Progress Note dated November 11, 2021 revealed less elbow extension by 10° but increased elbow flexion by 15°, he continued to have severe pain at the lateral elbow and radial head and the pain was worse with gripping. They noted that the shoulder was also becoming stiff because of decreased use and noted that Petitioner may benefit from a work conditioning program (Px.4 p.39). Petitioner informed his physical therapist that he was going to see Dr. Gross for a second opinion and that his job required him to lift up to 100 lbs. by himself, but the job description said lifting requirements were over 45 lbs. without a maximum listed. His pain rating was 8 at that time (Px.4 p.40).

He was evaluated by Dr. Mark Gross at Illinois Bone & Joint on November 15, 2021. The records indicated a history of injury while at work in a warehouse on September 2, 2021 when he was using a big drill to work on a boat. The drill abruptly stopped causing significant torque on the right elbow. On exam, there was swelling over the common extensor tendons of the right lateral aspect of the elbow he had pain with resisted right wrist extension and severe pain with resisted supination. The MRI noted findings consistent with lateral epicondylitis and a mild amount of joint effusion. Dr. Gross opined that the mechanism of injury at work was consistent with his symptoms related to lateral epicondylitis of the right elbow and he gave the Petitioner a steroid injection into the right elbow. Petitioner was to remain off work and hold off from physical therapy for 1 week after the injection then resume physical therapy twice a week and light duty work with no use of his right arm (Px.3 p.3-6).

A November 23, 2021 Progress Note from Athletico documented that Petitioner's pain had decreased to 4/10 and his range of motion had increased since the cortisone injection. Strength was still impaired and he had pain with palpation to the lateral elbow (Px.4 p.47). The plan was to continue physical therapy twice a week for 6 weeks for progression to return to work (Px.4 p.49).

A December 7, 2021 Functional Status Report from Athletico documented that Petitioner attended 10 appointments, canceled 4 and had 5 scheduled appointments. It was a baseline functional status report to identify patient's current safe ability to perform the activities of his job. The heaviest weight required for lifting at his job was 45lbs. Petitioner demonstrated a floor to waist occasional lift tolerance of 21lbs, an overhead occasional lift tolerance of 13lbs and a waist to shoulder frequent lift tolerance of 18.5lbs. Petitioner still reported pain at the lateral elbow but no longer on the medial side of elbow. Best pain rating was 1/10 and worst was 3/10. There was pain to palpation of the lateral epicondyle of 3/10. (Px.4 p.55-56). He showed improvement in range of motion and strength but had not achieved full duty return to work requirements. He still had positive tests for lateral epicondylitis and tenderness/pain of 4 with palpation to the lateral epicondyle. There was inflammation in the lateral epicondyle and tightness in the extensor mass. They noted he would continue to benefit from skilled occupational therapy to progress in strength to meet needs for a return to work. The short-term goals to achieve a floor to waist and waist to shoulder lift of 45 lbs. bilaterally was still in progress as he only achieved 21 lbs. and 18.5 lbs. respectively. He also did not meet short-term carrying goals of 45 lbs. for 10 feet as he only achieved 15.5 lbs. long-term goals of increase in right elbow strength for assembly tasks of the tower and for using a drill were also still in progress (Px.4 p.58). An Athletico Daily Note dated December 9, 2021, noted a current pain rating of 3. The short-term goals and long-term goals were still in progress. The plan was to place physical therapy on hold while on a vacation/trip to Florida (Px.4 p.65-66).

A December 13, 2021 Athletico Discharge Summary documented that the short-term goal to achieve an occasional floor to waist and waist to shoulder lift of 45 lbs. bilaterally was not met as he only achieved 21 lbs. and 18.5 lbs. respectively on December 7, 2021. He also did not meet short-term carrying goals of 45 lbs. for 10 feet as he only achieved 15.5 lbs. The long-term goals of increase in right elbow strength for assembly tasks of the tower and for using a drill were also not met upon discharge. Patient goals were only partially achieved (Px.4 p.67). Assessment was that Petitioner provided good effort during treatment, he demonstrated knowledge and understanding of a home exercise program and his subjective reports were consistent with objective findings. The reason for discharge was a partial recovery and transition to self-management to address remaining deficits (Px.4 p.68).

On December 13, 2021, he followed up with Dr. Mark Gross following the right lateral epicondylar corticosteroid injection. Petitioner noted a 70% improvement in the right arm pain. On examination, the muscle tone had markedly improved but he still had mild tenderness over the lateral epicondyle. He had full range of motion of the right elbow, resisted extension of the wrist and resisted supination of the wrist exhibited minimal discomfort and was much stronger. The assessment was status post right lateral epicondylar cyst/common extensor forearm musculature insertion strain with significant improvement

from conservative management and he was to continue with meloxicam and a forearm band on the right side. He was released to go back to work with a 30 lbs. lifting restriction and wear his forearm band at all times (Px.3 p.38-40).

On January 24, 2022, Petitioner followed up with Dr. Gross' physician assistant, Joyce Wesner, who reported that he last had a steroid injection of the right elbow on November 15, 2021 and stated that the injection helped significantly for about 2 weeks before his pain returned. With activity, pain was 8/10 and he continued to complain of pain and swelling to the lateral aspect of the right elbow. He had done physical therapy and was discharged home with instructions for a home exercise program which he continued to do. He tried to return to work wearing the tennis elbow strap but continued to have pain with lifting and had not been able to successfully return to work with a 30 lbs. lifting restriction. Examination of the right elbow showed mild soft tissue swelling of the origin of the extensor tendon on the lateral epicondyle. He had pain with full flexion and full extension of the right elbow that was isolated to the lateral epicondyle region with resisted wrist extension and third finger digit extension. MRI imaging from October 21 indicated a focal area of abnormal signal intensity seen involving the common tendinous attachment of the extensor muscles of the forearm at its attachment with the lateral epicondyle exhibiting bright signals on IR. There was a mild amount of elbow joint effusion and the assessment was right elbow lateral epicondylitis which continued to be symptomatic. The treatment plan was to discontinue meloxicam because it was not providing any benefit but continue use of the strap and home exercises. The next treatment option was surgical intervention by way of a right elbow lateral epicondylar debridement with extensor tendon origin repair. He was given work restrictions of no lifting and no repetitive activities with the right arm, he was capable of sedentary work (Px.3 p.53-58).

He followed up with Dr. Gross on March 11, 2022 for persistent right elbow pain. He had completed physical therapy but his symptoms were still quite severe and constantly at 7/10. Any lifting with his palm facing down or repetitive wrist extension activities aggravated it severely. Dr. Gross noted that the previous improvement from the corticosteroid injection had completely dissipated. On exam, the right elbow was swollen over the lateral aspect and the lateral epicondylar region along with exquisite tenderness. He appeared to have a palpable defect just distal to the epicondyle which suggested possible extensor tendon disruption. He was weak to resisted wrist extension and passive wrist flexion with the elbow fully extended and the forearm supinated was both stiff and very painful. The assessment was chronic right elbow lateral epicondylitis with lack of response to prolonged conservative care and marked worsening of weakness and change in examination of the lateral elbow suggestive of possible common extensor origin disruption. Dr. Gross recommended a repeat MRI scan (Px.3 p.71-73). Petitioner could return to light duty work with no lifting or repetitive activities with the right upper extremity and was able to do sedentary work (Px.3 p.75).

An MRI from March 19, 2022, showed a high-grade partial-thickness tear of the proximal common extensor tendon with low-grade strain of the proximal extensor compartment musculature of the forearm and small joint effusion (Px.3 p.90).

On March 24, 2022, Dr. Gross opined that the new MRI revealed progression of deterioration of his common extensor origin and there was a substantial partial thickness tear without complete rupture. He noted that there had been a marked progression on the MRI findings when compared to the previous MRI of the right elbow. Petitioner continued to have marked pain with activities. On exam, there was marked tenderness over the lateral epicondyle of the right elbow, no instability and Petitioner was lacking a few terminal degrees of extension which created relatively severe lateral elbow pain. He could flex to 130°. There was a moderate amount of atrophy of the common extensor musculature of the proximal forearm. Resisted wrist extension was weak and tender both in the proximal forearm musculature and the lateral epicondylar region. The assessment was chronic posttraumatic lateral epicondylitis of the right elbow and progression of the disruption of the common extensor origin at the right lateral epicondyle with

continued significant impairment of function, pain and weakness. Dr. Gross recommended a lateral epicondylar debridement with repair of common extensor high-grade partial tear. Dr. Gross also stated that Petitioner was unable to work at that time pending scheduling of surgery (Px.3 p.95-97).

On August 26, 2022, Petitioner was seen by Dr. Gross for continued right elbow pain. He had severe pain in the right lateral elbow and occasionally medially. Dr. Gross noted worsening of symptoms. His assessment was a one-year history of posttraumatic injury to the right elbow with sustained severe lateral epicondylitis and rupture, tear of the common extensor origin, unresponsive to conservative care. His plan remained operative intervention of right elbow for lateral epicondylar debridement and repair of the common extensor origin disruption (Px.3 p.111-114). Dr. Gross opined that Petitioner should remain out of work pending surgery (Px.3 p.117).

Light Duty Return to Work

When Petitioner was initially evaluated at the emergency room at Condell on September 2, 2021, he was placed in a sling and given work restrictions (Tr.19a-20a). Petitioner testified that initially, following the accident, the Respondent was not able to accommodate the work restrictions and that he only returned to work months later (Tr.21a).

Petitioner testified that when he followed up with Dr. Gross on December 13, 2021, the plan was to go back to work with no lifting more than 30 lbs. (Tr.29a). Petitioner testified that he was offered and accepted light duty work through the Respondent at Sigma Services Corporation on January 20, 2022. He testified that he was given a table and chair and that he was brought many bags and labels and was supposed to stick the labels onto the bags. While doing this, his arm started to get inflamed and after about 3 or 4 hours later, they were going to move him to an assembly line and he stated that he would not be able to do that job on the assembly line (Tr.22a). Petitioner agreed that he signed a light duty job offer dated January 20, 2022 (Rx.5). On cross-examination, he further explained that the labels came rolled up and he had to use both hands to unstick them and stick them on the plastic bags but he did not have to lift any boxes (Tr.52a). After putting the labels on boxes he was told that he was going to move to an assembly line and was informed that the assembly line would be moving fast and he would be removing bags from the line and that he informed the supervisor at Sigma Corporation that he was unable to do this job and subsequently left (Tr.55a).

Petitioner's Employment with Respondent

Petitioner testified that among the products manufactured by Geremarie, were masts. He testified that these masts are placed on boats and they were made with welded pipes. He would have to drill holes in order to place the cables to go to the speakers and that these masts weighed approximately 100 lbs. and he would have to lift these by himself (Tr.23a-24a).

Petitioner testified to working overtime hours while assigned to the job at Geremarie. He testified that he had to work overtime hours, because it seemed that he had to finish the whole job. Sometimes he worked between 13 and 14 hours because they were supposed to finish the entire job and if they did not want to work the hours, it would seem like the people (foreman at Geremarie) would get bothered or upset. Petitioner testified that he was afraid of losing this job assignment if he did not work the overtime hours explaining that since he worked through a temp agency he was afraid that he would not get called back and that he would be replaced by other workers if he refused the overtime hours (Tr.24a-25a).

On cross-examination, he testified that every morning, he reported to Geremarie where a meeting was held and they were assigned work and were expected to finish it (Tr.40a). Petitioner was informed by the Respondent that he could work overtime if he wanted to, and that it was his choice. He further testified however, if he refused the overtime hours, they (Geremarie) would get annoyed and wouldn't need him anymore (Tr.40a-41a). He testified that it wasn't whether or not he wanted to (work overtime), he had to finish the job (Tr.42a) and was told this by the people at Geremarie, not Respondent (Tr.42a). He testified

that in the morning, he would punch in with a digital number and then punch out at the end of the day, there was no set schedule, and that work hours each day were determined by finishing the job (Tr.67a-68a).

Dr. Xavier Simcock Section 12 Evaluation and Addendum Report

At the request of the Respondent, Dr. Simcock examined the Petitioner on February 15, 2022. The history and mechanism of injury was consistent with medical records of the Petitioner using a drill in his right hand when there was a torque moment from the drill when it got stuck which resulted in a pull at the right elbow on September 2, 2021. He reviewed medical records from Condell Immediate Care, Dr. Talarico, Lake Zurich MRI, Athletico, and Dr. Mark Gross.

On physical examination he noted that Petitioner was initially cautious to move the elbow because of guarding however when distracted, had full range of motion. Neurological tests were negative, he had acute tenderness to palpation at the lateral epicondyle and pain with resisted extension at the wrist. He had significant pain with resisted supination.

Dr. Simcock noted that the MRI from October 6, 2021 was of poor-quality secondary to the open nature of the MRI as well as some motion artifact. He noted that there was some increased signal at the insertion of the common extensor origin with no overt tear seen. The biceps tendon was not visualized.

He opined that the prescribed medications (meloxicam, tramadol and gabapentin) were all appropriate medications for Petitioner's injury and that continued prescription of the medication would be reasonable for between 3-6 months.

He opined that Petitioner was very guarded initially injuring the exam however with reassurance, he had full range of motion and did not opine that Petitioner had any symptom magnification, malingering or nonorganic pain.

Dr. Simcock questioned Petitioner about a trip to Florida in December 2021 to help a friend move which the Petitioner stated that he initially planned on going but denied going because of a scheduled medical appointment. Dr. Simcock confirmed the diagnosis of right elbow lateral epicondylitis and concern for possible biceps strain.

In response to Interrogatory 10 – "Could the Petitioner's alleged mechanism of injury as he described have caused his right arm condition?", Dr. Simcock responded "Yes. When using a drill in the right arm there is a heavy gripping activity in the right hand. When the drill catches and there is increased torque on the drill and grip is increased to counteract this the recoil can go up the arm to the elbow. This can be felt as a pull on the right elbow and resisting this pull can lead to pain at the lateral epicondyle as well as injury to the biceps tendon."

Dr. Simcock opined that the mechanism of injury was consistent with the Petitioner's pain and symptomatology and the diagnosis of lateral epicondylitis and possible biceps sprain pain and symptoms and found it causally related (Rx.1 Interrogatory #13).

Dr. Simcock opined that the MRI was of too poor quality to assess the degree of inflammation at the lateral epicondyle and whether this was age-related degeneration versus an acute trauma. He was unable to comment whether the mechanism of injury caused the pathology in the October 6, 2021 MRI due to its poor quality (Rx.1 Interrogatory #14).

He opined that Petitioner's subjective complaints and objective findings on physical examination did correlate with lateral epicondylitis and a biceps tendon strain (Rx.1 Interrogatory #15).

Dr. Simcock opined that lateral epicondylitis is a very common degenerative condition in working laborers in their 50s. Surgical intervention for lateral epicondylitis is normally indicated after at least 6 months of conservative care and more commonly 1 year. Routine conservative care included bracing, one

or two cortisone injections, possible PRP injections, and short courses of physical therapy as needed. Without a higher quality MRI he could not comment on whether the degeneration in the lateral elbow was merely and age-related finding or there was a higher degree of tear caused or exacerbated by the trauma he reported at work (Rx.1 Interrogatory #15).

He opined that it was unlikely that shoveling snow caused the Petitioner's lateral epicondylitis entirely, it may have exacerbated the recurrence of symptoms (Rx.1 Interrogatory #17). Treatment to date had been medically reasonable and necessary and related to the alleged incident (Rx.1 Interrogatory #18).

For more diagnostic clarity, Dr. Simcock recommended a higher quality MRI which would define the degree of inflammation at the lateral epicondyle and whether there was any significant tearing present, stating that a good quality MRI of the elbow would fully image the insertion of the biceps tendon. If there is no significant tear to the biceps tendon, he would recommend a repeat cortisone injection into the lateral epicondyle followed by a 6-week course of formal therapy and repeat evaluation with the potential of returning to work with heavy gripping activities at that time (Rx.1 Interrogatory #19).

Dr. Simcock also provided several opinions regarding Petitioner's left elbow (Rx.1 Interrogatory #20-27).

Dr. Simcock recommended sedentary duty work with no lifting more than 10 lbs. with the right arm and no heavy gripping or grasping activities with the right arm (Rx.1 Interrogatory #28) and recommended a cortisone injection. If there was a positive response to the injection Dr. Simcock would increase the work restrictions 6 weeks following the injection to 30 lbs. on the right arm and by 3 months after the cortisone injection he would anticipate a return to full duty work (Rx.1 Interrogatory #28A).

Dr. Simcock was posed a question "if you believe Petitioner is not able to return to work but his ongoing conditions and symptoms are wholly due to pre-existing unrelated injuries, please explain" to which he responded, "not applicable" (Rx.1 Interrogatory #28B). He opined that Petitioner had not reached maximum medical improvement and anticipated MMI to be reached over 3-6 months (Rx.1 Interrogatory #29).

At the request of the Respondent, on May 18, 2022, Dr. Simcock issued an addendum report based upon his review of additional medical records. He reviewed a physical therapy note from December 9, 2021 which noted improvement in pain to 3 out of 10 and given this improvement, Petitioner was transitioned to a home exercise program. Dr. Simcock documented that Petitioner was improving in his lifting and gripping activities with the exercises and had been able to progress back to return to work. His therapy was put on hold given a planned trip to Florida for the next 2 weeks. Physical therapy records from Athletico noted cancellation of appointments on 12/14/2021, 12/21/2021, 12/23/2021, 12/28/2021 and 12/30/2021 (there was no record of this in the full and complete set of records from Athletico). He also reviewed office notes from Dr. Gross from 3/11/2022 and 3/24/2022 and an MRI report dated 3/19/2022. Specifically, he noted from the 3/24/2022 office note that Dr. Gross noted review of the MRI with progression of the common extensor origin. Based on that, Dr. Gross indicated the need for surgical intervention given the high-grade partial tear (Rx.2 p.1).

Dr. Simcock documented that he reviewed both MRIs from October 6, 2021 and March 6, 2022 which both showed partial tears of the lateral common extensor origin with worsening progression. The biceps tendon was poorly visualized in the first MRI and well visualized in the second MRI and was intact (Rx.2 Interrogatory #1).

Dr. Simcock was again asked whether intervening events of Petitioner helping his friend move boxes or heavy repetitive shoveling of snow could have caused or accelerated Petitioner's right elbow condition. His opinion was that heavy repetitive lifting of boxes and heavy repetitive shoveling of snow could easily exacerbate and accelerate lateral epicondylitis, especially since Petitioner hasn't seen improvement in therapy prior to these time points (Rx.2 Interrogatory #2, 3, 4).

Dr. Simcock was asked "Dr. Gross opined there was worsening changes on the March 16, 2022 MRI which are due to the natural progression of edema. Do you agree with this opinion regarding the worsening right elbow condition, please explain." Dr. Simcock responded "no, I do not agree that this is a natural progression of edema. Edema around a partial tear tends to improve slowly with time. The progression of swelling and edema is more likely associated with the above-mentioned events." (Rx.2 Interrogatory #5).

Dr. Simcock disagreed with Dr. Gross' recommendation for surgical intervention and stated "given the fact he saw improvement with activity modification and therapy this was likely to improve his lateral epicondylitis alone. Furthermore, lateral epicondylitis commonly self resolves within one year time. Therefore, he rarely recommends surgery prior to the one-year time." (Rx.2 Interrogatory #6).

Regarding causation, Dr. Simcock opined that given the worsening of findings on his MRI, he suspected that the worsening of the condition was associated with the intervening events as mentioned earlier. Furthermore, lateral epicondylitis and degeneration of the common extensors is very common for patients at this age. Therefore the first event could well have been an aggravation of a pre-existing condition.

Testimony of Luz Serrano

Ms. Serrano testified on behalf of the Respondent that Quality Labor Services was a temp agency and that she was the office manager. Her job included making sure that all orders had been covered (customers were staffed), to send employees and recruit employees as well as other administrative duties (Tr.73a74a).

She described the work that Geremarie performed included making parts for boats and other metal parts (Tr.75a) and agreed that Respondent Exhibit #6, a job description of Petitioner's job at Geremarie of "Assembly Operator – Towers" was an accurate reflection of the job title (Tr.76a). Upon cross-examination, she did acknowledge that the job description stated that employees "must be able to work long hours if needed" (Tr.92a). She testified that employees are expected to work 40 hours per week and that she did not know whether Geremarie required any employees to work more than 40 hours a week (Tr.77a). She further testified that neither overtime nor weekend work was mandatory and that any assignment of overtime work would be discussed with employees prior to their assignment, no such conversation was had with Petitioner. She testified that Petitioner's statement to the Arbitrator that he had to work as long as it took to finish the job was not an accurate statement (Tr.78a-79a). Upon cross-examination, she identified Petitioner's payment history in Respondent's Exhibit #4 and that Petitioner was paid weekly. Beginning with the week ending July 23, 2021, Petitioner worked 14 overtime hours, second week - 19 hours of overtime, third week - 22.5 hours of overtime, fourth week - 25 hours of overtime, fifth week - 29.5 hours of overtime, sixth week - 31.25 hours of overtime, seventh week 32.25 hours of overtime and 0.75 hours of overtime in the eighth week, the week of the injury (Tr.94a-96a).

Ms. Serrano testified that generally to accommodate light duty work restrictions, she would look for a company that would accept an employee with the restrictions in place. If the company where he was originally working did not accept him with restrictions, she would then look to another one that would accommodate the restrictions. She would then contact the employee to let them know that they had found alternative work within restrictions as soon as they were able to identify the position (Tr.101a-102a).

She testified that she notified Petitioner by email and phone that they could accommodate his light duty work restrictions and that he was going to work at Sigma Corporation. She sent him the offer to return to light duty work on January 20, 2022 (Tr.81a-83a). The job Petitioner would be doing at Sigma would be placing stickers on bags and packing small boxes in a box which could be done sitting or standing. Later he would be on a line, grabbing a bag from the belt and sealing them (Tr.84a). Later on January 20, 2022, she had a phone call with Petitioner who stated that he could not stay and work all day because his

elbow was hurting him. She testified that he left work on his own and was not ordered to go home by anyone at Sigma (Tr.86a-87a). She testified that she had no further conversations whatsoever with Petitioner (Tr.88a). She testified that she never called Petitioner again to see how his elbow was doing (Tr.100a). On cross-examination, she testified that most of the time, Respondent's customers did not allow them to go into the sites due to safety concerns to perform audits or inspect the jobs Respondent employees would be performing and that she had not seen the type of job Petitioner was signed to do, she also did not know the name of his supervisor at Geremarie (Tr.90a).

Other Probative Relevant Evidence

Admitted into evidence was the Petitioner's wage statement, a record of Petitioner's earnings between July 12, 2021 and September 24, 2021 (Rx.4). The Petitioner's wages are summarized in the table below.

Pay Date	Period End	Regular Hours	Overtime Hours	Hourly Rate	Total Hours	Gross Pay
7/23/2021	7/18/2021	40	14	$ 15.00	54	$ 810.00
7/30/2021	7/25/2021	40	19.5	$ 15.00	59.5	$ 892.50
8/6/2021	8/1/2021	40	22.25	$ 15.00	62.25	$ 933.75
8/13/2021	8/8/2021	40	25	$ 15.00	65	$ 975.00
8/20/2021	8/15/2021	40	29.5	$ 15.00	69.5	$ 1,042.50
8/27/2021	8/22/2021	40	31.25	$ 15.00	71.25	$ 1,068.75
9/3/2021	8/29/2021	40	32.25	$ 15.00	72.25	$ 1,083.75
9/10/2021	9/5/2021	40	0.75	$ 15.00	40.75	$ 611.25
		320	174.5		494.5	$ 7,417.50

Admitted into evidence was Respondent's ledger of Medical and TTD payments (Rx.3). The TTD payments are summarized in the table below.

Payment Date	Benefit Start	Benefit End	Amount	Check Message
10/28/2021	9/27/2021	10/24/2021	$ 2,592.84	4 weeks TTD
12/10/2021	10/25/2021	12/5/2021	$ 3,889.26	6 weeks TTD
12/10/2021	12/6/2021	12/12/2021	$ 648.21	1 week TTD
12/17/2021	12/13/2021	12/19/2021	$ 648.21	1 week TTD
12/23/2021	12/20/2021	12/26/2021	$ 648.21	1 week TTD
1/2/2022	12/27/2021	1/2/2022	$ 648.21	1 week TTD
1/7/2022	1/3/2022	1/9/2022	$ 648.21	1 week TTD
1/14/2022	1/10/2022	1/16/2022	$ 648.21	1 week TTD
1/21/2022	1/17/2022	1/23/2022	$ 648.21	1 week TTD
1/28/2022	1/24/2022	1/30/2022	$ 648.21	1 week TTD
2/4/2022	1/31/2022	2/6/2022	$ 648.21	1 week TTD
2/11/2022	12/7/2022	12/13/2022	$ 648.21	1 week TTD
2/18/2022	12/14/2022	12/22/2022	$ 648.21	1 week TTD
			$ 13,612.41	

Respondent's Exhibit #5 depicts an offer of light duty work. Petitioner was notified that his work restrictions of 12/14/2021 of lifting/carrying/pushing/pulling less than 30lbs with the right arm could be accommodated at Sigma Services Corporation as of January 20, 2022. The job description was consistent general labor, labeling, packing and restocking of food products. Pay rate was $14 per hour. Petitioner endorsed his acceptance of this accommodation of light duty work restrictions.

Respondent's Exhibit #6 is a job description of the Petitioner's employment assignment at Geremarie. His job title was Assembly Operator - Towers. The job required assembling fabricated and manufactured finished products for customers, including the use of a variety of hand tools to construct the final product: Maintaining quality and safety standards and keeping accurate work records of assembly tasks. One of the essential duties, responsibilities and requirements of the job was that the Petitioner must be able to work long hours if needed (Rx.6 p.1). Relevant physical requirements of the job included lifting/carrying objects weighing less than 15lbs (95% frequency); lifting/carrying objects weighing between 50 and 44lbs (95% frequency); lifting/carrying objects weighing 45lbs and over (26% frequency); standing (100% frequency) and repetitive motion/repetitive work (50% to 75% frequency) (Rx.6 p.2).

Respondent's Exhibit #7 contains photographs obtained from Facebook. A photograph of Petitioner and his wife on April 24, 2022 in PDF and JPG format. A January 27, 2022, photograph of Petitioner with his right arm around his wife in PDF format. A January 27, 2022 photograph of Petitioner sitting at a birthday party in JPEG format. A September 5, 2022 photograph of Petitioner holding his grandson in PDF and JPG format. There was also a short video clip however it did not involve any activity by the Petitioner.

CONCLUSIONS OF LAW

In support of the Arbitrator's Decision relating to (F), Is the Petitioner's current condition of ill-being causally related to the injury? The Arbitrator finds the following:

Petitioner's credible and unrebutted testimony as well as the medical records establish that he suffered an accidental injury on September 2, 2021 while using a drill at which got stuck, causing a recoil and torque injury to his right elbow. The accident is undisputed.

It is the Commission's function, to choose between conflicting medical opinions. *International Vermiculite Co. v. Industrial Comm'n,* 77 Ill.2d 1, 4, 31 Ill.Dec. 789, 394 N.E.2d 1166, 1168 (1979); *ARA Services, Inc. v. Industrial Comm'n,* 226 Ill. App. 3d 225, 232, 168 Ill. Dec. 756, 590 N.E. 2d 78, 82 (1992). Not only may the Commission decide which medical view is to be accepted, it may attach greater weight to the opinion of the treating physician. *International Vermiculite Co. v. Industrial Comm'n,* 77 Ill.2d 1, 4, 31 Ill.Dec. 789, 394 N.E.2d 1166, 1168 (1979); *ARA Services, Inc. v. Industrial Comm'n,* 226 Ill. App. 3d 225, 232, 168 Ill. Dec. 756, 590 N.E. 2d 78, 82 (1992).

Petitioner was seen shortly after the injury at Condell Immediate Care where the records indicated that he was using a drill which got stuck and he felt a pull on his right elbow. On September 22, 2021 he was referred by Dr. Alexander at Condell to see an orthopedic specialist because of no improvement. He was evaluated by Dr. Talarico on September 27, 2021, who ordered and MRI for the Petitioner's tendon disruption or lateral epicondylitis. Following the October 2021 MRI, Dr. Talarico opined that Petitioner's history, physical exam findings and MRI were consistent with tendinopathy and injury to the lateral elbow and common extensor origin.

Petitioner sought the second opinion of Dr. Mark Gross who on November 15, 2021, opined that the mechanism of injury at work was consistent with his symptoms related to lateral epicondylitis of the right elbow and gave the Petitioner a cortisone steroid injection which provided some temporary relief of Petitioner's pain as documented in a November 23, 2021 progress note from Athletico noting how Petitioner's pain had decreased to 4/10 and his range of motion had increased since the cortisone injection. An Athletico functional status report from December 7, 2021 was a baseline report to identify Petitioner's ability to perform the activities of his job. The heaviest weight required for lifting at his job was 45 lbs. without documentation of a maximum lifting weight. Petitioner demonstrated an occasional floor to waist lift of 21 lbs., an occasional overhead lift of 13 lbs. and a frequent waist to shoulder lift of 18.5 lbs. Petitioner still had pain to palpation of the lateral epicondyle and showed improvement in range of motion and strength but had not achieved full duty return to work requirements. He still had positive tests for

lateral epicondylitis and tenderness/pain of 4 with palpation to the lateral epicondyle. A December 13, 2021, physical therapy discharge summary from Athletico documented that the short-term goals were not met as he only achieved lifting tolerances of 21 lbs. and 18.5 lbs. He also did not meet short-term carrying goals of 45 lbs. for 10 feet as he only achieved 15.5 lbs. The long-term goals of increased right elbow strength for assembly tasks of the tower and for using a drill were also not met. He saw Dr. Gross on December 13, 2021, who noted a 70% improvement in the right arm but he still had mild tenderness over the lateral epicondyle.

On January 24, 2022, Petitioner followed up with Dr. Gross' physician assistant who reported that the cortisone steroid injection of the right elbow on November 15, 2021 helped significantly for about 2 weeks before his pain returned. It was noted that he tried to return to work and had not been able to successfully return to work with the 30 lbs. lifting restriction. On March 11, 2022, Dr. Gross noted that the previous improvement from the corticosteroid injection had completely dissipated. On exam, the lateral part of the right elbow was swollen and had exquisite tenderness. Dr. Gross noted a palpable defect distal to the epicondyle which suggested possible extensor tendon disruption and ordered a new MRI scan which showed a high-grade partial-thickness tear of the proximal common extensor tendon with low-grade strain of the proximal extensor compartment musculature of the forearm and small joint effusion. Dr. Gross opined that the new MRI revealed progression of the deterioration of his common extensor origin and a substantial partial thickness tear without complete rupture. There was a marked progression on the new MRI findings. Dr. Gross' assessment was chronic posttraumatic lateral epicondylitis of the right elbow and progression of the disruption of the common extensor origin at the right lateral epicondyle for which he recommended lateral epicondylar debridement with repair of common extensor high-grade partial tear.

Dr. Simcock, Respondent's Section 12 examiner saw the Petitioner on February 15, 2022 and noted that the history and mechanism of injury was consistent with the medical records. Dr. Simcock stated that "When using a drill in the right arm there is a heavy gripping activity in the right hand. When the drill catches and there is increased torque on the drill and grip is increased to counteract this, the recoil can go up the arm to the elbow. This can be felt as a pull on the right elbow and resisting this pull can lead to pain at the lateral epicondyle as well as injury to the biceps tendon." Dr. Simcock opined that the mechanism of injury was consistent with the Petitioner's pain, symptoms and a diagnosis of lateral epicondylitis and found causal connection. Dr. Simcock did however recommend a higher quality MRI for diagnostic clarity because the October 2021 MRI was poor quality because it was an open MRI and there was motion artifact. He reasoned that a higher quality MRI would define the degree of inflammation at the lateral epicondyle and whether there was any significant tearing present. He further opined that if there was no significant tear to the biceps tendon, he would recommend a repeat cortisone injection into the lateral epicondyle followed by a 6-week course of formal therapy and repeat evaluation for a full duty return to work at that time. Dr. Simcock recommended sedentary duty work with no lifting more than 10 lbs., no heavy lifting, gripping or grasping with the right arm. Then, if Petitioner had a positive response to the injection, he would increase the work restrictions 6 weeks following the injection to 30 lbs. on the right arm and by 3 months after the cortisone injection he would anticipate a return to full duty work. He stated that Petitioner had not reached MMI.

During the Section 12 exam, Dr. Simcock questioned Petitioner about a trip to Florida in December 2021 to help a friend move. Petitioner responded that he had planned to but denied going because of a scheduled medical appointment. Petitioner testified candidly about his trip to Florida and that he had planned to leave on December 12, 2021, to help a neighbor move to Florida by driving the wife's car to Florida and return to Illinois one or two days later, but cancelled the trip because of his scheduled doctor's appointment on December 13, 2021.

Petitioner testified that during December 2021, January or February 2022 that he tried to shovel snow once but couldn't do it because it hurt his arm, so he had his wife shovel the snow from the

driveway. Dr. Simcock opined in his February 15, 2022 report that it was unlikely that shoveling snow caused the Petitioner's lateral epicondylitis entirely, stating that it may have exacerbated the recurrence of symptoms.

Dr. Simcock opined that lateral epicondylitis was a common degenerative condition in working laborers in their 50s and that surgical intervention for lateral epicondylitis is normally indicated after at least 6 months of conservative care and more commonly 1 year, he opined that treatment through February 2022 had been medically reasonable and necessary and related to the alleged incident.

Dr. Simcock then provided an addendum report dated May 18, 2022 where he reviewed office notes from Dr. Gross from 3/11/2022 and 3/24/2022 and an MRI report dated 3/19/2022. Specifically, he noted from the 3/24/2022 office note that Dr. Gross reviewed the MRI and noted progression of the tear of the common extensor origin which Dr. Gross then indicated the need for surgical intervention given the high-grade partial tear. Dr. Simcock reviewed both MRIs from October 6, 2021 and March 19, 2022 and documented that both showed partial tears of the lateral common extensor origin with worsening progression.

In his addendum report, Dr. Simcock responded to questions whether the intervening events of the Petitioner helping his friend move boxes or heavy repetitive shoveling of snow could have caused or accelerated Petitioner's right elbow condition by stating that "heavy, repetitive lifting of boxes and heavy, repetitive shoveling of snow could easily exacerbate and accelerate lateral epicondylitis."

Dr. Simcock then commented on Dr. Gross' opinion that there were worsening changes on the March 16, 2022 MRI due to the natural progression of edema and disagreed with Dr. Gross' statement regarding the worsening right elbow condition, stating, "No, I do not agree that this is a natural progression of edema. Edema around a partial tear tends to improve slowly with time. The progression of swelling and edema is more likely associated with the above-mentioned events." The Arbitrator has scoured the records of Dr. Gross and does not find anywhere where Dr. Gross mentions the "natural progression of edema".

Dr. Simcock then modified his previous opinion regarding causation stating that given the MRI findings, he suspected that the worsening of the condition was associated with the previously mentioned intervening events. The Arbitrator finds this opinion gratuitous, disingenuous and without basis, since Dr. Simcock specifically questioned Petitioner during the Section 12 exam in February 2022 about the trip to Florida in December 2021, which the evidence proves did not happen. Furthermore, in his initial IME report, Dr. Simcock specifically opined that it was unlikely that shoveling snow caused the Petitioner's lateral epicondylitis entirely and that that it may have exacerbated the recurrence of symptoms. The Arbitrator does not find the opinions of Dr. Simcock to be credible or persuasive.

Consequently, the Arbitrator finds that the medical records and opinions of Dr. Mark Gross more persuasive and credible than the opinions of Dr. Simcock and assigns greater weight to the opinions of Dr. Gross. Therefore, the Arbitrator finds that based upon the credible testimony of the Petitioner and the Petitioner's medical records, that the Petitioner has established by more than a preponderance of the credible evidence that his current condition of ill-being regarding his right elbow is causally related to the accidental injury on September 2, 2021 which arose out of and in the course of his employment with the Respondent.

In support of the Arbitrator's Decision relating to (G), What were the Petitioner's earnings at the time of the accident? The Arbitrator finds the following:

At the time of hearing, Petitioner alleges that his earnings during the year preceding the injury were $50,560.12 and his average weekly wage was $972.31. Respondent alleges an average weekly wage of $600.00. The dispute surrounding the calculation of average weekly wage is based on whether Petitioner's overtime hours should be included in the calculation of Petitioner's average weekly wage.

Section 10 of the Act provides that the weekly benefits to which an injured employee is entitled for TTD under section 8(b) of the Act shall be computed on the basis of his or her average weekly wage (820 ILCS 305/10) (West 2011). The statute provides that "average weekly wage" means:

> "the actual earnings of the employee in the employment in which he was working at the time of the injury during the period of 52 weeks ending with the last day the employee's last full pay period immediately preceding the date of his injury, illness, or disablement excluding overtime, and bonus divided by 52; but if the injured employee lost 5 or more calendar days during such period, whether or not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks and parts thereof remaining after the time so lost has been deducted." 820 ILCS 305/10 (West 2011)."

Section 10 of the Act explicitly states that overtime is to be excluded in calculating an employee's average weekly wage. However, the statute fails to define "overtime." In *Airborne Express Inc. v. IWCC*, 372 Ill. App. 3d 549, 554, 865 N.E.2d 979, 310 Ill. Dec. 259 (2007), the Appellate Court held that those hours which an employee works in excess of his regular weekly hours of employment are not considered overtime within the meaning of Section 10 and are to be included in an average weekly wage calculation if the excess number of hours worked is consistent or if the employee is required to work the excess hours as a condition of his employment.

Petitioner testified to working overtime hours while assigned to the job at Geremarie. He testified that he had to work the overtime hours because he had to finish the whole job. He worked between 13 and 14 hours per day in order to finish the entire job. If he did not want to work the hours, Petitioner believed that his foreman at Geremarie would get bothered or upset. He testified that if he refused to work overtime, he was afraid of losing the job assignment by not getting called back to work through the agency or be replaced by other workers. Every morning he reported to Geremarie, a meeting was held and they were assigned work and they were expected to finish it. There was no set work schedule, work hours each day were determined by finishing the job. Petitioner admitted that he was told by the Respondent that he could work overtime if he wanted to, but that it was his choice.

Luz Serrano testified that the work that Geremarie performed included making parts for boats and agreed that Respondent Exhibit #6, a job description of Petitioner's job at Geremarie of "Assembly Operator – Towers" was an accurate reflection of his job title. Ms. Serrano admitted that the job description stated that employees "must be able to work long hours if needed". She testified that neither overtime nor weekend work was mandatory and that any assignment of overtime work would be discussed with employees prior to their assignment. She testified that Petitioner's pay history showed that, beginning with the week ending July 23, 2021, Petitioner worked 14 overtime hours, the second week - 19 hours of overtime, the third week - 22.5 hours of overtime, fourth week - 25 hours of overtime, fifth week - 29.5 hours of overtime, sixth week - 31.25 hours of overtime, seventh week 32.25 hours of overtime and 0.75 hours of overtime in the eighth week, the week of the injury.

Pay Date	Period End	Regular Hours	Overtime Hours	Hourly Rate	Total Hours	Gross Pay
7/23/2021	7/18/2021	40	14	$ 15.00	54	$ 810.00
7/30/2021	7/25/2021	40	19.5	$ 15.00	59.5	$ 892.50
8/6/2021	8/1/2021	40	22.25	$ 15.00	62.25	$ 933.75
8/13/2021	8/8/2021	40	25	$ 15.00	65	$ 975.00
8/20/2021	8/15/2021	40	29.5	$ 15.00	69.5	$ 1,042.50
8/27/2021	8/22/2021	40	31.25	$ 15.00	71.25	$ 1,068.75
9/3/2021	8/29/2021	40	32.25	$ 15.00	72.25	$ 1,083.75
9/10/2021	9/5/2021	40	0.75	$ 15.00	40.75	$ 611.25
		320	174.5		494.5	$ 7,417.50

Evidence of Petitioner's pre-injury wages for the 8 weeks prior to his date of injury were admitted into evidence as Respondent's Exhibit #4 and summarized above. Between July 23, 2021 and September 5, 2021, the Petitioner received 8 paychecks. During each week, he worked 40 hours of regular time and he worked overtime on a regular and consistent basis. During the 8-week period, Petitioner worked a total of 494.5 hours and was paid $15 per hour. Consequently, the Arbitrator finds that Petitioner's total earnings for the 8 weeks prior to his injury were $7,417.50, extrapolated over 52 weeks, the annual earnings were $48,213.75 and therefore the average weekly wage is $927.19.

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

The dispute as to the Respondent's liability for payment of medical expenses is based upon the disputed issue of causal connection. Having found in favor of the Petitioner on the issue of causal connection, and based upon a review of the medical records, the Arbitrator finds that Petitioner has established that the medical bills related to the treatment of the Petitioner's right elbow contained in Petitioner's Exhibit 5, are reasonable, necessary and causally related to the accidental injury sustained on September 2, 2021, and that the Respondent shall pay to the Petitioner, the amount of $285.00 in medical expenses under sections 8(a) and 8.2 of the Act and pursuant to the Illinois Fee Schedule. It has been stipulated between the parties that Respondent shall have a credit for any medical bills already paid.

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

The dispute as to prospective medical treatment under Section 8(a) is likewise based upon the issue of causal connection because of the differing medical opinions between Dr. Mark Gross, the Petitioner's treating physician and Dr. Xavier Simcock, the Respondent's Section 12 physician.

At the time of Petitioner's testimony on December 21, 2022, he testified that his right arm got swollen and that he had a lump on the outside of his right elbow with pain in the right elbow and numbness down to his fingers as well as swelling in the fingers. At his most recent visit with Dr. Gross on August 26, 2022, he had severe pain in the right lateral elbow and occasionally medially. The assessment was a one-year history of posttraumatic injury to the right elbow with sustained severe lateral epicondylitis and rupture, tear of the common extensor origin, unresponsive to conservative care. Dr. Gross continued to recommend a lateral epicondylar debridement and repair of the common extensor origin disruption of the right elbow. Dr. Simcock also stated that surgical intervention for lateral epicondylitis is normally indicated after at least 6 months of conservative care and more commonly 1 year in his initial IME report and further opined that lateral epicondylitis commonly self resolves within a year and therefore, he rarely recommends surgery within that first year.

Having found in favor of the Petitioner on the issue of causal connection, and based upon the credible testimony of the Petitioner, a review of the medical records, the Arbitrator finds that Petitioner has established by more than a preponderance of the credible evidence that the Respondent shall authorize and pay for the additional reasonable, necessary and related medical treatment that has been offered by Dr. Gross including the surgery for a lateral epicondylar debridement with a repair of the common extensor high-grade partial tear as well as any associated temporary total, temporary partial disability benefits and other reasonable and necessary medical treatment related thereto.

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

It is a well-settled principle that when a claimant seeks TTD benefits, the dispositive inquiry is whether the claimant's condition has stabilized, *i.e.,* whether the claimant has reached maximum medical improvement. *Westin Hotel v. Industrial Comm'n,* 372 Ill.App.3d 527, 542, 310 Ill.Dec. 18, 865 N.E.2d

342 (2007).

At the outset, the Arbitrator notes that neither Dr. Gross nor Dr. Simcock have opined that the Petitioner is at maximum medical improvement. The dispute to Petitioner's entitlement to temporary total disability benefits is based upon the disputed issue of causal connection and the accommodation of light duty work restrictions.

At the initial visit at Condell Immediate Care on September 2, 2021, Petitioner's right arm was placed in a sling and he was released to return to work on September 3, 2021, with no use of the right arm. On September 8, 2021, Dr. Alexander noted that Petitioner was unable to work due to the restrictions and was limited to a sling and could not grip or lift with his right arm, work restrictions remained the same. On October 13, 2021, Dr. Talarico released Petitioner to return to left-handed work only. On November 15, 2021, Dr. Gross opined that Petitioner should remain off work and hold off from physical therapy for 1 week following the cortisone injection and then could return to work with no use of the right arm. On December 13, 2021, Dr. Gross advanced Petitioner's restrictions to no lifting more than 30lbs. with the right arm and to wear the forearm band at all times.

On January 24, 2022, Dr. Gross gave work restrictions of no lifting and no repetitive activities with the right arm. Petitioner was limited to sedentary work. The same restrictions were applied on March 11, 2022 by Dr. Gross and on March 24, 2022 following the new MRI, Dr. Gross opined that Petitioner was unable to work pending scheduling of surgery. As of the last visit with Dr. Gross on August 26, 2022, the surgical recommendation remained in place and Petitioner was to remain off work.

Petitioner testified that initially, Respondent was not able to accommodate his work restrictions. He was offered and accepted a light duty position through the Respondent at Sigma Services Corporation on January 20, 2022, where he was given a table and chair and was to stick the labels onto bags. While doing this, he stated his arm began to get inflamed and that he could no longer do the light-duty work. The Arbitrator finds that the Respondent offered Petitioner legitimate light duty work accommodations and that the Petitioner did not make a bona fide attempt to work within those restrictions. Petitioner testified that he has not worked or tried to work since January 20, 2022. The Arbitrator finds that Petitioner was temporarily and totally disabled from September 3, 2021 until January 19, 2022 because during this time, Respondent was unable to accommodate the Petitioner's work restrictions and Petitioner did not work. The Respondent made a legitimate light duty offer of employment on January 20, 2022 which ended the Respondent's liability for temporary total disability benefits for that period of time. Since Petitioner was taken off work completely by Dr. Gross on March 24, 2022, Petitioner is entitled to TTD benefits from that date until the time of hearing because he has not yet reached maximum medical improvement.

Having found that the Petitioner's condition of ill-being regarding his right elbow is causally related to the accident of September 2, 2021, and having found the opinions of Dr. Gross more persuasive and credible than Dr. Simcock, the Arbitrator finds that the Petitioner has not yet reached maximum medical improvement because of the need for prospective medical treatment that is awarded herein, and that the Petitioner has established by more than a preponderance of the credible evidence that he entitled to receive temporary total disability benefits in the amount of $618.13 per week for 60 - 6/7 weeks for the periods of September 3, 2021 through January 19, 2022 and March 24, 2022 through January 4, 2023. The Respondent shall receive a credit in the amount of $13,612.41 for TTD benefits paid between September 27, 2021 and February 20, 2022.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	14WC007302
Case Name	Maria Flores v. Chicago Public Schools
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0016
Number of Pages of Decision	11
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Nancy Shepard
Respondent Attorney	Kathleen Ulbert

DATE FILED: 1/17/2024

/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

Maria Flores,

Petitioner,

vs. No. 14 WC 7302

Chicago Public Schools,

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, supplements the Decision of the Arbitrator as stated below, and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

In affirming the Arbitrator's award of 32.5% loss of use of the left foot pursuant to §8(e) of the Act, the Commission finds this portion of the award comes to 54.275 weeks of permanent partial disability, at the maximum rate then in effect of $721.66 per week.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 19, 2023, is hereby affirmed and adopted, with the supplemental findings stated herein.

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.

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.

January 17, 2024

MP/mcp
o-12/21/23
068

/s/ *Marc Parker*
Marc Parker

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	14WC007302
Case Name	Maria Flores v. Chicago Public Schools
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	Raychel Wesley, Arbitrator

Petitioner Attorney	Nancy Shepard
Respondent Attorney	Kathleen Ulbert

DATE FILED: 4/19/2023

THE INTEREST RATE FOR THE WEEK OF APRIL 18, 2023 4.87%

/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

Maria Flores
Employee/Petitioner

v.

Chicago Public Schools
Employer/Respondent

Case # **14** WC **007302**

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 **Feb. 8, 2023**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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 **Jan. 31, 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 $**99,551.40**; the average weekly wage was $**1914.45**.

On the date of accident, Petitioner was **47** years of age, ***married*** with **one** dependent child.

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

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $ 1276.30 /week for 25 5/7 weeks, commencing 02/01/2014 through 08/06/2014, 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 $**14,539.64** for other benefits, for a total credit of $.

Respondent shall pay reasonable and necessary medical services as listed in Petitioner's Exhibit List, pursuant to the medical fee schedule, of $917 to City of Chicago - Dept of Finance EMS , and $ 15,933.40 to Midwest Orthopedics at Rush, as provided in Sections 8(a) and 8.2 of the Act. The Arbitrator also specifically finds that the treatment at Rush University Medical Center, University Anesthesiologists S.C, and Athletico Physical Therapy is also reasonable and necessary medical services. Their services were paid in full by Blue Cross Blue Shield and Respondent is receiving a credit per the below.

Respondent shall be given a credit of $30,519.43 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.

Based on the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 32.5% loss of use of left foot pursuant to §8(e) of the Act.

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

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

/s/ Raychel A. Wesley

Signature of Arbitrator

APRIL 19, 2023

Maria Flores v. Chicago Public Schools
14 WC 7302

STATEMENT OF FACTS

Maria Flores, Petitioner, was employed by Chicago Public Schools, Respondent, as a teacher on January 31, 2014. (T. 11). She testified she was teaching fourth grade. (T. 11-12).

On January 31, 2014, Petitioner testified that she suffered an injury when she fell on the stairs between her classroom and the lunch room. (T. 12). Petitioner testified that her classroom was on the fifth floor. Her students were in the lunch room on the first floor for breakfast. (T. 13) She testified that part of her job duties was to pick up her students from the lunch room on the first floor and escort them up to the classroom on the fifth floor. She testified that she was required to do this every day. (T. 14). Petitioner testified that she fell going down the stairs on her way to pick up her students and was nearing the first floor when the fall occurred. (T. 12, 25). Petitioner testified on cross examination that she is not sure exactly as to the mechanism of her fall. (T. 25-27).

Petitioner testified that these stairs were the only way to get from her classroom on the fifth floor to the first floor of the school building. (T. 14-15). Petitioner testified that she would be required to go up and down these stairs ten plus times per day. (T. 14).

Petitioner testified that after her fall she felt pain in her left leg and was unable to get up. (T. 15). She was taken to Rush University Medical Center emergency room by ambulance. (T. 15). The Chicago Fire Department EMS records indicate that she was found sitting on floor after falling approximately one to three stairs. (Px. 4, pg. 256). At Rush, Petitioner had pain in her left foot and ankle. X-rays were taken of her left foot/ankle, which demonstrated a spiral fracture of distal diaphysis of the left tibia, as well as a Weber B/C fracture of the distal fibula. This was felt to be unstable. (Px. 4, pg 63-64). An orthopedic consult with Dr. David Garras was recommended. He documented that Petitioner tripped on stairs and suffered left tibial shaft fracture. He recommended surgery. (Px. 5, pg 20-21).

Dr. Garras performed surgery that same day. Her post-operative diagnosis was left lateral malleolar fracture and left tibia shaft fracture. Her procedure consisted of left tibial intermedullary nailing and open reduction internal fixation of her left lateral malleolus. (Px. 4, pg 24-26). She was discharged from the hospital and told to follow up with Dr. Garras. (Px. 4, pg 26-27).

Petitioner followed up with Dr. Garras on February 17, 2014. He recommended continued non-weightbearing and she was kept off work. (T. 16, Px. 5, pg 54). On March 20, 2014, Dr. Garras recommended that Petitioner begin physical therapy and was continued off work. (Px. 5, pg 50). She began physical therapy at Athletico Physical Therapy on March 28, 2014. (Px. 7, pg 144). She continued to follow up with Dr. Garras and attend physical therapy at Athletico through June 12, 2014. (Px. 5, Px. 7).

Petitioner followed up with Dr. Garras on August 7, 2014. Dr. Garras noted that her physical therapy had been stopped approximately a month earlier and that she was doing her exercises at home. (Px. 5, pg 33). Athletico noted on September 8, 2014 that her physical therapy was stopped due to insurance issues. (Px. 7, pg 52). At the August visit, Dr. Garras released Petitioner to return to work full duty. (Px. 5, pg 30). Petitioner testified that she did return to work. (T. 19). She was advised to continue

her home exercise program and wear a compression stocking for swelling. Dr. Garras recommended that she follow up in three months. (Px. 5, pg 30).

Petitioner returned to Dr. Garras on November 6, 2014. She had ongoing complaints of not being able to ambulate quickly or climb stairs as quickly as she used to. He restricted her stair use due to her decreased strength and continued limp. He did recommend additional physical therapy to help with these issues. He continued her at full duty work. (Px. 5, pg 29). Petitioner had an initial evaluation for physical therapy on November 19, 2014. They documented continued limp and difficulty ambulating long distances. However, additional therapy appointments were cancelled due to insurance denial. (Px. 7, pg 3-8).

Petitioner returned to Dr. Garras on May 7, 2015. She had ongoing issues with climbing stairs. He noted that her classroom was moved to the first floor. (Px. 5, pg 23). He did not feel she had any dysfunction regarding stairs and encouraged her to practice to help with her fear. He recommended several physical therapy sessions to work on her lower extremity strength for going up and down stairs. He released her from his care at that time. (Px. 5, pg 23). She did attend eight sessions of physical therapy at Athletico from June 9, 2015 through August 13, 2015. (Px. 7, pg 11-49).

Petitioner testified that she did return to her employment with Respondent. (T. 20). She testified that she does not work for them currently. She testified that following her release from Athletico she has not had any further treatment specifically for her left ankle. (T. 21). She testified that she does continue with her home exercise to maintain strength in her left leg. (T. 21).

Petitioner testified that currently she still has stiffness and pain in her left ankle. She indicated that her pain increases when she is standing or walking for a long time. (T. 22, 24). She testified that she can do stairs but it is at her own pace and that she is more careful when coming down the stairs. (T. 24). She experiences her pain and swelling daily. She testified that her pain was six to eight out of ten. (T. 22-23). She continues to use the compression stockings that her doctor gave her. (T. 23). Petitioner testified that she will take over the counter medications such as Advil or Aleve at times.

CONCLUSIONS OF LAW

The Arbitrator finds that Petitioner testified credibly regarding her job duties, the mechanism and details of her injury, her medical treatment, and the lasting effects of her injury.

Regarding (C), "Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?", the Arbitrator finds:

The Arbitrator finds that Petitioner did suffer an injury that arose out of and in the course of her employment with Respondent. Both elements, "arising out of" and "in the course of" must be shown in order for a claimant to establish a compensable accident under the Act. *McAllister v. Illinois Workers' Compensation Commission,* 450 Ill.Dec. 304, 313 (2020).

"In the course of" refers to the "time, place, and circumstances under which the injury occurred." *Accolade v. Illinois Workers' Compensation Commission*, 2013 ILApp (3d) 120588WC; 990 N.E.2d 901, 907 (3d Dist., 2013). In the present case, the injury occurred at work while performing work duties of getting

her students from the lunch room to escort them to class. It is clear that this injury occurred "in the course of" Petitioner's employment.

The requirement that the injury "arose out of" Petitioner's employment concerns the origin or cause of the claimant's injury. *Sisbro, Inc. v Industrial Comm'n,* 207 Ill.2d 193, 203 (2003). The claimant must show that the injury "had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Id.* at 203. The courts have found that there are three types of risks that an employee can be exposed to: employment risks, personal risks, and neutral risks. *McAllister*, 450 Ill,Dec at 314. A risk is incidental to an employee's employment when "it belongs to or is connected with what the employee has to do in fulfilling his duties." *Id*. The risk of injury to Petitioner in this case as a result of traversing down several flights of stairs to pick up her students to escort them to class is incidental to her employment.

Petitioner testified that she is required to escort her students to class every day as part of her job duties. She testified that the only way to get to the first floor lunch room from her classroom was to take the stairs. (T. 14-15). This testimony was unrebutted. The Supreme Court in *McAllister* states that risks are directly associated with employment when "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 job duties." 450 Ill.Dec. at 315. Petitioner's act of going down the stairs to pick up her students clearly falls within these requirements as it was required that she escort her students and the only way to get to the students was to traverse the stairs.

However, even if this activity was not considered an employment risk but a neutral risk, Petitioner has established she encounters this risk to a greater extent than the general public. A neutral risk is one that does not have any particular employment or personal characteristics. A neutral risk can be compensable under the Act when a claimant is exposed to that risk to a greater degree than that of the general public. *McAllister*, 450 Ill.Dec. at 315. The risk can be increased either qualitatively or quantitively. *Id.* Petitioner has established both.

In this instance, it was established that Petitioner was forced to traverse four flights of stairs from the fifth floor to the first floor, this exceeds the normal amount of stairs that a member of the general public would encounter going about their everyday life. Further, she established that she encounters these flights of stairs more often than the general public would encounter stairs. She testified that she goes up and down these stairs ten plus times a day. This was unrebutted testimony. Therefore, the risk to Petitioner of injury from traversing the stairs is quantitively and qualitatively higher than that of the general public.

Therefore, Petitioner has established she suffered an injury that arose out of and in the course of her employment with Respondent.

Regarding (F), "Is Petitioner's current condition of ill-being causally related to the injury?", the Arbitrator finds:

The Arbitrator finds Petitioner's current condition of ill-being is causally related to the injury that occurred on January 31, 2014. The only true dispute was to accident. The fall down the stairs clearly led to the left ankle fracture and surgical repair. There is no evidence to the contrary.

Regarding (J), "Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary treatment?", the Arbitrator finds:

As the Arbitrator has already found that there was a compensable accident and causation, the Arbitrator finds that Petitioner's treatment following the injury on January 31, 2014 was related to the injury and reasonable and necessary to cure the effects of the injury. Therefore, the bills related to this treatment are awarded. Respondent is liable for outstanding bills paid pursuant to the fee schedule and out of pocket expenses as documented in Petitioner's Exhibit List. Respondent will receive a credit pursuant to Section 8(j) for payments made by Petitioner's group health insurance and will be required to hold Petitioner safe and harmless for any subrogation interest Petitioner's group health insurance may have.

Regarding (K), "What temporary benefits are in dispute? TTD?", the Arbitrator finds:

As the Arbitrator has already found that there was a compensable accident and causation, the Arbitrator finds that Petitioner was temporarily and totally disabled from February 1, 2014 through August 6, 2014 representing 26 5/7 weeks. The only dispute was to accident. Therefore, the Arbitrator awards this time period.

Respondent will receive a credit pursuant to Section 8(j) for payments made by Petitioner's short term disability insurance and will be required to hold Petitioner safe and harmless for any subrogation interest Petitioner's insurance may have.

Regarding (L), "What is the nature and extent of the injury?", the Arbitrator finds:

The Arbitrator finds that Petitioner suffered a significant injury to her left foot and ankle resulting in the need for surgical repair. Petitioner credibly testified to ongoing complaints of stiffness and pain, especially after standing and walking for extended periods of time and that she does take over the counter medication on occasion to relieve this soreness. Petitioner has retained hardware in her left foot/ankle.

The Arbitrator has analyzed the five factors as required by Section 8.1b of the Act.

i) **The reported level of impairment pursuant to subsection (a) of Section 8.1b**: Neither party submitted an AMA impairment rating and so this factor is given no weight.

ii) **The occupation of the injured employee**: Petitioner worked as a teacher for Respondent. While she currently does not perform this job, she was released to return to work full duty and did in fact return to work full duty prior to her leaving Respondent's employ. The Arbitrator gives this factor great weight.

iii) **The age of the employee at the time of the injury**: Petitioner was 47 at the time of the injury. She is still quite young and this injury will impact her moving forward with her life. The Arbitrator gives this factor some weight.

iv) **The employee's future earning capacity:** There was no evidence that Petitioner's earning capacity was affected by this injury. This factor is given much weight by the Arbitrator.

v) **Evidence of disability:** The Arbitrator gives great weight to this factor as the medical records corroborate Petitioner's testimony of continued symptoms. This factor is given much weight by the Arbitrator.

Based on the foregoing facts and the record as a whole, the Arbitrator awards 32.5% loss of use of the left foot/ankle.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC003078
Case Name	Crystella Avila v. Mainfreight, Inc.
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0017
Number of Pages of Decision	10
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Scott Goldstein
Respondent Attorney	Diandra Abate

DATE FILED: 1/17/2024

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF KANKAKEE)

☐ 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

CRYSTELLA AVILA,

Petitioner,

vs. NO: 22 WC 03078

MAINFREIGHT, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission affirms the Decision of the Arbitrator, however strikes the last sentence of the first paragraph under Section "F" on page 5 of the Decision which states: "Dr. Glantz did not consider the evidence of Petitioner's general state of good health before the accident or the fact that her complaints thereafter are consistent and well-documented." The Commission replaces that sentence with the following sentence: "Dr. Glantz did not consider the fact that Petitioner's complaints were consistent and well-documented."

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 17, 2023 is hereby affirmed and adopted.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $32,889.00 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.

January 17, 2024

MEP/dmm

O: 121223

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/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	22WC003078
Case Name	Crystella Avila v. Mainfreight, Inc.
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	7
Decision Issued By	Jessica Hegarty, Arbitrator

Petitioner Attorney	Scott Goldstein
Respondent Attorney	Kelly Kamstra

DATE FILED: 2/17/2023

THE INTEREST RATE FOR THE WEEK OF FEBRUARY 15, 2023 4.84%

/s/ Jessica Hegarty, Arbitrator

Signature

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

☐ 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)

Crystella Avila
Employee/Petitioner

v.

Mainfreight, Inc.
Employer/Respondent

Case # **22** WC **03078**

Consolidated cases:

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

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **1/24/22**, 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 $**44,720.00**; the average weekly wage was $**860.00**.

On the date of accident, Petitioner was **32** 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 $**15,378.02** for TTD, $**0** for TPD, $**0** for maintenance, and $**23,048.02** **for past medical payments not to be credited against outstanding medical bills.**

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

ORDER

Medical benefits
Respondent shall pay reasonable and necessary medical services of $44,186.20, contained in Petitioner's Exhibit 1, pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act.

Temporary Total Disability
Respondent shall pay Petitioner temporary total disability benefits of $573.33/week for 47 1/7 weeks, commencing 1/25/22 through 12/20/22, as provided in Section 8(b) of the Act.

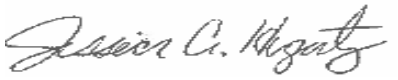
Respondent shall be given a credit of $15,378.02 for temporary total disability benefits that have been paid

Average Weekly Wage
Petitioner's Average Weekly Wage (AWW) is $860.00 per week.

Prospective Medical Care
Petitioner is entitled to prospective medical treatment pursuant to Section 8(a) of the Act including continued neurological care with Dr. Kozlov and continued pain management services with Dr. Lipov and physical therapy.

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

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



Signature of Arbitrator

FEBRUARY 17, 2023

ICArbDec19(b)

ADDENDUM TO THE DECISION OF THE ARBITRATOR

On January 24, 2022, Petitioner was working for Respondent, operating a forklift to unload freight from a semi-truck, when the semi-truck unexpectedly pulled away from the dock, causing Petitioner's forklift to fall and crash about 6 feet to the ground. (Tr. 9). Petitioner was wearing a seat belt that secured only her lower body to the forklift. (Id., at 9). Immediately following the accident, Petitioner felt dizzy, anxious, and nauseous. (Id., at 9). Petitioner went home after the accident. (Id., at 11).

On January 26, 2022, Petitioner reported her accident to Respondent who sent her to Physicians Immediate Care that day. Petitioner presented to Physician's Immediate Care with a history of accident consistent with her testimony. (Px. 2). Her complaints of midline and lateral neck pain, mild headaches, nausea, and dizziness were noted. (Id.). On exam, midline tenderness in the cervical spine, bilateral tenderness along the STM muscles, and reduced range of neck motion was noted. Petitioner was diagnosed with a concussion without loss of consciousness and a cervical sprain. Sedentary work restrictions were noted. (Id.).

On January 28, 2022, Petitioner presented to Illinois Orthopedic Network where Dr. Eugene Lipov, a pain management physician, noted a history of neck, head, and right shoulder complaints. Petitioner reportedly experienced dizziness on a daily basis as well as nausea, and daily headaches since her accident. (Id.). Dr. Lipov diagnosed a concussion, cervicalgia, and back pain (Id.).

On March 3, 2022, Petitioner followed up with Dr. Lipov who noted that her complaints were largely unchanged. (Id.).

On March 17, 2022, Petitioner underwent a cervical MRI that identified a 2.4 mm central and left paracentral disc bulge causing some mild effacement of the thecal sac along with mild, left-sided, neural foraminal stenosis at C6-C7 along with a 2.2 mm central disc bulge causing mild effacement of the thecal sac at C5-C6. (Id.).

On March 28, 2022, Dr. Lipov noted Petitioner's complaints of persistent headaches, neck pain, and right shoulder pain (Id.). He recommended an occipital nerve injection at C3-5 on her right side for her symptoms. Dr. Lipov also referred Petitioner for a neurological consultation. (Id.).

On September 7, 2022, Petitioner underwent cervical medial branch injections at C3-C6 administered by Dr. Lipov (Id.). Petitioner reported short-term pain relief from the injections at her follow-up with Dr. Lipov at which time the doctor recommended radiofrequency ablation for Petitioner's cervical spine which she underwent on October 18, 2022. (Id.).

On April 20, 2022, Petitioner presented for a neurological consult with, Dr. Olga Kozlova at Associated Medical Centers of Illinois, pursuant to Dr. Lipov's referral. (Px. 3). Dr. Kozlova noted the 32-year-old Petitioner reported a history dizziness, weakness, memory impairment, lack of concentration, nausea, and headaches every day, up to a 10/10 in intensity, accompanied by light and

sound sensitivity (Id.). Petitioner also reported frequent fatigue, mood changes, and difficulty falling and staying asleep. Petitioner reportedly was healthy before the accident. Dr. Kozolva diagnosed Petitioner with a mild Traumatic Brain Injury (TBI) which, the doctor noted, is a clinical diagnosis based on positive symptoms in all 4 domains (physical, cognitive, emotional, and sleep). Dr. Kozlova recommended an MRI of Petitioner's brain, prescribed medications, and took Petitioner off of work. (Id.).

On May 17, 2022, Petitioner presented to Dr. Mark Levin, an orthopedic specialist, pursuant to Respondent's Section 12 request. (Rx. 2). Dr. Levin noted Petitioner's subjective complaints were consistent with her exam findings. Based on her history, exam, radiographs, and medical record, the doctor opined that Petitioner's January 24, 2022 work injury aggravated her underlying cervical spondylosis (Id.). Dr. Levin opined that Petitioner was not at MMI. He recommended continued treatment, including a stronger oral medication, like a Medrol Dosepak and possibly an occipital nerve block and facet injections if the medication did not help with her symptoms. (Id.).

On June 14, 2022, Petitioner underwent an MRI of her brain that showed no significant abnormality. (Px. 3).

On July 8, 2022, Petitioner presented to Dr. Russel Glantz, a neurologist, pursuant to Respondent's Section 12 request. (Rx. 1). Dr. Glantz noted her neurological exam was normal. Regarding Petitioner's headaches, he noted that headache complaints are subjective and cannot be objectified on a neurologic exam. Dr. Glantz opined that Petitioner did not suffer a head injury noting that she did not lose consciousness and there was no obvious head trauma, bruising, or bleeding on Petitioner's head. (Id.).

Respondent paid Petitioner TTD from January 25, 2022, through September 7, 2022. (Arb. 1). Petitioner did not receive any documentation from Respondent indicating her TTD benefits would be suspended or terminated. (Tr. at 23-24).

The records in evidence show that Petitioner last followed up with Dr. Kozlova on November 16, 2022, with complaints of persistent headaches, sleep disturbance, and memory impairment. The doctor has maintained Petitioner's off-work restrictions for her head injury. (Px. 3).

Regarding her current condition, Petitioner testified she has significant, persistent headaches, neck pain, and right shoulder pain that she did not have before her January 24, 2022, work injury (Id., at 25-27). She is still treating with Dr. Lipov and Dr. Kozlova for her injuries and wishes to continue. (Id., at 31).

CONCLUSIONS OF LAW

(F) Causal Connection

Petitioner's testimony in this case is unrebutted. Her consistent and persistent complaints are well documented in the record. Her testimony regarding the general state of good health she enjoyed before the accident is corroborated by the treating medical records in evidence. Her treating physicians continue to restrict her from working. Dr. Levin opined that there was a causal relationship between the accident and her cervical condition, that Petitioner was not at MMI, and that she required further treatment. Regarding Petitioner's head injury, the Arbitrator places more weight on the treating medical records, and opinions contained therein, than the opinions of Respondent's Section 12 examiner. Dr. Glantz did not consider the evidence of Petitioner's general state of good health before the accident or the fact that her complaints thereafter are consistent and well-documented.

The Arbitrator found Petitioner presented at the hearing as honest and sincere. The records in evidence corroborate her testimony which is unrebutted. Accordingly, the Arbitrator places significant weight on her testimony.

Based on a preponderance of the credible evidence contained in the record, the Arbitrator finds that Petitioner has proven a causal connection exists between the accident and her current condition of ill-being.

(G) Average Weekly Wage

Petitioner's Average Weekly Wage (AWW) is $860.00 a week as documented by her hiring letter from Respondent which indicates that Petitioner is a salaried worker at $44,270.00 a year which equates to $860.00 a week (Px. 5).

(J) Medical Bills

Based on a preponderance of the credible evidence contained in the record, including the disputed medical bills and the records associated with those bills, the Arbitrator finds that Petitioner's treatment to date, including doctor's appointments, diagnostic testing, injections, ablations, physical therapy, and pain medications, has been reasonable and necessary.

Respondent shall pay reasonable and necessary medical services of $44,186.20, contained in Petitioner's Exhibit 1, pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act.

(K) Prospective Medical Care

Based on the preponderance of credible evidence contained in the record, the Arbitrator finds that Petitioner is entitled to prospective medical treatment by Dr. Lipov including continued pain management services and physical therapy as well as continued neurological care with Dr. Kozlov.

(L) TTD

Based on a preponderance of the credible evidence contained in the record, including the testimony of IME Dr. Levin, the Arbitrator finds the Petitioner is entitled to TTD from January 25, 2022, to December 20, 2022, a period of 47 1/7 weeks.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC029798
Case Name	James J Labonne v. Zion Police Department
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0018
Number of Pages of Decision	22
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Daniel Johnson
Respondent Attorney	Derrick Lloyd

DATE FILED: 1/18/2024

/s/Amylee Simonovich, Commissioner

Signature

24IWCC0018

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JAMES LABONNE,

Petitioner,

vs. NO: 17 WC 29798

ZION POLICE DEPARTMENT,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of whether Petitioner's claim is barred by collateral estoppel, whether Petitioner sustained an accidental injury arising out of and occurring in the course of his employment on May 8, 2015, whether Petitioner's current right wrist condition is causally related to the work injury, entitlement to temporary disability benefits, entitlement to incurred medical expenses, and the nature and extent of any permanent disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as set forth below, but otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

CONCLUSIONS OF LAW

I. Temporary Total Disability

On page 14, the Commission modifies the first paragraph of Section K to the following: "The parties stipulated to Temporary Total Disability benefits paid. ArbX1. The Commission finds the record establishes the credit for the previously paid amount of TTD (RX3), and no additional TTD for which a credit can be attributed is awarded."

II. Medical Expenses

The Request for Hearing reflects, "Petitioner requests he be held harmless for any treatment found to be causally related to his May 8, 2015 work injury by the Illinois Workers' Compensation Commission"; Respondent disputed the claim for a hold harmless, did not allege it paid any medical bills, and did not assert a credit under §8(j). ArbX1. Finding "Respondent has not paid all of the

Petitioner's reasonable and necessary medical services," the Decision orders Respondent to pay or hold Petitioner harmless for the right wrist medical treatment undertaken with the Department of Veteran Affairs. Arb.'s Dec., p. 14. The Commission views the evidence differently.

The Commission emphasizes Petitioner did not submit any medical bills into evidence and therefore failed to prove entitlement to an award of medical expenses. Moreover, as Respondent did not allege entitlement to credit under §8(j), there is no statutory basis for the Commission to impose a hold harmless order on Respondent.

The Commission vacates the order directing Respondent to pay or hold Petitioner harmless for incurred medical expenses.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 28, 2022, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the order directing Respondent to pay or hold Petitioner harmless for medical expenses incurred through March 17, 2016 is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $735.37 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 use of the person as a whole.

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

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

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

January 18, 2024

/s/ *Amylee H. Simonovich*

AHS/mck

O: 12/13/23

43

/s/ *Carolyn M. Doherty*

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC029798
Case Name	LABONNE,JAMES J v. ZION POLICE DEPT
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	19
Decision Issued By	Michael Glaub, Arbitrator

Petitioner Attorney	Daniel Johnson
Respondent Attorney	Derrick Lloyd

DATE FILED: 12/28/2022

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

/s/Michael Glaub, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF LAKE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

James LaBonne
Employee/Petitioner
v.
City of Zion Police Department
Employer/Respondent

Case # **17** WC **029798**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Michael Glaub,** Arbitrator of the Commission, in the city of **Waukegan**, Illinois on **September 26, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **5/8/2015**, 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 to his right wrist.

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

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

The year preceding the injury, Petitioner earned $**85,746.96**; the average weekly wage was $**1,648.98**.

On the accident date, Petitioner was **48** years of age, ***married*** with **no** 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 and will hold Petitioner harmless for all causally related medical treatment provided from May 8, 2015, through March 17, 2016. Additionally, Respondent will hold Petitioner harmless for any Department of Veterans Affairs liens.

Respondent shall be given a credit of $**13,336.80** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**13,336.80**.

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

The Petitioner reached maximum medical improvement on March 17, 2016. Petitioner reported residual right wrist pain and loss of strength that prevents him from returning to work as a police detective. Petitioner's medical treatment and loss of trade were corroborated by Respondent's Section 12 examiner, Dr. Wysocki.

The Petitioner sustained a right wrist TFCC and scapholunate ligament tear from the May 8, 2015, work accident. Petitioner's right wrist injury led him to retire early from the City of Zion Police Department. As a result, Petitioner suffered a loss of trade injury resulting in a 25% loss of the person as a whole.

ORDER

Respondent is to pay Petitioner 125 weeks of benefits at $735.37 a week, reflecting 25% loss of a person as a whole. Respondent to pay or hold Petitioner harmless for related medical treatment incurred from May 8, 2015, through March 17, 2016. Respondent to pay all awarded medical according to the fee schedule.

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, this decision shall be entered as the decision of the Commission.

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

Michael Glaub
Signature of Arbitrator

December 28, 2022

ICArbDec P.2

James LaBonne v. City of Zion Police Department
17 WC 029798

Case History

Petitioner filed an Application for Adjustment of Claim with the Illinois Workers' Compensation Commission (IWCC) on October 12, 2017, for bilateral wrist injuries that arose from a May 8, 2015, training event while employed as a detective for the City of Zion Police Department. (A.Ex2)

Respondent filed a Motion to Dismiss and Request for Hearing on October 22, 2019. (P.Ex4) Respondent alleged the Petitioner's workers' compensation claim was barred by res judicata and collateral estoppel principles. Respondent's Motion to Dismiss relied on a June 18, 2018, Board of Trustees of the Zion Police Pension Fund Decision and Order (Decision and Order). (R.Ex 2 & P.Ex5)

The Decision and Order arose from a pension duty disability application filed by the Petitioner pursuant to the Illinois Pension Code, 40 ILCS §5/3-101, on March 21, 2016. Petitioner's duty disability application sought "line of duty" disability benefits under §5/3-114.1 and §5/3-114.2 of the Illinois Pension Code due to a right wrist injury suffered performing a burpee exercise at a training event on May 8, 2015. The Illinois Pension Code required the Petitioner to be evaluated by three independent physicians selected by the Pension Board. All three physicians determined Petitioner's right wrist injury was a permanent disability that prevented him from safely performing the essential job duties of a police officer or police detective. (P.Ex2&5)

Hearings were held before the Board of Trustees of the Zion Police Pension Fund (Pension Board) on November 14, 2017, and April 18, 2018. The Pension Board found Petitioner was on duty attending a voluntary in-service firearms training which involved performing burpee exercises and shooting accurately under stress. Petitioner testified at the pension hearing that he did not experience pain immediately after the burpee exercise but noticed pain later that evening. The Pension Board found Petitioner performed burpee exercises outside of work and was an act the general public performs. The Pension Board found Petitioner's testimony regarding his ability to qualify with a firearm after the accident to be inconsistent with his employment records. (P.Ex5)

Based upon the preponderance of the evidence, the Pension Board Decision and Order found Petitioner failed to establish a special risk standard to be considered an "Act of Duty" as defined by the Illinois Pension Code and case law. The Pension Board analyzed the circumstances involved and the overall risk associated with those

circumstances at the time of injury to determine if Petitioner's injury involved an activity or risk unique to the police profession. See *Johnson v. Retirement Board*, 114 Ill.2d 518 (1986). *Swoboda v. Board of Trustees of the Village of Sugar Grove Police Pension Fund*, 46 N.E.3d 408 (2nd Dist. 2015). However, based on the medical records, the Pension Board found Petitioner met the burden of proof establishing a permanent disability that prevented him from returning to work as a police officer and therefore awarded non-duty disability benefits. (P.Ex5)

The Petitioner filed a Response to Respondent's Motion to Dismiss on December 10, 2019. Petitioner argued that the application for duty disability pension benefits did not involve the same cause of action or the same subject matter as the Application for Adjustment of Claim filed with the IWCC. Also, the Petitioner's workers' compensation claim is brought under a different statute and seeks benefits not available under the Illinois Pension Code. The Petitioner asserts the operative facts and evidence required to establish a claim for pension benefits under the Illinois Pension Code are materially different from those necessary to establish a claim for workers' compensation benefits under the Illinois Workers' Compensation Act (Act). See *Demski v. Mundelein Police Pension Board*, 831 N.E.2d 704 (2nd Dist. 2005). (P.Ex5(3))

Findings of Fact

Petitioner's Testimony

The Petitioner testified he began working for the City of Zion Police Department as a police officer in 1995 and received a promotion to detective in 2000. Petitioner served in the U.S. Army and received an honorable discharge before his employment with the Respondent. (Arbitration Transcript "AT" Pg. 8)

Petitioner explained the detective position required him to investigate felony crimes, apprehend suspects and fulfill applicable training requirements for his department. The Petitioner testified that he received approximately 27 service commendation awards during his career with the City of Zion Police Department. (P.Ex6) (AT 9)

The Petitioner testified he injured his right wrist on May 8, 2015, while performing a burpee exercise at an in-service training session held at the FBI shooting range in North Chicago, Illinois. Petitioner stated the training session was not mandatory, but his attendance was encouraged by the Respondent. Petitioner testified that the Respondent provided the ammunition and equipment for him to use at the training session. Petitioner stated the

Respondent also provided time and a half personal time as compensation for his attendance at the training session. (AT 10-11)

Petitioner stated the May 8, 2015 training session (training session) was different than other range sessions. He explained the training session involved more physical activity and strenuous exercises than prior training sessions. Petitioner stated the training session included running on a track, performing jumping jacks and burpees and shooting firearms. The Petitioner indicated this particular training session was designed for practicing shooting under physical stress. (AT 12)

The Petitioner testified he injured his right wrist performing burpee exercises at the training session. Petitioner affirmed he had not suffered an injury nor sought medical treatment on his right wrist prior to May 8, 2015. (AT 12-13) Petitioner reported the injury to the Respondent and completed a written injury report on May 21, 2015. (R.Ex10)

Petitioner stated he sought medical treatment for his right wrist through the Department of Veteran's Affairs (VA) and was primarily treated at the James A. Lovell Federal Health Care Center. The Petitioner testified he underwent right wrist surgery in October 2015 to repair a TFCC and ligament tear and had a pin removal procedure in January 2016. (AT 14) Petitioner had physical therapy and occupational therapy following surgery and was released from medical care in March 2016.

The Petitioner testified he continued to experience right wrist pain, loss of strength and endurance with flexion and extension of the right wrist following his March 2016 release from medical care. Petitioner asserted he could not safely apprehend, arrest or subdue resisting suspects due to his right wrist injury. Petitioner stated he submitted the disability application with the Pension Board because he was not able to perform the essential job duties of a detective safely. (AT 16)

Petitioner testified that the pension disability application process required him to be evaluated by three independent physicians selected by the Pension Board. (AT 16) The Petitioner stated he informed the three physicians he injured his right wrist performing burpee exercises on May 8, 2015. Petitioner provided the same right wrist injury history testimony to the Pension Board at his pension hearings. (AT 17) The Petitioner stated the Pension Board awarded non-duty disability benefits. (AT 18)

The Petitioner stated he continued to serve with the U.S. Army National Guard after filing his disability application. Petitioner testified that he was in the middle of a six-year contract. (AT 18) Petitioner testified that he was called to active duty and deployed to Guantanamo Bay, Cuba, from May 2016 until May 2017. Petitioner stated his position with the National Guard was supervisory and did not require him to perform heavy physical demand activities nor apprehend or detain criminal suspects. (AT 19-20)

Petitioner testified that he took time off following his National Guard deployment in May 2017 and did not immediately look for alternative employment. Petitioner stated he would have continued working as a detective with Respondent had he not suffered the right wrist injury in May 2015. The Petitioner testified that he currently works for the Tennessee National Guard as a GS-9 logistical technician and earns $47,000.00 annually. Petitioner stated his position as a logistical technician does not require heavy physical demand activities and is an administrative role. (AT 21)

The Petitioner reported he continues to suffer right wrist pain with flexion or extension of the wrist or when he carries objects with a wide palm grip. The Petitioner testified he owns personal firearms and enjoyed shooting them weekly before the May 2015 wrist injury. He no longer enjoys shooting due to right wrist pain the activity causes. (AT 21)

On cross-examination, Petitioner testified that he worked as a personal trainer outside his employment with Respondent and was a master fitness trainer for the U.S. Army. (AT 29) Petitioner testified that he requested approval from the Respondent to work as an independent contractor personal trainer for RecPlex on November 18, 2014. (R.Ex9) Petitioner's off-duty employment approval form contained a start date of December 2014. Petitioner testified he did not start working at RecPlex because the training program was canceled. (AT 57)

Respondent's Witness Testimony - Lieutenant Paul Kehrli

Lieutenant Paul Kehrli (Off. Kehrli) appeared for the Respondent and testified that he began his employment with the Respondent as a police officer 15 years ago. Off. Kehrli stated he worked with and knew the Petitioner personally. (AT 62) Off. Kehrli testified that he was the certified range instructor and created the lesson plan for the training session on May 8, 2015. Off. Kehrli stated the training session lesson plan focused primarily on shooting accuracy under physical stress and included various cardio exercises to elevate the participant's heart rate. (AT 63)

Off. Kehrli stated that he could not recall burpee exercises performed at the training session and "that nothing short of a video of the training session" would help refresh his recollection. (AT 64-65) Off. Kehrli testified that he authored a supplemental accident report for Respondent regarding Petitioner's injury at the training session. (R.Ex11) Off. Kehrli's supplemental report stated the training session included two cardio sessions with moderate strenuous physical exertion.

Off. Kehrli's report indicated that participants performed partner carries, torso carries, leg carries and push-ups during the training session. Off. Kehrli's report stated participants performed 25 push-ups at the start of the cardio segments and completed push-ups for missed shots during the firearm shooting segment. Off. Kehrli did not record the exact number of push-ups and exercises performed at the training session. (R.Ex11)

Off. Kehrli testified that the training session lesson plan was altered to accommodate a reduced number of participants. Off. Kehrli testified that the actual training plans could vary and differ from the written lesson plan. Off. Kehrli testified that specific exercises may be performed at a training session which are not listed on his written report. Off. Kehrli testified that his written lesson plan for the training session was not exhaustive and did not accurately reflect all of the exercises performed that day. (AT 81)

Off. Kehrli testified that he could not recall burpees being performed at the training session but also stated a push-up was a portion of a burpee. Off. Kehrli testified that the semantics of a burpee include push-ups and that he personally did not like to perform burpees. (AT 89)

Off. Kehrli testified that he knew the Petitioner personally and never had a reason to doubt the Petitioner's honesty, integrity or credibility. Off. Kehrli testified that he knew the Petitioner to be truthful and honest. (AT 82)

Off. Kehrli testified he was a member of the Pension Board and participated in Petitioner's pension hearings. Off. Kehrli testified that he remembered participating in Petitioner's pension disability hearing but did not remember if he abstained from signing the Decision and Order. (AT 85) Off. Kehrli stated that he had no reason to dispute the Pension Board Decision and Order nor their findings of fact if it found Petitioner had performed burpees at the training session. (AT 86)

Pension Board Decision and Order

The Zion Police Pension Fund Decision and Order regarding Petitioner's pension disability application was admitted into evidence. (R.Ex2 & P.Ex5) The Decision and Order included a "Findings of Fact" in which the Pension Board made the following findings:

3. The Applicant (Petitioner) filed his disability application on March 21, 2016, seeking line of duty disability benefits pursuant to §5/3-114.1 of the Illinois Pension Code, and a non-duty in the alternative pursuant to §5/3-114.2 of the Code as a result of injuries he received to his right wrist while performing burpee exercises during a training exercise. (ZPPB 001-005)

4. On May 8, 2015, the Applicant was on duty attending in-service firearms training. The training was an optional open range date at the FBI range which involved performing shooting accurately under stress. The Applicant was performing burpee's during the training exercise which required falling face first onto his hands and pushing himself up. (Tr.A. 13-15;66 Tr.B 9)

5. The Applicant testified that he performed burpee exercises outside of work. (Tr.A 67-68)

6. The Applicant completed the training without incident. He testified that he did not notice any pain or anything abnormal while performing burpee exercises. (Tr.A. 61) The Applicant testified that later in the evening he experienced pain in his right wrist. (Tr.A. 17, 38-39)

7. The Applicant waited approximately one to two weeks after the training exercise to report his injury to his supervisor. (Tr.A. 18, 60-61) The Applicant claimed he did not know the system and that is what contributed to his delay in reporting. (Tr.B. 17-18)

8. The Applicant initially testified he had not completed any firearm qualification since the injury on May 8, 2015, but later admitted he had qualified with his firearm and completed firearm training on June 11, 2015 and August 10, 2015. (Tr.A. 41; Tr.B. 10-11)

12. Pursuant to his Application and §5/3-115 of the Illinois Pension Code, the Pension Board had the Applicant evaluated by three physicians selected by the Pension Board. Those physicians were Dr. Daniel

Samo, M.D., Dr. Michael Vender, M.D. and Dr. Craig Williams, M.D. The three physicians' reports were admitted into the Administrative Record. (R.Ex2 Pg.2-5)

All three physicians chosen by the Pension Board examined the Petitioner and found that he could not safely perform the essential job duties of a police officer. (R.Ex2 Pg.4-5) Petitioner reported the same date of injury, mechanism of injury and treatment history to the three physicians. The three physicians possessed Petitioner's VA medical records, National Guard deployment records and his employment records with Respondent while drafting their written reports for the Pension Board. (P.Ex2&5)

The Pension Board found the Petitioner failed to establish his injury met the special risk standard to be considered an "Act of Duty" as defined by Illinois law. The Pension Board questioned the circumstances of Petitioner's wrist injury due to his delay in reporting the injury, his testimony that he did not immediately notice pain until later in the evening and did not qualify for his weapon after the alleged injury date. (R.Ex2 Pg.7)

The Pension Board was:

> "not convinced the Applicant was injured while performing the burpee exercises given its finding that he was not credible in his testimony, even if he did sustain an injury during the exercise it would not qualify as an "Act of Duty" as defined by Illinois caselaw. The Applicant admitted he was performing a physical fitness burpee exercise when he claims he was injured." (R.Ex2 Pg.8)

The Pension Board voted 5 to 0 to deny Petitioner's line-of-duty disability application; however, the Pension Board voted 5 to 0 to grant Petitioner's non-duty disability benefits pursuant to Sec. 3-114.2. Off. Kehrli was a voting member of the Pension Board and participated in Petitioner's pension hearings. (R.Ex2 Pg.10-11)

Section 12 Examiner – Dr. Robert Wysocki

Petitioner presented for a Section 12 independent medical examination with Dr. Robert Wysocki on November 10, 2020. Petitioner completed a new patient intake form and provided a history of a right wrist injury that occurred on May 8, 2015, at a shooting range while performing burpee exercises with a weighted vest. (P.Ex2 Pg.281) Respondent's February 27, 2020 examination request letter (request letter) to Dr. Wysocki included a detailed medical synopsis and pension claim history for Petitioner. (P.Ex2 Pg.302-312)

The request letter revealed the Respondent's position was "that even if petitioner sustained an injury to his right wrist as a result of the May 8, 2015 training, he had reached maximum medical improvement by the time he had been cleared for deployment on May 31, 2016." (P.Ex2 Pg.310) Respondent's request letter also asked Dr. Wysocki to opine if the Petitioner suffered any intervening injuries to his right wrist, specifically whether catching a heavy door could be a separate and distinct injury. (P.Ex2 Pg.308-312)

Respondent's request letter referenced Off. Kehrli's written training session lesson plan and noted burpees were not included in the planned exercises. (P.Ex2 Pg.302-312) The request letter contained no accident reports or witness statements controverting Petitioner's injury history.

Dr. Wysocki opined in his Section 12 report that:

> I do believe with the other independent physicians that the aforementioned diagnosis and his current symptoms should be considered 100% causally related to the work injury in question. I have noted that there is a discrepancy in the medical record in the comparison to the claimant's testimony as to whether the symptoms began immediately while he was doing burpee activities during his training or if the symptoms began immediately while he was doing burpee activities during his training or if the symptoms began later that day, potentially when pushing away from a table. I would state that regardless of whether the symptoms began right away or began later that day with pushing off the table, that it is more likely than not that the aforementioned diagnosis was related to the burpee activities. (P.Ex3(b) Pg.264).

Dr. Wysocki testified that Petitioner's medical care and surgeries through the VA were causally related to the accident. Dr. Wysocki also found Petitioner's right wrist medical treatment reasonable and necessary. Dr. Wysocki opined Petitioner would not be able to return to work as a police officer due to his injury. Dr. Wysocki testified that he would not place any specific lifting, gripping, or repetitive use restrictions on the Petitioner and could not confirm if the Petitioner would be able to qualify for his weapon. (P.Ex3(b) Pg.265)

Dr. Wysocki performed an AMA impairment rating on the Petitioner and assigned an 8% upper extremity impairment which translated into a 5% whole person impairment. (P.Ex3(b) Pg.265)

Respondent requested an addendum to Dr. Wysocki's Section 12 report on August 18, 2021. (P.Ex3(c-d)) Respondent's addendum request letter alleged the Petitioner did not perform burpee exercises at the training session. (P.Ex3(d)) Dr. Wysocki opined that his causation opinion would change if the Petitioner did not perform burpee exercises at the training session on May 8, 2015. (P.Ex3(d))

Dr. Wysocki's testified in an evidence deposition on April 11, 2022. (P.Ex3) Dr. Wysocki testified that it was common for individuals with full-thickness scapholunate ligament tears to go entirely unnoticed for a period of time after the injury. (P.Ex3 Dep.Tr.35) Dr. Wysocki could not identify the officer in charge of the training session and was not provided witness statements with the addendum request. (P.Ex3 Dep.Tr.36) Dr. Wysocki stated that prior to his November 10, 2022 examination, he was not given any evidence that Petitioner did not perform burpees at the training session. (P.Ex3 Dep.Tr.40)

Dr. Wysocki testified that:

> Sometimes different language is imparted to different providers on different days. So if someone were to say strenuous activity during work exercises and then on another day they say burpees, they're a little bit of the same thing. But if it's an entirely different mechanism, like one time he says he's doing strenuous activity at work and another time the person says he fell off a chair at home, that would definitely be a red flag.
>
> I think it's fair in that case for him to deny falls or trauma because the history he gave to me, again, was that he was doing burpees in a weighted vest… So not quite a fall or trauma but related to strenuous activity. Even though in my mind a burpee is a fall, to the layperson they probably don't think of a burpee as a fall or trauma, they think of it more as a strenuous activity. (P.Ex3 Dep.Tr.45-46)

Dr. Wysocki agreed that Petitioner's reported mechanism of injury and injury history were consistent with the records he was provided from Respondent. Dr. Wysocki found no evidence of symptom magnification or malingering from the Petitioner. Dr. Wysocki found Petitioner's current right wrist complaints to be consistent with his objective exam findings and believed Petitioner was credible. (P.Ex3 Dep.Tr.38-40)

Conclusions of Law

The burden is upon the party seeking an award to prove by the preponderance of the credible evidence the elements of his claim. *Peoria County Nursing Home v. Industrial Comm'n*, 115 Ill.2d 524, 505 N.E.2d 1026 (1987). Circumstantial evidence, especially when entirely favorable to the claimant, is sufficient to prove a causal nexus between an accident and resulting injury. *Gano Electric Contracting v. Industrial Comm'n*, 260 Ill. App.3d 92, 96-97, 631 N.E.2d 724, 728 (4th Dist. 1994). 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 or connection between the accident and the employee's injury. *International Harvester v. IWCC*, 93 Ill.2d 59, 422 N.E.2d 908 (1982)

Although the testimony of the claimant standing alone is sufficient to sustain an award, that testimony must be considered with all the evidence in the record. *Board of Education of the City of Chicago v. Industrial Comm'n*, 83 Ill.2d 475, 479 (1981).

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

The Petitioner must establish his injury had its origin in some risk connected with, or incidental to, the employment as to create a causal connection between the employment and the accidental injury. Generally, all risks to which a claimant may be exposed fall within one of three categories: 1) risks directly associated with the employment, 2) risks personal to the employee, and 3) neutral risks which have no particular employment or personal characteristics. *McAllister v. Ill. Workers' Comp. Comm'n*, 2020 IL124848 (2020)

Petitioner's testimony at arbitration that he injured his right wrist performing burpee exercises at the training session was consistent with the medical evidence, his pension disability hearing testimony and the Findings of Fact in the Pension Board Decision and Order. (R.Ex2) Dr. Wysocki and Off. Kehrli testified they believed Petitioner to be credible.

Interestingly, Off. Kehrli, a sitting member on the Pension Board hearing panel that heard Petitioner's pension disability application, testified at arbitration that he had no reason to dispute Petitioner's history of injury nor the findings of the Pension Board. In addition, Off. Kehrli testified he believed the Petitioner to be an honest

person of integrity. Therefore, the Arbitrator finds the Petitioner's testimony regarding his burpee accident and right wrist injury to be credible and consistent with the evidence.

Petitioner testified the Respondent encouraged employees to attend the training session, provided the attendees ammunition and supplies to use at the training session and compensated attendees with additional personal time. Respondent offered no evidence to dispute Petitioner's testimony.

Petitioner's accident occurred while performing reasonable activities in conjunction with his employment for Respondent. Petitioner was injured performing burpee exercises at a voluntary training session held at the FBI shooting range in North Chicago. The FBI shooting range is not open to the general public. Additionally, it is not disputed that the exercises performed by the shooters at the range are performed for the purpose having the officers practice shooting accuracy with a raised heart rate and shortness of breath from these exercises. Petitioner's injury arose from an act reasonably expected of him to perform and was incidental in fulfilling his assigned job duties as a police detective for the Respondent. Accordingly, the Arbitrator finds Petitioner's accidental injuries arose out of and in the course of his employment with the Respondent.

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

Ultimately, an accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it was a causative factor in the resulting condition of ill-being. *Rechenberg v. Ill. Workers' Comp. Comm'n*, 99 N.E.3d 521WC (Ill. App. 2018)

Petitioner testified that he did not experience right wrist pain and never received medical treatment on his right wrist until the May 8, 2015 accident. Dr. Wysocki, as well as the three Pension Board physicians, found Petitioner's current condition of ill-being of the right wrist to be causally related to the training session burpee injury. The Arbitrator notes that the petitioner was seen by Dr. Wysocki for the purposes of an Independent Medical Exam at the request of the respondent.

No evidence was submitted that Petitioner suffered a right wrist injury either prior to or subsequent to the training session. Dr. Wysocki opined Petitioner suffered no intervening accidents nor injuries to his right wrist that would break the chain of causal connection. Respondent offered no evidence to dispute the causal connection of Petitioner's right wrist injury.

Based upon the Arbitrator's finding that the Petitioner suffered a compensable accidental injury to his right wrist performing burpee exercises at the training session on May 8, 2015, the Arbitrator finds Petitioner's right wrist condition is causally related to the training session accident.

G. ☒ What were Petitioner's earnings?

Petitioner's wage statement reflects an average weekly wage of 1,648.98 per week. (R.Ex4) The Arbitrator finds the Petitioner earned $1,648.98 per week and a yearly income of $85,746.98.

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

Upon a claimant's establishment of a causal connection between injury and accident, employers are responsible for their employees' medical care reasonably required in order to diagnose, relieve, or cure the effects of a claimant's injury. *Plantation Mfg. Co. v. Industrial Comm'n,* 691 N.E.2d 13 (2nd Dist. 1997)

The Arbitrator finds the medical services provided to Petitioner from May 8, 2015 through March 17, 2016 to be reasonable and necessary. Dr. Wysocki testified that Petitioner's right wrist medical treatment and surgeries to be reasonable and necessary. Respondent submitted no evidence to dispute the reasonableness nor necessity of the medical services provided to the Petitioner.

The Arbitrator finds Respondent has not paid all of the Petitioner's reasonable and necessary medical services. The Arbitrator Orders the Respondent hold Petitioner harmless for the right wrist medical treatment undertaken with the Department of Veteran Affairs.

K. ☒ What temporary benefits are in dispute?

The parties stipulated to Temporary Total Disability benefits. The Arbitrator finds Respondent provided Petitioner with TTD benefits in the amount of $13,336.80. (R.Ex3)

Petitioner testified that he applied for a pension disability following his release from medical treatment in March 2016. Petitioner remained employed through the National Guard and did not look for alternative employment after his medical discharge. Petitioner testified that he currently earns approximately $47,000.00 per year and collects a non-duty pension disability benefit of approximately $4,000.00 per month.

The Arbitrator finds Petitioner failed to establish a right for Temporary Partial Disability benefits as he did not look for alternative employment following his release from medical care. Petitioner testified that he did not immediately look for alternative employment and moved from Illinois to Tennessee. The Arbitrator also finds the Petitioner failed to establish a right to maintenance benefits as he did not document nor perform a good faith and diligent job search.

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

The Arbitrator finds the Petitioner sustained accidental injuries to his right wrist including a partial thickness tear of the scapholunate ligament as a result of the injury sustained and continues to suffer pain, loss of strength and endurance of the right hand. The injury prevents the Petitioner from returning to work as a police detective for the Respondent.

Section 8.1(b) of the Act provides that permanent partial disability shall be established using the following criteria:

(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.

Regarding (i), the Arbitrator notes that the parties submitted an American Medical Association (AMA) impairment rating performed by Dr. Wysocki which found Petitioner to have an 8% upper extremity impairment or 5% person as a whole impairment. Dr. Wysocki stated the Petitioner would suffer permanent residual pain and loss of strength from the injury. The Arbitrator finds that this factor weighs in favor of decreased permanence.

Regarding (ii), the occupation of the injured employee, Petitioner was employed as a police detective for Respondent at the time of the work accident and was unable to return to his employment due to the permanent disability from the work injury. Petitioner's testimony, medical records and expert testimony documented permanent residual pain and loss of strength in the Petitioner's right hand. Petitioner testified he could not safely perform the essential duties of a police detective after the injury which was consistent with the medical records and expert testimony at hearing. The Arbitrator, therefore, finds Petitioner suffered a loss of occupation from the injury. The Arbitrator finds that this factor weighs in favor of greater permanence.

Regarding (iii), the Petitioner's age at the time of the injury was 48 years of age. Petitioner is in the second half of his work life expectancy and will have to work with the effects of his injury for a shorter time than a younger worker. The Arbitrator finds that this factor weighs in favor of decreased permanence.

Regarding (iv), for future earning capacity, stated above, the Petitioner was unable to return to work as a police detective and lost access to his usual and customary trade. Petitioner's injury led him to apply for a disability pension from the Pension Board. Petitioner testified that he currently earns $47,000.00 per year which represents a significant reduction from his pre-injury earnings as a police detective. The Arbitrator finds that this factor weighs in favor of increased permanence.

Regarding (v), evidence of disability corroborated by the treating medical records, the Arbitrator notes that the Petitioner, as a result of the injury to his right wrist, underwent two surgeries and continues to suffer permanent pain and loss of strength in the right wrist. Dr. Wysocki, as well as the three pension physicians, all opined Petitioner's injury represented a permanent disability that prevents him from working as a police officer. The Arbitrator that this factor weighs in favor of greater permanence.

The Arbitrator finds that the Petitioner, as a result of the injury in question, sustained permanent injuries that resulted in a loss of trade and awards 25% loss of the person as a whole.

O. ☒ Other – Whether Petitioner's claim is barred by collateral estoppel or res judicata?

Respondent filed a motion to dismiss based upon collateral estoppel and res judicata. The doctrines of *collateral estoppel* (issue preclusion) and *res judicata* (claim preclusion) are separate principles that require different elements to establish.

The principle of *collateral estoppel* requires a party show: (1) the issue decided in the prior adjudication is identical to the issue in the current action; (2) the issue was "necessarily determined" in the prior adjudication; (3) the party against whom estoppel is asserted was a party or in privity with a party in the prior action; (4) the party had a full and fair opportunity to contest the issue in the prior adjudication; and (5) the prior adjudication must have resulted in a final judgment on the merits. *Mabie v. Village of Schaumburg*, 847 N.E.2d 796 (1st Dist. 2006)

The principle of *res judicata* requires a party show: (1) the former adjudication resulted in a final judgment on the merits; (2) the former and current adjudications were between the same parties; (3) the former adjudication involved the same cause of action and same subject matter of the latter case; and (4) a court or administrative agency of competent jurisdiction rendered the first judgment. *Hannigan v. Hoffmeister*, 240 Ill.App.3d 1065, 608 N.E.2d 396 (1992)

The issue before the Pension Board was whether Petitioner's pension application qualified for an award of "duty" or "non-duty" pension disability benefits. The Illinois Pension Code (Code) states an officer is entitled to receive "duty" disability benefits when he or she is injured in the "performance of an act of duty". Under the Code, an "act of duty" or "duty" disability pension is awarded to reflect the special risks faced by an officer who is required to act and to reflect that those dangers are different from those encountered by officers who, while injured, are harmed in the performance of any act that is not unique to their profession. An officer who becomes disabled as a result of any cause other than injury incurred in the performance of an act of duty shall receive ordinary disability benefit. See *Demski v. Mundelein Police Pension Board*, 358 Ill.App.3d 499, 831 N.E.2d 704 (2nd Dist. 2005). See also *Mabie v. Village of Schaumburg*, 364 Ill.App.3d 756, 847 N.E.2d 796 (1st Dist. 2006)

Petitioner's application for duty disability pension benefits did not involve the "same cause of action and same subject matter" as his claim for workers' compensation benefits. Petitioner's pending workers' compensation

claim is brought under a different statute (the Act as opposed to the Code), and seeks benefits not available under the Code such as TTD benefits and medical expenses. Thus, Respondent is precluded from asserting the application of *res judicata*. See *Hannigan*, 608 N.E.2d 396 (1992)

The issue before the Pension Board was whether Petitioner's pension application qualified for an award of "duty" or "non-duty" pension disability benefits. The Illinois Pension Code states an officer is entitled to receive "duty" disability benefits when he or she is injured in the "performance of an act of duty".

The operative facts and evidence necessary for Petitioner to establish a claim for "act of duty" pension benefits under the Code (the "act of duty" special risk analysis vs. "line of duty" analysis amongst others) differ from those necessary to prove Petitioner's claim for workers' compensation benefits under the Act (arising out and in the course and scope).

The issues to be litigated before the IWCC differ from those brought and litigated before the Board. See *Demski*, 831 N.E.2d 704 (2nd Dist. 2005). Respondent presented no evidence of any collaboration between the City of Zion Police Department and Zion Police Pension Fund Board as to the pension disability application hearing, and the fact that both the City of Zion Police Department and the Board are public entities is not enough to establish that they are the same parties or that they are in privity for the purpose of *collateral estoppel*. Id.

The Court in *Demski* held a police pension board was not collaterally estopped from determining a police officer's injury did not occur in the "act of duty" even though a prior final IWCC decision determined the officer's injury causally related to their employment. *Demski*, 831 N.E.2d 704 (2nd Dist. 2005)

As a result, the Arbitrator finds the dismissal of Petitioner's workers' compensation claim is not supported by the principles of *collateral estoppel* or *res judicata* and denies Respondent's motion to dismiss in its entirety.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC033957
Case Name	Harold Butler v. Village of Glencoe
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0019
Number of Pages of Decision	14
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Steven Seidman
Respondent Attorney	Daniel Arkin

DATE FILED: 1/18/2024

/s/Kathryn Doerries, Commissioner

Signature

24IWCC0019

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

HAROLD BUTLER,

Petitioner,

vs. NO: 17 WC 33957

VILLAGE OF GLENCOE,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, notice, temporary total disability, medical expenses, permanent partial disability, and right to amend the application to conform to the proofs post-decision, 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 a scrivener's error in the Arbitrator's decision, on page 2, first sentence of the first full paragraph, and inserts the word "by" so the sentence now reads, "When the tube became clogged, Petitioner was trained to signal to the truck driver to stop by using hand signals."

In the Conclusions of Law section entitled, "Issue C, whether the accident arose out of and in the course of Petitioner's employment by Respondent," the Commission strikes the third sentence in paragraph 5 beginning with, "While the Arbitrator…" to the end of the paragraph. The Commission further modifies the section by adding the following after paragraph 5:

It is undisputed the Arbitrator/Commission may amend the Application at any time to conform to the evidence. However, the evidence in this case shows Petitioner provided inconsistent histories of several potential accident dates that reflect on his credibility. Petitioner's Application

for Adjustment of Claim signed November 15, 2017, and the Request for Hearing form allege a work-related accident date of October 26, 2017. On cross-examination, he confirmed he was alleging a work-related accident date of October 26, 2017. (T. 43) However, the attendance calendar, corroborated by Mr. Kirk's testimony, shows he was not working on that date and the Application for Adjustment of Claim and Request for Hearing form were never amended before the hearing or at the hearing. In addition, when Petitioner first sought medical treatment at Northshore Omega on November 10, 2017, he reported he first sustained back pain at work on November 1, 2017, with a further episode on November 2, or November 3. Notably, there is no mention of an accident on October 26, 2017. Moreover, Petitioner testified he believed the first day he went back to work after October 26, 2017, was on November 10, 2017. (T. 62) Thus, the evidence does not corroborate an accident date of November 1, 2, or 3, either. The claimant in a workers' compensation case has the burden of proving by a preponderance of the evidence all the elements of his claim. *O'Dette v. Industrial Comm'n*, 79 Ill 2d 249, 253, 403 N.E.2d 221, 38 Ill.Dec. 133 (1980). These inconsistencies are a significant obstacle to proving his claim. Petitioner has not proven, by a preponderance of the credible evidence, he sustained a work-related accident on October 26, 2017, or any other date.

All else is affirmed and adopted. As Petitioner failed to meet his burden of proving accident, all other issues are rendered moot.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 6, 2022, is hereby, otherwise, affirmed and adopted. Claim for benefits denied.

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

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

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.

January 18, 2024

o-11/21/23
KAD/jsf

/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	17WC033957
Case Name	BUTLER, HAROLD v. VILLAGE OF GLENCOE
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	11
Decision Issued By	Rachael Sinnen, Arbitrator

Petitioner Attorney	Steven Seidman
Respondent Attorney	Daniel Arkin

DATE FILED: 12/6/2022

THE INTEREST RATE FOR THE WEEK OF DECEMBER 6, 2022 4.57%

/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

Harold Butler
Employee/Petitioner

v.

Village of Glencoe
Employer/Respondent

Case # **17** WC **33957**

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 **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 **October 26, 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 [***n/a***] given to Respondent.

Petitioner's current condition of ill-being [***n/a]*** causally related to the accident.

In the year preceding the injury, Petitioner earned $***n/a***; the average weekly wage was $***n/a***

On the date of accident, Petitioner was ***29*** years of age, ***single*** with ***1*** dependent children.

Petitioner [***n/a***] received all reasonable and necessary medical services.

Respondent [***n/a***] paid all appropriate charges for all reasonable and necessary medical services.

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

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

ORDER

All benefits are denied as the Arbitrator finds that Petitioner's accident was not in the course of Petitioner's employment by Respondent on October 26, 2017.

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 6, 2022

Signature of Arbitrator

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Harold Butler,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Case No. 17WC33957
Village of Glencoe	)	
	)	
	)	
Respondent.	)	

FINDINGS OF FACT

This matter proceeded to hearing on September 28, 2022 in Chicago, Illinois before Arbitrator Rachael Sinnen on Petitioner's Request for Hearing. Issues in dispute include accident, notice, causal connection, medical bills, temporary total disability "TTD" benefits, and nature and extent of the injury. Arbitrator's Exhibit "Ax" 1.

Petitioner's Job Duties

Petitioner worked for Respondent's Public Works Department in 2017. (T 10-11.) At some point that year, he was directed to perform leaf collection work. (T 11.) In that role, he was responsible for operating a huge industrial leaf vacuum for Respondent. (T 12.) The vacuum was mounted on a trailer and pulled along the street by a truck and had a tube that was approximately 10 to 15 feet long. (T 12-13.)

Petitioner was part of a three-person crew during leaf collection: a truck driver, a raker, and himself. (T 47.) Petitioner was responsible for following the truck on foot, directing the vacuum's tube side to side over large piles of leaves on the curb, and unclogging the tube when it became clogged. (T 12-13.)

Petitioner testified that the tube was not hard to manipulate when the vacuum was off. (T 14.) When the vacuum was on, however, the force of air being sucked through the tube made it difficult to direct. (T 14.) Petitioner estimated that the tube would pull with 40 to 50 pounds of pressure while the vacuum was on. (T 14.) Petitioner was able to estimate the amount of pressure because he lifted weights very regularly and knows what 40 to 50 pounds feels like. (T 44-45.)

Petitioner had to use two hands to direct the tube. (T 14.) The vacuum tubes usually came with a metal bar attached that Petitioner could use to direct the tube; however, not all of the vacuums had

one. (T 14.) Petitioner testified that if he ever let go of it while the vacuum was on, the tube would swing out towards the curb and over the grass. (T 19, 48-49.)

When the tube became clogged, Petitioner was trained to signal the truck driver to stop using hand signals. (T 19.) This was necessary because the vacuum was very loud, and it was hard to hear shouting over the noise of the vacuum. (T 19.)

Respondent submitted a video purporting to demonstrate Petitioner's job duties. (RX4.) A bar is visible on the tube in the video. (RX4.) Petitioner testified that the video showed uncharacteristically small piles of leaves, stating: "We had to pick up way larger piles than that." (T 56.) He testified that he had been trained to operate the machine differently than the video depicted; rather than standing on the grass, Petitioner would stand in the street between the truck and the vacuum trailer, directing the tube toward the curb as a second employee drove the truck and a third employee rakes leaves toward the tube. (T 56-57.) With the much larger piles he was tasked with vacuuming, Petitioner would sometimes have to lift up the tube and place the tube on top of the leaf piles to get them sucked up. (T 56.)

Petitioner's Prior Medical Condition

In approximately 2007, Petitioner suffered an accident in Birmingham, Alabama. (T 16.) He was approximately 24 years old at the time and he treated conservatively with a chiropractor. (T 16.) Other than this, prior to October 2017, Petitioner did not have any medical care for his back. (T 15.)

Petitioner's Alleged Accident & Notice to Respondent

Sometime on or around October 26, 2017, Petitioner was working for Respondent performing leaf collection. (T 18.) On that day, Petitioner was manipulating the vacuum tube with two hands, without the benefit of a bar. (T 14.)

At some point during leaf vacuuming the tube became clogged; using hand signals, Petitioner directed the truck driver, Paul Elloian, to stop so that he could turn off the vacuum and unclog the tube. (T 19, 23.) However, Elloian didn't stop. (T 19.) The tube nearly came free of Petitioner's hands. (T 19.) Petitioner testified that the tube would have swung outward, and that his coworker with the rake was standing right there. (T 19-20.) Therefore, Petitioner hung on to the tube. (T 19-20.) Petitioner testified that he felt a lot of strain in his back restraining the tube. (T 20.)

When Petitioner and the others got into the vehicle to return to the garage, Petitioner stated that his back hurt and he requested the front seat so that he could lean back a bit. (T 23.) On the following workday, Petitioner called Ray to report that his back was hurting badly and that he could not come in to work. (T 30.) Petitioner did not return to work until November 10, 2017. (T 30-31.)

Testimony of Paul Elloian

Elloian testified that he has worked for Respondent for 26 years. (T 90.)

Elloian testified that Respondent's Exhibit 4 accurately depicted how the job of leaf vacuuming is performed. (T 92.) He testified that the leaf piles could get quite high and could even impede into the street itself. (T 101.) The piles shown in the video are "one of the smaller piles." (T 101.) When asked if the job of vacuuming involved any lifting of the tube, Elloian testified that it involved more guiding than lifting. (T 94.) Piles of leaves can get so high that the vacuum's hydraulic lift cannot lift the tube high enough to get at the top of the leaf pile; in those instances, an employee has to manually pick up the tube and lift to get it in position. (T 112-13.) Elloian testified that if the worker directing the tube lets go, it can swing out away from the vacuum but did not think that the tube would hit the man raking. (T 95.) Elloian testified that the vacuum's tube gets clogged occasionally and that it needs to be unclogged by sticking their foot inside the tube and knocking the leaves loose. (T 103.)

As a driver, it was Elloian's duty to use his side mirrors to keep an eye on what was going on behind him. (T 103-04.) Elloian would stop the truck if the tube became clogged. (T 104.) However, Elloian testified that there may have been times where a coworker was trying to get his attention to stop the truck and he didn't notice. (T 104.) The machine is pretty noisy; people doing this work wear hearing protection while they work. (T 104-05.) Elloian testified that Petitioner did not tell him he had hurt his back or that he felt tightness in his back. (T 96.)

Testimony of Raymond Irby

Raymond Irby worked for Respondent as a Public Works Supervisor in October and November of 2017. (T 116.) He testified that during leaf collection, the truck was typically driven at between 2 and 5 miles per hour. (T 118.) He testified that if the tube was released, it would generally go straight down if the truck was stopped or swing backwards behind the trailer if the truck was moving. (T 120.) Larger leaf piles might require the vacuum tube to be lifted, hydraulically or manually. (T 125.)

Irby testified that on November 10, 2017, he had a meeting with Petitioner, and that Petitioner reported he was having back pain caused by the physical act of operating the leaf vacuum at work. (T 126.)

Testimony of Donald Kirk

Kirk works as a General Superintendent of Public Works Operations for Respondent, a role he has held for seven years. (T 135.) Kirk testified that Petitioner worked for Respondent from early November 2016 through to late November 2017. (T 135.)

Kirk testified that Petitioner was seasonal/temporary. (T 136.) Kirk testified that seasonal employees are hired for six months, laid off for two weeks, and then brought back for a further six months as a temporary employee if there is mutual interest. (T 136.) Kirk testified that

Respondent carried six temporary employees, and that Respondent issued them a memo informing them of the upcoming end of their employment on October 11, 2017. (T 137; RX6.)

Kirk testified that there was a change in Petitioner's attitude and attendance after receiving the memo. (T 143.)

Respondent submitted a calendar showing attendance after October 3, 2017 for Petitioner as Respondent's Exhibit 2. Kirk testified that the calendar indicates Petitioner did not work on October 25th nor 26th, 2017. Kirk confirmed that Petitioner worked on October 27th and the calendar notes that Petitioner arrived late to work on October 30th as well as November 1st. (T 137-38; RX2.)

Kirk testified that he arranged for Petitioner to be treated at NorthShore as Respondent's occupational health provider on November 10, 2017 and he took statements from Petitioner's crew. (T 142.)

Summary of Medical Records

On November 10, 2017, Petitioner presented to Northshore Omega complaining of pain in his back. (PX3, 4.) Petitioner reported bilateral lower back pain with discomfort maintaining a sitting or standing position for more than 10 minutes. (PX3, 4.)

Petitioner related his history of injury: on November 1, 2017, he developed back pain at work working with a heavy leaf vacuum after the truck driver failed to stop. (PX3, 4.) A further episode occurred on November 2, 2017 or November 3, 2017. (PX3, 4.) Petitioner reported that he had no prior back injuries. (PX3, 4.)

Dr. Ana Nobis assessed Petitioner with a back strain, took him off work until November 12, 2017, and stated that he could return to work with 10-pound restrictions thereafter. (PX3, 5.) She instructed Petitioner to take Ibuprofen and Cyclobenzaprine, and to treat with moist heat and gentle stretches. (PX3, 5.)

Petitioner returned to NorthShore Omega on November 20, 2017, where he was seen by Dr. Michael Joseph McCormick. (PX3, 10.) Petitioner reported no significant improvement in his low back since the first visit. (PX3, 10.) He continued to have midline back pain, lateral at each side. (PX3, 10.) He related his mechanism of injury: Petitioner was holding a leaf vacuum close to his body while flexed somewhat at the waist when the vacuum pulled away from him. (PX3, 10.) Petitioner had been unable to signal the driver that he was having trouble. (PX3, 10.)

Petitioner reported that his back felt better when sitting and leaning forward, but that it worsened when sitting or standing for too long. (PX3, 10.) The pain improved with walking. (PX3, 10.)

Petitioner reported that Respondent was not able to accommodate his work restrictions. (PX3, 10.) Dr. McCormick maintained Petitioner's diagnosis and restrictions; Dr. McCormick prescribed Petitioner methylprednisone and referred him to physical therapy. (PX3, 10.)

On November 30, 2017, returned to NorthShore Omega reporting slight improvement in his lower back. (PX3, 13.) He complained of continued low back pain at 7/10 across his lower back, worse with bending, straightening, and position change. (PX3, 13.)

On December 29, 2017, Petitioner followed up at Northshore Omega once more. (PX3, 15.) Petitioner reported that his back pain had worsened over the prior week. (PX3, 15.) He complained of lower back pain at 9/10, worse with sitting, bending, and on awakening. (PX3, 15.) He also complained of numbness in the plantar surface of his left foot. (PX3, 15.) Dr. McCormick continued Petitioner's restrictions and ordered him to begin physical therapy. (PX3, 15.)

On January 3, 2018, Petitioner presented to Evanston Athletic Club for his physical therapy initial evaluation. (PX4, 3.) Petitioner complained of pain in his lower back and numbness in his left foot, as well as pain in his left trap shooting down the back of his arm. (PX4, 3.) Petitioner reported that when he woke up in the morning, his left foot felt like ice. (PX4, 3.)

Petitioner related his history of injury: he was at work holding the tube of a very heavy leaf vacuum attached to a trailer; he signaled to the driver to stop, but he didn't stop. (PX4, 3.) Petitioner's back felt tight and grew more painful over the following day. (PX4, 3.)

On examination, Petitioner presented with decreased sensation to light touch in his left lateral and plantar foot. (PX4, 4.) Straight leg raise tests were positive bilaterally. (PX4, 4.) Petitioner was positive for pain reproduction during Dural tension testing; the physical therapist stated that it was difficult to tell if the pain was neurological or caused by muscle guarding. (PX4, 4.)

On January 9, 2018, Petitioner presented to NorthShore Community Health Center where he was seen by Dr. Osama Elkhatib. (PX5, 2-3.) Petitioner complained of progressively worsening low back pain, weakness and shooting pain in his left leg, numbness in his left foot, rectal numbness, and two episodes of bowel incontinence occurring over the prior two weeks. (PX5, 3.) He reported that he had begun using a cane. (PX5, 3.)

On physical examination, Dr. Elkhatib noted reduced strength in Petitioner's lower extremities at 4/5; abnormal gait due to pain; decreased perirectal sensation; poor rectal tone; and bilateral paraspinal tenderness. (PX5, 5.) Dr. Elkhatib diagnosed Petitioner with lower back pain with concern for spinal cord or cauda equina compression with the presence of saddle anesthesia, bowel incontinence, decreased anal tone, and lower extremity weakness requiring a cane. (PX5, 5.) Dr. Elkhatib instructed Petitioner to go to the emergency room immediately for an urgent MRI. (PX5, 5.)

Petitioner presented to the NorthShore Hospital emergency room that same day, where he was seen by Dr. Michael Ernst. (PX5, 9.) Petitioner reported worsening lower back pain that began with a mechanical work injury involving a leaf vacuum; numbness in his left foot; and numbness in his thighs. (PX5, 9.) He reported episodes of incontinence over the prior two weeks. (PX5, 9.)

Petitioner received an MRI from Northshore Hospital Radiology that same day showing an eccentric left-sided disc bulge and L5-S1 displacing and deforming the left descending S1 nerve

root; a central right/paracentral disc protrusion at L4-5 with bilateral neural foraminal narrowing, borderline lateral recess compromise, and facet arthropathy; and a left neural foraminal annular fissure and eccentric disc bulge at L1-2. (PX5, 19.)

On January 17, 2018, Petitioner returned to NorthShore Omega complaining of continued back pain with radiation and numbness. (PX3, 17.) Petitioner reported that he was still using a cane to walk. (PX3, 17.)

Dr. Daria Pachovsky examined Petitioner; she noted decreased range of motion in Petitioner's back and decreased sensation to light touch in Petitioner's left lower extremity. (PX3, 17.) She reviewed Petitioner's lumbar spine MRI; she noted that it showed three-disc bulges with neural foraminal narrowing bilaterally at L4-5 and displacement of the left descending S1 nerve root at L5-S1. (PX3, 17-18.) Dr. Pachovsky assessed Petitioner with continuing low back pain with occasional radiation since his work injury in the fall. (PX3, 17.) She continued Petitioner's work restrictions. (PX3, 17.)

Respondent's Section 12 Examiner, Dr. Zelby

On April 25, 2018, Petitioner was seen by Dr. Andrew Zelby for a Section 12 examination. (RX5.)

On examination, Dr. Zelby noted a positive Spurling maneuver, positive lying straight-leg raise tests bilaterally, and diminished sensation in Petitioner's left lower extremity. (RX5, 3-4.) Dr. Zelby opined that Petitioner had suffered a lumbar strain in his work accident. (RX5, 6.) Dr. Zelby stated that Petitioner had a "normal spine exam and a normal neurological exam" with no signs of radiculopathy on examination. (RX5, 6.) Dr. Zelby stated that Petitioner "does have some evidence for neural impingement." (RX5, 6.) Dr. Zelby opined that the herniations visible in Petitioner's lumbar spine on MRI represented degenerative rather than acute changes. (RX5, 6.)

Dr. Zelby opined that Petitioner could return to work at full duty within six weeks of his injury and that Petitioner was at maximum medical improvement by the end of December 2017 at the latest. (RX5, 6.) Dr. Zelby opined that Petitioner requires no further treatment for his spine "irrespective of cause." (RX5, 6.)

Petitioner's Current Condition

At the hearing, Petitioner testified that he had pain in his lower back now, radiating from side to side. (T 40.) Petitioner testified: "right now my left leg is numb. It happens every time I sit down." (T 40.) Petitioner takes two to three pills of 650 milligram Ibuprofen along with some Tylenol on a daily basis in order to address his symptoms, but it doesn't help. (T 41-42.) Petitioner is 34 years old. (T 16.)

CONCLUSIONS OF LAW

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

Issue C, whether the accident arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds as follows:

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

"The 'arising out of' component is primarily concerned with causal connection. To satisfy this requirement it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." Id. at ¶ 36.

Petitioner testified that he worked for Respondent performing leaf collection that required operating a huge industrial leaf vacuum. Petitioner testified that he hurt his back while restraining the vacuum tube. The Arbitrator finds that Petitioner was exposed to a risk distinctly associated with his employment.

However, the record contains conflicting evidence as to the date of injury. Petitioner was forthcoming that he did not recall exact dates and he testified to being injured on October 26, 2017 at work. Petitioner's Application for Adjustment of Claim ("Application") and the Request for Hearing form listed a date of accident of October 26, 2017. (See Ax 1, Px 1). Neither were amended. However, an attendance calendar shows and Kirk testified that Petitioner did not work on October 26, 2017. (See Rx2).

The Arbitrator notes that Petitioner worked, at least in part, on October 27, 30, 31 and November 1 according to the attendance records. Further, Respondent's IME report stated that Petitioner reported a work accident "a little before Halloween 2017" and initial Northshore records indicate a date of injury/onset of November 1, 2017. (See Px3, 5). While the Arbitrator finds Petitioner credible as to the fact that an injury did occur, the Arbitrator cannot on her own accord declare a different date of accident. See Walker v. Industrial Comm'n (AmerenCIPS), 345 Ill. App. 3d 1084, 804 N.E.2d 135 (4th Dist. 2004).

As such, the Arbitrator finds that Petitioner failed to carry his burden in proving that his alleged work accident was in the course of Petitioner's employment by Respondent on October 26, 2017.

Issue E, whether timely notice of the accident was given to Respondent, the Arbitrator finds as follows:

Given the Arbitrator's findings regarding accident, all other issues are moot, and any benefits must be denied.

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

Given the Arbitrator's findings regarding accident, all other issues are moot, and any benefits must be 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:

Given the Arbitrator's findings regarding accident, all other issues are moot, and any benefits must be denied.

Issue K, whether Petitioner is entitled to temporary total disability benefits, the Arbitrator finds as follows:

Given the Arbitrator's findings regarding accident, all other issues are moot, and any benefits must be denied.

Issue L, the nature and extent of the injury, the Arbitrator finds as follows:

Given the Arbitrator's findings regarding accident, all other issues are moot, and any benefits must be denied.

It is so ordered:

Arbitrator Rachael Sinnen

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC032175
Case Name	Dawn Oles v. Sedgwick
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0020
Number of Pages of Decision	15
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Robert Smoler
Respondent Attorney	Aukse Grigaliunas

DATE FILED: 1/19/2024

/s/ Amylee Simmonvich, Commissioner

Signature

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

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DAWN OLES,

Petitioner,

vs. NO: 20 WC 32175

SEDGWICK,

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, prospective medical care, nature and extent, penalties under §19(k) and §19(l) of the Act, and fees under §16 of the Act, 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 May 5, 2020.

FINDINGS OF FACT

I. Background and Accident

Petitioner testified to her employment history dating back to 1988 when she began as a Bank Teller. She worked in banking for the next 25 years, until she chose to leave the profession in March of 2013. On July 16, 2014, Petitioner was hired by Respondent as a Biller. Petitioner checked insurance companies billings, verifying that the adjuster's rates and mileage were correct. Once everything was input on the computer with all necessary corrections, Petitioner would invoice it and send it back to the office that sent it in. Petitioner's Work Order Reports indicate that on a daily, weekly, and monthly basis, she put through more work orders than her colleagues. *See PX 7*. To perform her duties, Petitioner sat at a typical office computer workstation, with an adjustable chair and an eye-level monitor. She worked eight hours a day.

After a probationary period, Petitioner was allowed to work some days remotely. Her workstation at home was her kitchen table, where she sat on a wooden chair which was not adjustable. She used a laptop, keyboard, and mouse.

On March 16, 2020, due to COVID-19, Petitioner was told to work from home until further notice. She was allowed a 15 minute break in the morning and afternoon, as well as 30 minutes for lunch. In April of 2020, Petitioner switched her kitchen table to a high-top table with bar stool-height chairs.

From March 16, 2020 through May 5, 2020, Petitioner worked 8a.m. to 4:30 or 5p.m. At the end of every month, she would work an additional two hours Monday through Friday if needed, and four to eight hours on Saturday and Sunday.

Petitioner testified that prior to May 5, 2020, she had no neck injuries and had not received any medical treatment for her neck. On that date, Petitioner testified she felt fine at the beginning of her workday. However, by late morning/early afternoon, while typing and using the mouse, she felt a stabbing pain in her neck, along with "tingling and some weirdness" in her right middle and ring fingers. *Transcript, p.21*. She called her family physician and set up an appointment. She also notified Respondent, who sent Petitioner to Concentra that same day at the end of her shift.

II. Medical Treatment

On May 5, 2020, Petitioner presented to Concentra with a chief complaint of cervical and right hand pain while doing a lot of computer work. She had intermittent stabbing pain in her neck 10 out of 10, and intermittent right middle and ring finger pain, 8 or 9 out of 10. *PX 1, p.79*. Physical examination revealed right hand palmar tenderness, limited right middle and ring finger flexion with pain, and decreased right hand grip strength. An examination of her cervical spine revealed tenderness from C5 to C7, full range of motion with pain at the end of the range movements except right rotation, and limited flexion and extension. *PX 1, p.81*. Right hand and cervical x-rays were negative. *PX 1, p.82-83*. Petitioner was diagnosed with a neck strain, strain of the right hand and finger, and a repetitive strain injury of the right hand. She was started in occupational therapy for her right hand and physical therapy for her neck strain. *PX 1, p.85-86*. She was placed on modified duty of no repeated neck movements. *PX 1, p. 86-87*.

On May 9, 2020, Petitioner underwent a telehealth appointment with her primary care physician, Dr. Jain. She complained of neck and right hand pain. *PX 2*. Petitioner testified she subsequently discontinued treating with Dr. Jain for these issues, as she was treating with Concentra.

On May 14, 2020, Petitioner followed up with Dr. Diadula at Concentra, noting that her neck pain had increased yesterday while doing computer work. Her pain was intermittent and did not radiate to her arms, but she still had intermittent aching pain in her right middle and ring fingers. Dr. Diadula's physical examination yielded similar results as Petitioner's initial visit, and her diagnosis was the same. Petitioner was continued on modified duty, physical and occupational therapy, and a cervical MRI was ordered. *PX 1, p.6-7*.

On June 9, 2020, a cervical spine MRI was performed. On June 11, 2020, Dr. Diadula discussed the MRI results with Petitioner, finding C4-5 diffuse broad based disc bulge-osteophyte complex resulting in mild spinal canal stenosis and mild bilateral neural foramen stenosis, C5-6 diffuse broad based and right paracentral disc bulge-osteophyte complex resulting in mild spinal canal stenosis and mild bilateral neural foramen stenosis, C6-7 right foraminal disc bulge-osteophyte complex resulting in moderate neural foramen stenosis, C7-T1 diffuse broad based disc bulge and left paracentral disc extrusion with extruded segment resulting in mild spinal canal stenosis, and mild right and moderate left neural foramen stenosis causing impingement of nerve roots. Dr. Diadula referred Petitioner for pain management and restricted her from repeated neck movements. *PX 1*.

On June 15, 2020, Petitioner presented to Dr. Sajjad Murtaza for pain management. Petitioner complained of neck pain radiating to her left trapezius and scapular region. Dr. Murtaza reviewed the June 9, 2020 cervical spine MRI, finding C6-7 disc osteophyte complex resulting in moderate right foraminal stenosis and impingement of the nerve root. At C7-T1 there was a left paracentral disc extrusion with extruded segment causing mild spinal, mild right, and moderate left foraminal stenosis and impingement of the nerve root. Dr. Murtaza diagnosed cervical radiculopathy. He also recommended a left C7 epidural steroid injection and released Petitioner to regular duties. *PX 1*.

The epidural injection was performed August 13, 2020. On August 31, 2020, Petitioner reported no change in pain after the injection. She was diagnosed with cervical radiculopathy and was referred to neurosurgeon Dr. Sean Salehi. Petitioner was allowed to work eight-hour days, but was restricted from working overtime. *PX 1*.

On September 24, 2020, Petitioner was evaluated by Dr. Salehi. She complained of neck pain radiating to her left shoulder and scapular region. Dr. Salehi reviewed the June 9, 2020 cervical spine MRI, and diagnosed cervical spondylosis from C4 to C7. He noted Petitioner had neck pain secondary to the work injury of May 5, 2020, and she was referred back to Dr. Murtaza for 1 to 2 facet injections on the left C6-7. *PX 1*.

On October 5, 2020, Dr. Murtaza agreed it was best to move forward with left-sided cervical facet injections from C5 to C7, and continued restrictions of Petitioner working only 40 hours per week. *PX 1*.

On December 7, 2020, Dr. Murtaza recommended left-sided medial branch blocks from C5-C7. He also continued Petitioner's restrictions. *PX 1*.

On January 9, 2021, Petitioner followed up with Dr. Jain for a referral to neurosurgery. She still complained of neck pain and was diagnosed with cervical radiculitis. Dr. Jain noted the cervical MRI report of June 9, 2020 indicated disc bulges from C4 to C7, with a right foraminal disc bulge osteophyte complex at C6-C7 with moderate right neural foraminal narrowing. Petitioner complained of pain when looking left, tingling in her third and fourth fingers, and decreased right hand grip strength. Physical examination revealed limited range of motion in the neck, pain with flexion on the left side of the neck, trapezius spasms and sternomastoid musculature, and right sided neck tenderness. Petitioner was referred to a neurosurgeon. *PX 2*.

On February 2, 2021, Petitioner treated with Thomas L. Pittman, P.A. for Dr. William Scheuler at Edward Neuroscience Institute. She complained of cervical pain which increased when looking left, sitting at her desk for long periods, driving, and sleeping. She also had pain in the left upper trapezius. Petitioner denied any specific trauma to her neck on the date of accident other than prolonged sitting at her computer. Physical examination revealed tenderness over the spinous processes from C4 to C7. P.A. Pittman reviewed the June 9, 2020 cervical spine MRI, finding loss of normal lordosis, spondylosis from C4 to C7, with spondylitic bulging at the same levels. Foraminal stenosis at multiple levels was also found. P.A. Pittman diagnosed C4 to C7 spondylosis with spinal stenosis, left cervical facet joint pain, and cervical pain. He continued Petitioner's restrictions of working no more than eight hours a day, five days a week, with no overtime. He also referred Petitioner to the pain clinic for cervical facet injections and possible trigger points, and recommended cervical spine x-rays. He opined Petitioner suffered an exacerbation of underlying spondylosis and facet arthrosis on the accident date in question. *PX 3, p.2-5*. P.A. Pittman also completed an ADA Substantiation form on this date, indicating Petitioner's condition substantially limited her ability to lift, perform manual tasks, reach, read, sit, sleep, stand, and walk. He also opined it substantially limited the function of Petitioner's cervical spine. He ordered additional 10-15 minute breaks throughout the day. *PX 5*.

On March 23, 2021, Petitioner followed up with Dr. Scheuler, and continued complaining of neck pain radiating to her shoulder, worse when working. Dr. Scheuler reviewed the June 9, 2020 cervical MRI and had findings similar to those of P.A. Pittman. Dr. Scheuler diagnosed cervical spondylosis and cervical pain. He recommended cervical x-rays, trigger point injections, facet injections, and pain management. He also recommended Petitioner keep her computer at eye level and use a stand-up desk. He wanted Petitioner to return after receiving the injections. *PX 4, p.2-3*.

On December 22, 2021, Petitioner underwent the recommended trigger point injections with Dr. David Peng. *See PX 9*. Petitioner testified that in February of 2022 she followed up with P.A. Pittman for the final time. At that time, she was told her choices were to either deal with the pain or undergo surgery which would result in a two to three inch scar across the front of her neck. She noted Mr. Pittman did not recommend the surgery because the scar was ugly, as he had one himself. *Transcript, p.31-32*.

III. Respondent's §12 Examiner

On November 6, 2020, Petitioner underwent a §12 examination at Respondent's request with Dr. Tibor Boco. Dr. Boco noted there was no particular mechanism of injury reported, and that Petitioner's work mostly included sitting behind a computer and typing. Petitioner complained of neck pain, mostly localized on the left side and periscapular area. Pain worsened when she turned to the left. Dr. Boco reviewed medical records, including the June 9, 2020 cervical spine MRI films, finding proper alignment of the cervical vertebral bodies with some loss of regional cervical lordosis secondary to diffuse spondylotic changes. Spondylotic disease was most significant from C4 to C7. At C4-C5 and C6-C7 there was moderate right lateral recess stenosis. At C5-C6 there was severe right lateral recess stenosis secondary to disc osteophyte complex. Upon physical examination Dr. Boco noted discomfort in the left paraspinal area in the area of the

thoracocervical junction when flexing or rotating to the left. He diagnosed cervicalgia and spondylosis without myelopathy or radiculopathy. He noted Petitioner's right arm/hand pain had resolved. Dr. Boco noted Petitioner had significant spondylotic disease of the cervical spine, but found no mechanism of injury that would support an acute pathology. He also opined the cervical MRI revealed chronic degenerative changes throughout the cervical spine, which supported a pre-existing degenerative process. He stated Petitioner's disability was a natural progression of an underlying disease process and had nothing to do with her work activity. He opined that continued care for cervical pain was appropriate, but unrelated to any work activity, and any work restrictions would be related to her preexisting cervical disease rather than any work injury. *RX 2*.

On December 2, 2020, Petitioner received an email from Shannon Casey, her case manager at Sedgwick. Shannon Casey informed Petitioner that, based on Dr. Boco's report, Respondent was terminating all benefits with regard to her claim. *PX 8*.

Dr. Boco's deposition was taken on April 22, 2022. Dr. Boco is a board-certified neurological surgeon. He testified consistent with his §12 examination report. He reiterated his findings upon reviewing the June 9, 2020 cervical spine MRI, adding that spondylosis is a degenerative disease and osteophyte complex is essentially a manifestation of degenerative disease at two bridging bones (in other words, bone overgrowth).

Dr. Boco opined Petitioner suffered a temporary exacerbation of her preexisting degenerative cervical disease, but that no objective injury occurred, and there was no evidence of any acute injury in the MRI. He reiterated his opinion that Petitioner's cervical findings had nothing to do with her work activities. He went further to state that any work restrictions would be related to her neck pain, but that it made no sense to opine that any restrictions would be based on Petitioner typing in front of a computer. Dr. Boco also added that by the time of his §12 examination, Petitioner had been well beyond maximum medical improvement.

IV. Additional Information

Currently, although Petitioner has moved to Florida, she continues working for Respondent in the same position, and has worked overtime as well. She has also received raises. She now works at home on a desk that is about the same height as her raised kitchen table. The desk has shelving units, holds her laptop, and also holds a television that she uses as a monitor. She has a cushioned chair similar to a formal dining room chair. It has no wheels and is not adjustable.

Petitioner still complains of all day pain, especially when working. By 2p.m., her pain level is 7 or 8 out of 10. She takes four Aleve and usually logs off between 4 and 4:30p.m. She then takes an hour of rest before preparing dinner. She props her head up against a pillow to alleviate pain. She has difficulty getting comfortable at night and usually takes four more Aleve before bedtime. Ever since the August 2020 injection with Dr. Murtaza, she has been unable to fully turn her neck to the left without pain, and must turn her whole body when driving in order to merge into a left lane.

CONLUSIONS OF LAW

A. Accident and Causal Connection

In the instant case, Petitioner alleges that on May 5, 2020, she developed stabbing neck pain, along with tingling in her right middle and ring fingers, while performing her job duties as a Biller for Respondent. Her job duties on that date required prolonged exposure to sitting and typing at the computer. In order to be compensable under the Act, the injury complained of must be one "arising out of and in the course of" her 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, involving a causal connection between the employment and the accidental injury. *Parro v. Industrial Commission*, 167 Ill. 2d 385, 393 (1995).

A day of repetitive work that results in an acute exacerbation of a previously asymptomatic pre-existing degenerative cervical condition meets this standard. Petitioner need not claim that anything unusual happened for her regular job duties to cause injury. The Commission also finds that Petitioner sustained right upper extremity tendinitis as a result of her work duties on May 5, 2020.

Here, the evidence supports a finding that Petitioner had a pre-existing degenerative cervical condition prior to the May 5, 2020 accident date. This finding is based on the opinions of both treater Thomas L. Pittman, P.A., as well as Dr. Boco, Respondent's §12 examiner. However, the record reflects that after being hired by Respondent on July 16, 2014, Petitioner worked full duty with no cervical spine complaints until the instant accident. After the accident, Petitioner was diagnosed with cervical spondylosis from C4-C7 and a repetitive strain injury to the right hand. Immediately after the accident, she began complaining of stabbing pain and tenderness in her neck, right hand palmar tenderness, limited right middle and ring finger flexion with pain, and decreased right hand grip strength. She was initially treated with occupational therapy for her right hand and physical therapy for her neck. A June 9, 2020 cervical MRI revealed stenosis causing impingement of the nerve roots, leading Dr. Diadula to refer Petitioner for pain management. Petitioner was also restricted from making repeated neck movements.

Although the record reflects Petitioner's right upper extremity issues eventually resolved, conservative care for her cervical condition continued, including an epidural injection performed on August 13, 2020. However, this did not decrease Petitioner's symptoms, which remained ongoing. Eventually, Petitioner was recommended for left-sided medial branch blocks from C5-C7 and was referred to the Edward Neuroscience Institute. It was there where P.A. Pittman completed an ADA Substantiation form, indicating that Petitioner's condition substantially limited the function of her cervical spine, as well as her ability to perform activities of daily living. He recommended Petitioner take additional breaks throughout each day. Subsequently, Dr. Scheuler at Edward Neuroscience recommended cervical x-rays, trigger point injections, facet injections, and pain management. Petitioner subsequently underwent trigger point injections.

The Commission has considered the opinions of §12 examining physician Dr. Boco, but does not find them persuasive. During his deposition, Dr. Boco opined that Petitioner suffered a temporary exacerbation of her pre-existing degenerative cervical disease, but that no objective

injury occurred. Petitioner's testimony and medical records support a finding that her cervical condition never returned to baseline after the accident. Her ongoing treatment and symptoms post-accident coupled with a referral to neurosurgery, recommendations for additional injections, work modifications, and limited ability to remain active reflects the significant deterioration in her condition following the accident. Moreover, Dr. Sean Salehi noted Petitioner had neck pain secondary to the work injury, and P.A. Pittman opined Petitioner suffered an exacerbation of underlying spondylosis and facet arthrosis on the accident date in question. The opinions of Dr. Salehi and P.A. Pittman are corroborated by Petitioner's testimony and the medical records.

The record reflects Petitioner had cervical spondylosis with consistent and objectively supported corroborating symptomatology, proving by a preponderance of evidence that the accident suffered May 5, 2020 did aggravate and accelerate Petitioner's pre-existing cervical condition. Petitioner now has constant pain and requires modifications and pain medication to continue working. The record also reflects that the now resolved repetitive strain injury to the right hand was also caused by the work accident based upon Dr. Boco's opinion. The work accident is a factor in Petitioner's current cervical condition. We reverse the Arbitrator's denial of accident and causal connection.

B. Medical Expenses

In accordance with the reversal of accident and causation, the Commission also awards medical expenses to Petitioner. The record reflects Petitioner paid $60.00 out-of-pocket for the trigger point injections recommended by Dr. Scheuler and administered by Dr. Peng. *See PX 9*. The record supports a finding that these injections and associated bills were reasonable and necessary to diagnose, relieve, or cure the effects of Petitioner's cervical condition. *See Absolute Cleaning/SVMBL v. Illinois Workers' Compensation Commission*, 409 Ill. App. 3d 463, 470 (2011).

C. Permanent Disability

In determining the nature and extent of Petitioner's disability, the Commission analyzes the five factors enumerated in §8.1b(b) of the Act.

§8.1b(b)(i) – Impairment rating

Neither party submitted an impairment rating. As such, the Commission assigns no weight to this factor.

§8.1b(b)(ii) – Occupation of the injured employee

Petitioner was a Biller for Respondent. Following her conservative treatment, she returned to her pre-accident occupation and has even worked overtime on occasion. Moderate weight is given to this factor. The Commission finds this factor weighs in favor of decreased permanent disability.

§8.1b(b)(iii) – Age at the time of the injury

Petitioner was 51 years old on the date of her accidental injury. The Commission notes that due to her age, Petitioner is more likely to experience her residual complaints for a somewhat extended period as her remaining work life could potentially be a decade or more. Moderate weight is given to this factor. This factor weighs in favor of increased permanent disability.

§8.1b(b)(iv) – Future earning capacity

There is no direct evidence Petitioner's work accident had an adverse impact on her future earning capacity. In fact, Petitioner testified she has received raises since returning to work. Substantial weight is given to this factor. The Commission finds this factor weighs in favor of reduced permanent disability.

§8.1b(b)(v) – Evidence of disability corroborated by treating medical records

Petitioner's work accident resulted in a now resolved right upper extremity strain, as well as symptomatic cervical spondylosis. Petitioner underwent occupational therapy for her right upper extremity, and physical therapy, epidural and trigger point injections, and modified work restrictions for her cervical condition. P.A. Mr. Pittman completed an ADA Substantiation form, indicating that Petitioner's condition substantially limited the function of her cervical spine, as well as her ability to perform activities of daily living.

Today, although still working, Petitioner still complains of all day pain, especially when working. She takes four Aleve during the day, usually logs off between 4 and 4:30p.m., and then rests for an hour before preparing dinner. She has difficulty getting comfortable at night and usually takes four more Aleve before bedtime. Ever since the August 2020 injection with Dr. Murtaza, she has been unable to fully turn her neck to the left without pain, and must turn her whole body when driving in order to merge into a left lane. The Commission gives substantial weight to this factor. The Commission finds this factor weighs in favor of increased permanent disability.

Based on the above, the Commission finds Petitioner sustained a 10% loss of use of her person as a whole.

D. Penalties and Fees

Although we find Respondent's reliance on the opinions of Dr. Boco to be in error, we decline to award penalties and fees as requested by Petitioner. We find that, although incorrect, Respondent's denial of benefits was not unreasonable, vexatious nor in bad faith. Penalties and attorney fees are denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 7, 2022 is hereby reversed.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner sustained an accidental injury arising out of and occurring in the course of her employment on May 5, 2020.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's resolved right upper extremity condition and current cervical condition are both causally related to said accident.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the sum of $60.00 for out-of-pocket medical expenses, 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 the sum of $479.66 per week for a period of 50 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused a 10% 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.

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 $24,100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

January 19, 2024

/s/*Carolyn M. Doherty*

AHS/wde

O: 12/13/23

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/s/*Amylee H. Simonovich*

/s/*Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC032175
Case Name	Dawn Oles v. Sedgwick
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	5
Decision Issued By	Gerald Granada, Arbitrator

Petitioner Attorney	Robert Smoler
Respondent Attorney	Christopher Jarchow

DATE FILED: 11/7/2022

THE INTEREST RATE FOR THE WEEK OF NOVEMBER 1, 2022 4.44%

/s/Gerald Granada, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Dawn Oles
Employee/Petitioner

v.

Sedgwick
Employer/Respondent

Case # **20** WC **032175**

Consolidated cases: **Not Applicable**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Wheaton**, 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. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **May 5, 2020**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**41,570.36**; the average weekly wage was $**799.43**.

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

Petitioner ***has not*** received all reasonable and necessary medical services.

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

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

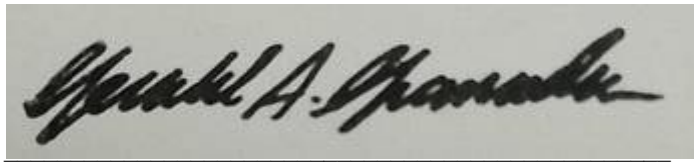
Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act.

ORDER

The Arbitrator finds that Petitioner failed to meet her burden of proof on the issues of accident and therefore 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.



Signature of **Arbitrator Gerald Granada**

November 7, 2022

FINDINGS OF FACT

This case involves Petitioner Dawn Oles, who alleges to have sustained injuries while working for the Respondent Sedgwick on May 5, 2020. Respondent disputes Petitioner's claims, with the issues being: 1) accident; 2) causation; 3) medical expenses; 4) nature and extent; and 5) penalties and attorney fees.

Petitioner was employed by Sedgwick as a billing clerk since 2014. Petitioner testified that prior to March 2020 she worked in an office setting in a cubicle in a normal cubicle at a normal desk in a normal rolling chair for about 8 hours a day inclusive of a 30-minute lunch and two 15-minute breaks. Petitioner testified she would use a typical mouse and laptop and would hook up a computer monitor to her laptop. She further testified that there was nothing unique about her workspace or work equipment. Petitioner testified that beginning March 16, 2020 she began working remotely due to the COVID-19 pandemic. She worked at her kitchen table on a laptop. After she was sent to work remotely at home, she purchased a high-top kitchen table in April 2020 where she would conduct her work. Her normal work hours were typically 8:00 AM to 4:30 PM or 5:00 PM.

Petitioner testified that nothing unusual happened on May 5, 2020 though later in the morning she started to feel neck pain. Petitioner described that she would also feel tingling into her right hand. Petitioner testified that she reported the injury immediately to her employer.

On May 5, 2020 Petitioner sought treatment at Concentra Medical Center. She described she was doing computer work when she started to complain of intermittent stabbing pain rated at 10/10 in the neck. Her pain did not radiate into the arms and she denied numbness and tingling. She complained of intermittent pain in the right middle finger rated at 8-9/10. An x-ray of the cervical spine revealed straightening of the normal cervical lordosis, possibly secondary to muscle spasm. There were degenerative changes with no evidence of acute osseous injury involving the cervical spine. She was referred to occupational therapy and assessed with a neck strain and sprain of the right hand and finger. On May 7, 2020, she returned for a recheck and continued to complain of 10/10 pain in the neck. (PX1)

On August 13, 2020, Petitioner underwent a C7 epidural steroid injection. On August 31, 2020 Petitioner reported to Dr. Murtaza she had slight relief from the steroid injection. Dr. Murtaza referred Petitioner to nDr. Salehi for further neurosurgical recommendations. Dr. Murtaza placed Petitioner on an eight-hour workday with no overtime work restrictions. (PX1) Dr. Murtaza subsequently noted that Petitioner had a large disc herniation at C7.

On September 24, 2020 Petitioner was evaluated by Dr. Sean Salehi. Dr. Salehi reviewed Petitioner's June 9, 2020 MRI and diagnosed Petitioner with cervical spondylosis from C4-C7. He indicated that Petitioner was not a surgical candidate and did not need to return. Dr. Salehi referred her back to Dr. Murtaza and kept Petitioner on a 40 hour per week work restriction. (PX1)

On November 6, 2020 Petitioner was evaluated by Dr. Tibor Boco for an Independent Medical Examination. Dr. Boco concluded that due to the underlying degenerative conditions and lack of a sufficient mechanism of injury petitioner's current condition is not related to any work event of May 5, 2020. (RX2, p. 7-8)

Petitioner's final visit with Dr. Murtaza was December 7, 2020. Petitioner continued to complain left sided neck pain. Dr. Murtaza recommended medial branch blocks on the left side at C5-C7 as a diagnostic and prognostic treatment plan. (PX1)

Petitioner returned to Dr. Jain on January 9, 2021. Petitioner did complain of some neck pain. Dr. Jain indicated that she would request referral for a different neurosurgical group to be evaluated. (RX5, p. 58-60)

Petitioner was seen by Physician's Assistant Thomas Pittman of Edward Neuroscience Institute on February 2, 2021. Petitioner was assessed with spondylosis and spinal stenosis at C4-5 C5-6 and C6-7. Petitioner was recommended to undergo cervical facet injections with possible trigger points. (PX3)

Petitioner testified she continues to work for Respondent in her same role as she did at the time of the May 2020 date of accident. Petitioner testified that her earnings increased and that she remains one of the top producers in her department. Petitioner testified that she continues to work overtime hours. She has not treated since February 2022 and is not currently treating with a physician in Florida, nor does she have any appointments scheduled with a doctor to address her cervical problems any time in the foreseeable future.

CONCLUSIONS OF LAW

1. With regard to the issue of accident, the Arbitrator finds that the Petitioner has failed to meet her burden of proof. In support of this finding, the Arbitrator relies on the Petitioner's testimony and the medical evidence, which fail to show that Petitioner had an accident as the result of a direct trauma or repetitive trauma from her employment activities. The Arbitrator notes that Petitioner denied a specific injury to her neck. On direct examination when asked what if anything unusual happened on May 5, 2020 she replied "nothing unusual happened" though expressed that she began feeling neck pain. She did not describe the mechanism of injury, nor did she describe a work event that caused her neck pain. Instead, she merely testified she began to feel pain in her neck while sitting at her kitchen table working on a laptop. Furthermore, the facts do not show evidence of any specific repetitive job activities that would support a claim for repetitive trauma. Based on the facts presented at trial, the Arbitrator concludes that the Petitioner failed to prove she sustained an accident arising out of and in the course of her employment on May 5, 2020.

2. Based on the Arbitrator's findings regarding the issue of accident, all other issues are rendered moot.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	10WC020851
Case Name	Maria Del Carmen Lopez v. Marriott International Admin Services Inc, Agent for Chicago Hotel Services LL
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0021
Number of Pages of Decision	57
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Alexandra Broderick
Respondent Attorney	Christine Jagodzinski

DATE FILED: 1/19/2024

/s/Amylee Simonovich, Commissioner

Signature

24IWCC0021

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Maria del Carmen Lopez,

Petitioner,

vs. NO: 10 WC 20851

Marriott International Admin. Services, Inc.,
Agent for Chicago Hotel Services, LLC

Respondent.

DECISION AND OPINION ON REVIEW

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

In the interest of efficiency, the Commission relies on the detailed recitation of facts provided in the Decision of the Arbitrator. The Commission affirms the Arbitrator's conclusion regarding notice. The Commission affirms the Arbitrator's conclusion that Petitioner's current condition of ill-being is not related to the April 27, 2010, work accident. The Commission affirms the conclusion that Petitioner's condition of ill-being regarding her cervical spine is not causally related to the April 27, 2010, work accident. The Commission also affirms the conclusion that Petitioner's condition of ill-being regarding her right carpal tunnel syndrome was causally related to the work accident only through October 11, 2011. The Commission affirms the conclusion that Petitioner's condition of ill-being regarding her left carpal tunnel syndrome was causally related to the work accident only through June 19, 2012. Finally, the Commission affirms the Arbitrator's award of permanent partial disability and the denial of penalties. However, the Commission modifies the awards of medical expenses and temporary total disability (TTD) benefits.

Medical Expenses

The Commission affirms the Arbitrator's award of medical expenses except for the expenses related to the May 15, 2010, EMG/NCV, the May 21 2010, EMG/NCV. The Arbitrator determined the medical expenses related to the May 15, 2010, study were reasonable and necessary, but denied medical expenses related to the May 21, 2010, study. The Commission

agrees with the Arbitrator's conclusion that it was not reasonable or necessary for Petitioner to undergo both studies within a one week period. However, after carefully considering the evidence, the Commission finds the May 15, 2010, EMG/NCV was not reasonable, necessary, or causally related to the April 27, 2010, work accident.

The credible evidence shows that the May 15, 2010, study was performed to determine whether Petitioner suffered from right side peripheral neuropathy, radiculopathy, and/or entrapment due to Petitioner's complaints of cervical spine pain and pain radiating down the right arm. In contrast, the May 21, 2010, EMG/NCV addressed Petitioner's complaints of tingling, weakness, and numbness in her bilateral hands and wrists. Dr. Fuelleman ordered the study to rule out peripheral mononeuropathy in the bilateral upper extremities. Notably, the May 21, 2010, study did not involve any testing relating to Petitioner's cervical spine. Therefore, after considering the evidence, the Commission denies all expenses related to the May 15, 2010, EMG/NCV. The Commission awards all necessary and reasonable expenses related to the May 21, 2010, EMG/NCV admitted into evidence that remain outstanding.

Temporary Total Disability Benefits

The Arbitrator concluded that Petitioner met her burden of proving an entitlement to TTD benefits for a total of 43-6/7 weeks during the following periods: May 4, 2010, through September 19, 2010; April 26, 2011, through July 18, 2011; and December 15, 2011, through March 7, 2012. The Commission views the evidence differently. After carefully considering the totality of the evidence, the Commission finds Petitioner proved an entitlement to TTD benefits for a total of 65-4/7 weeks during the following periods: May 4, 2010, through October 3, 2010; April 26, 2011, through October 11, 2011; and December 15, 2011, through April 29, 2012.

It is undisputed that Petitioner's entitlement to TTD benefits began on May 4, 2010. A review of the credible evidence reveals that on September 10, 2010, Dr. Fuelleman cleared Petitioner to return to work with restrictions as of September 20, 2010. On September 23, 2010, Rocio Villanueva sent Petitioner a letter directing Petitioner to report to work on October 4, 2010, because Respondent was able to accommodate the work restrictions. (RX 17 at Exh. 2). Thus, Petitioner was only entitled to TTD benefits through October 3, 2010, during this period. Respondent continued to accommodate Petitioner's restrictions until Petitioner underwent the right carpal tunnel release surgery on April 26, 2011, and Dr. Carroll took her off work.

On October 11, 2011, Dr. Fernandez, Respondent's Section 12 examiner, examined Petitioner's bilateral wrists. He credibly opined that Petitioner had reached MMI regarding her right carpal tunnel condition and her surgery. He also credibly opined that Petitioner's ongoing right wrist complaints were not related to her work duties; instead, her continued complaints were solely related to her Kienböck's disease, which continued to worsen. There is no credible evidence that Petitioner's Kienböck's disease is causally related to the work accident or Petitioner's employment. Dr. Fernandez opined that Petitioner could return to work full duty without restrictions regarding her work-related bilateral carpal tunnel condition. Thus, the Commission finds Petitioner's entitlement to TTD benefits during this period ended on October 11, 2011.

The Commission finds Petitioner was able to continue working full duty until she

underwent the left carpal tunnel release surgery on December 15, 2011. Following this surgery, Dr. Carroll cleared Petitioner to return to work with a twenty pound lifting restriction on April 18, 2012. On April 24, 2012, Robert Hawkins sent Petitioner a letter directing her to report to work on April 30, 2012, as Respondent could accommodate the work restrictions. (RX 16 at Exh. 1). Thus, the Commission finds Petitioner's entitlement to TTD benefits during this final period ended on April 29, 2012. After considering the credible evidence, the Commission finds any further work restrictions prescribed by Petitioner's treating physicians were not causally related to her work duties or the April 27, 2010, work accident.

For the foregoing reasons, the Commission finds Petitioner met her burden of proving an entitlement to TTD benefits from May 4, 2010, through October 3, 2010, April 26, 2011, through October 11, 2011, and December 15, 2011, through April 29, 2012—a period of 65-4/7 weeks—totaling $25,511.71. The parties stipulated that Respondent previously paid $23,566.53 in TTD benefits as well as an advance in the amount of $2,334.42, for a total credit in the amount of $25,900.95.

The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on July 28, 2022, is modified as stated herein.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner temporary total disability benefits of $389.07/week for 65-4/7 weeks commencing May 4, 2010, through October 3, 2010, April 26, 2011, through October 11, 2011, and December 15, 2011, through April 29, 2012, as provided in Section 8(b) of the Act. Pursuant to stipulation by the parties, Respondent shall receive credit for TTD benefits and an advance previously paid to Petitioner in the amount of $25,900.95. The $389.24 overage in benefits previously paid by Respondent shall be applied to the award of permanent partial disability.

IT IS FURTHER ORDERED that Petitioner proved an entitlement to temporary partial disability benefits from February 19, 2011, through April 25, 2011, in the amount of $1,553.19. The parties stipulated that Respondent previously paid $1,553.19 in TPD benefits to Petitioner. Thus, Respondent is not liable for any additional TPD benefits.

IT IS FURTHER ORDERED that maintenance benefits are denied.

IT IS FURTHER ORDERED that Respondent shall pay reasonable and necessary medical expenses related to the May 11, 2010, bilateral hand/wrist x-rays to Specialized Radiology Consultants, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall also pay reasonable and necessary medical expenses included in Petitioner's medical bill exhibits that remain outstanding for the May 21, 2010, EMG/NCV, as provided in Sections 8(a) and 8.2 of the Act. All medical expenses related to the May 15, 2010, EMG/NCV are denied.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner permanent partial

disability benefits of $350.16/week for 82 weeks, because the injuries sustained caused the 20% loss of the **right hand** (41 weeks) and 20% loss of the **left hand** (41 weeks), as provided in Section 8(e) of the Act.

IT IS FURTHER ORDERED that Petitioner's Petition for Penalties and Attorneys' Fees is denied.

IT IS FURTHER ORDERED that Respondent shall receive a credit in the amount of $52,060.35 for medical benefits paid by Respondent.

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $28,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

January 19, 2024

o: 12/12/23
AHS/jds
51

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	10WC020851
Case Name	Maria Del Carmen Lopez v. Marriott International Admin. Services, Inc., Agent for Chicago Hotel Services, LLC.
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	52
Decision Issued By	Charles Watts, Arbitrator

Petitioner Attorney	Alexandra Broderick
Respondent Attorney	Christine Jagodzinski

DATE FILED: 7/28/2022

THE INTEREST RATE FOR THE WEEK OF JULY 26, 2022 2.92%

/s/Charles Watts, Arbitrator

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

MARIA DEL CARMEN LOPEZ,
Employee/Petitioner

Case #**10 WC 20851**

v.

Consolidated cases:

MARRIOTT INTERNATIONAL ADMIN. SERVICES, INC., AGENT FOR CHICAGO HOTEL SERVICES, LLC,
Employer/Respondent

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

DISPUTED ISSUES

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

FINDINGS

On **4/27/2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**30,347.20**; the average weekly wage was $**583.60**.

On the date of accident, Petitioner was **49** 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 **$23,566.53** for TTD, **$1,533.19** for TPD, **$0** for maintenance, and $**2,334.42 (advance)** for other benefits, for a total credit of **$27,434.14**.

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

ORDER

Credits

Respondent shall be given a credit of **$23,566.53** for TTD, **$1,533.19** for TPD, **$0** for maintenance, and $**2,334.42 (advance)** for other benefits, for a total credit of **$27,434.14**.

Respondent shall be given a credit of $**52,060.35** for medical benefits that have been paid.

Maintenance

No maintenance benefits are awarded.

Temporary Partial Disability

Respondent paid Petitioner temporary partial disability benefits from **February 19, 2011** through **April 25, 2011**, as provided in Section 8(a) of the Act and no additional temporary partial disability benefits are owed.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $**389.07**/week for **43 6/7** weeks, commencing **May 4, 2010** through **September 19, 2010**; from **April 26, 2011** through **July 18, 2011**; and from **December 15, 2011** through **March 7, 2012** , as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from **April 27, 2010** through **June 15, 2021** and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $**23,566.53** for temporary total disability benefits that have been paid.

Medical benefits

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of **$98.82 to Specialize Radiology Consultants for a date of service of May 11, 2010**, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit of $**52,060.35** for medical benefits that have been paid. Respondent shall hold petitioner harmless from any claims for reimbursement by Blue Cross Blue Shield for payments made for the EMG/NCV studies on May 26, 2010 to any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Permanent Partial Disability: Schedule injury

Respondent shall pay Petitioner permanent partial disability benefits of **$350.16**/week for **41** weeks, totaling $**14,356.56,** because the injuries sustained caused the **20**% loss of the **right hand**, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$350.16/**week for **41** weeks, totaling **$14,356.56** because the injuries sustained caused the **20**% loss of the **left hand**, as provided in Section 8(e) of the Act.

The total amount owed for permanent partial disability is $19,875.67 ($28,713.12 awarded minus advance paid of $2,334.42 and minus the overpayment of TTD benefits of $6,503.03).

Penalties

No Penalties are awarded pursuant to Sections 19(k) or 19(l) and no Fees are awarded pursuant to Section 16.

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

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

_____

Signature of Arbitrator **JULY 28, 2022**

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Maria Del Carmen Lopez

Petitioner,

v.

Marriott International Admin. Services, Inc., Agent for Chicago Hotel Services, LLC

Respondent.

Court No. 10 WC 20851

FINDINGS OF FACT AND CONCLUSIONS OF LAW
MEMORANDUM OF ARBITRATOR'S DECISION

STATEMENT OF FACTS

Testimony

Ms. Lopez testified she worked for Marriott on April 27, 2010. (Tr.9). Prior to April 27, 2010, Ms. Lopez sought treatment with Dr. Shukla for her upper extremities. (Tr. 9). She saw Dr. Shukla in 2009 while working as a housekeeper. (Tr. 10). She started working at Marriott in 2002. (Tr. 10). She previously worked for eight months at the Embassy Suites in Columbus as a housekeeper. (Tr. 10). She denied any prior employment. (Tr. 10-11).

Her job duties as a housekeeper at Marriott included changing the sheets, changing the covers on the mattress, changing the bedspreads, changing the pillowcases, as well as cleaning bathrooms, bathtub, mirrors, walls, and floors. (Tr. 11). She used soap in bottles to clean and applied the soap with sponges. (Tr. 11). In order to clean the carpets, she used vacuums. (Tr. 12). Ms. Lopez testified the vacuums weighed more than 2 gallons of milk. (Tr. 12-13). After she changed the beds, sheets, and pillowcases, she placed the dirty ones into a tub or cart with wheels. (Tr. 13). She testified the cart weighed over 200 pounds. (Tr. 13-14). On a daily basis, she cleaned 15 or 16 rooms while working from 7:30 a.m. to 4:00 p.m. (Tr. 14). Ms. Lopez testified she had to finish all rooms before she went home for the day. (Tr. 14). When asked whether she had to lift as part of her job, Ms. Lopez testified she dragged the garbage and pushed the carts with dirty clothes. (Tr. 14. Upon further questioning, she testified the dirty

clothes actually meant the sheets from the bed. (Tr. 14). She estimated the trash weighed over 50 pounds. (Tr. 15). Ms. Lopez stated she had to fill up trash bags and usually had one in the morning, one at lunch and another one. (Tr. 15). She testified the guests at Marriott would help her carry the trash. (Tr. 15). Ms. Lopez stated prior to April 27, 2010, she completed her job duties without issue. (Tr. 15).

On April 27, 2010, Ms. Lopez stated she was fine and had cleaned 3 ½ rooms. (Tr. 15). She wanted to finish one room because she wanted it to be dry and then she would start to clean the bathtub in another room. (Tr. 16). She started scrubbing the bathtub, which was very dirty. (Tr. 16). She could not believe it when she started feeling a lot of pain in her hands and itchiness. (Tr. 16). She testified her hands were very red and she could not stand the pain. (Tr. 16). When asked if she ever felt pain like the specific pain she felt right then, Ms. Lopez testified she had not. (Tr. 16). Ms. Lopez stated she wore gloves. (Tr. 16). She then reported this to Vanessa, Denise, and Vanessa. (Tr. 16). Ms. Lopez stated these are the people in charge of making the schedules and she verbally told them. (Tr. 16-17). She stated they instructed her to see security. (Tr. 17). Ms. Lopez indicated security told her to wait and then sent her to a clinic, Concentra Medical Center on that same day. (Tr. 17). After she presented to Concentra, she returned to work the next day. (Tr. 18). She noticed she had a lot of pain in her hands and was feeling very bad. (Tr. 18).

Ms. Lopez testified she went to Marque Medicos on May 4, 2010. (Tr. 18). Ms. Lopez stated since she could not stand the pain, she did not know what to do so she just went out on the street and saw the clinic and went in to ask. (Tr. 19). On that date, she reported neck pain and bilateral hand pain. (Tr. 19). She testified Marque Medicos referred her for additional treatment for her neck and hands and authorized her off work. (Tr. 19). She also saw her primary care doctor, Dr. Shukla, who referred her for some nerve testing. (Tr. 19). She saw Dr. Shukla for her blood pressure too. (Tr. 20). Ms. Lopez agreed she was sent for cervical MRI studies and nerve testing as well as physical therapy at Marque Medicos. (Tr. 20). She also received referrals to various hand specialists including Dr. Wiesman, Dr. Goldberg, and Dr. Kotis.(Tr. 20-21). Ms. Lopez stated she underwent pain management for her neck and treated with Marque Medicos and Medicos Pain. (Tr. 21). She underwent two diagnostic medial branch blocks in her neck in late 2010. (Tr. 21). Ms. Lopez agreed they offered nerve ablation and she chose not to undergo this as her hands were still not right. (Tr. 22). Ms. Lopez agreed she returned to work light duty on approximately October 29, 2010. (Tr. 22). When she returned to light duty, she reported a lot of pain. She said she could not open the lockers or doors. She was not able to change. (Tr. 23). She had to wait for somebody to open the locker door. (Tr. 23).

Ms. Lopez testified Marque Medicos and Medicos Pain referred her to Dr. Charles Carroll. (Tr. 23). She saw Dr. Carroll for her bilateral hands. (Tr. 24). He recommended a right carpal tunnel surgery which she underwent on April 26, 2011. (Tr. 24). He authorized her off work after the surgery. (Tr. 24). After surgery, she testified the pain was still very strong and it had not gone away. (Tr. 24). She testified she has suffered a lot because of this pain. (Tr. 25). Dr. Carroll then recommended proceeding with a left carpal tunnel release. (Tr. 25). Initially, Ms. Lopez indicated she was not ready to undergo this procedure as her right hand was not healing very

well. (Tr. 25). She continued treatment for her neck seeing a pain doctor and neurosurgeon, Dr. Erickson. (Tr. 25). Dr. Erickson recommended neck surgery. (Tr. 25-26). Ms. Lopez elected not to undergo surgery. (Tr. 26). She testified her hands were not right and she was very worried so she did not accept the surgery as they did not guarantee she would be okay. (Tr. 26). Dr. Carroll authorized her off work after she underwent a left carpal tunnel release on December 15, 2011. (Tr. 26). He returned her to light duty for her hands around May 1, 2012. (Tr. 26-27). Ms. Lopez claimed she was not able to record her time working on May 1, 2012 as she was not on the schedule. (Tr. 27). When she returned to work, she had a lot of pain in her hands, and she could not open the doors or lockers. (Tr. 28). She could not even put toilet paper and she had a lot of pain, a lot of cramping and itchiness all the way up to her neck and head. (Tr. 27-28). She reported this to her doctors, and they gave her a paper to go to light duty work. (Tr. 28). She could not recall telling her doctors what happened after she went back to work that day. (Tr. 28). Ms. Lopez testified Dr. Carroll sent her for a functional capacity evaluation. (Tr. 28). She last saw Dr. Carroll on September 26, 2012. (Tr. 29). He released her with permanent restrictions. (Tr. 29). Dr. Carroll recommended she continue to wear splints. (Tr. 29). She also followed up with Medicos Pain for her neck and they doubled the time for therapy. (Tr. 29). She received instructions to continue her exercises at home. (Tr. 30). When asked whether she continues to do her exercises for her hands and neck at home, Ms. Lopez stated she does. (Tr. 30).

She then returned to see Dr. Shukla. (Tr. 30). Her attorney asked whether she had a fall injury. (Tr. 30). Ms. Lopez agreed she had a fall in 2009. (Tr. 31). She testified this was not part of the April 27, 2010 alleged accident. (Tr. 31). Ms. Lopez stated she saw Dr. Fisfalen for depression. (Tr. 31). Prior to April 27, 2010, she said she never sought treatment for depression. (Tr. 32).

On January 9, 2013, she presented to Dr. Shukla. (Tr. 32). He referred her for physical therapy at Therapy Providers. (Tr. 32). She also sought treatment with Dr. Ezequiel Mendez on February 21, 2013. (Tr. 32-33). Dr. Mendez was her new primary care doctor as he was closer. (Tr. 33). Ms. Lopez stated she was not able to actually close doors and that place was easy since she could walk over there. (Tr. 33). When asked if she has restrictions to prevent her from closing doors, Ms. Lopez testified she cannot open them and she needs help when she cannot do it. (Tr. 33). Dr. Mendez referred her to Dr. Jawidzik at Rush hospital. (Tr. 33). He referred her for MRI studies of her neck and therapy as well as recommended she see a neurosurgeon. (Tr. 34). Ms. Lopez testified she never saw a neurosurgeon and she could not remember why. (Tr. 34).

Ms. Lopez testified she looked for work within her restrictions. (Tr. 35). Ms. Lopez reviewed Petitioner's Exhibit 40 and confirmed it was her handwriting.(Tr. 36). She recognized the document and noted it was a record of applications that she went to. (Tr. 36-37). Ms. Lopez agreed the dates included February 5, 2014 through April 2014 and August 2013. (Tr. 36). She testified she has not continued to look for work. (Tr. 37). When asked why she stopped looking for work, Ms. Lopez stated her hands are in a lot of pain, things fall from her hands, and she would need help if she had to open bottles or a gallon of milk. (Tr. 38). She stated she actually needs help for almost everything. (Tr. 38). Her husband helps her, and she receives disability (Tr. 38). Ms. Lopez testified she understands she is on Social Security Disability because of her

hands and neck. (Tr. 40). Ms. Lopez agreed she received a decision awarding her disability benefits. (Tr. 41-42). The decision was sent to her home. (Tr. 42). Ms. Lopez testified she does not know anything about computers. (Tr. 43). Ms. Lopez then made a fist with both hands and the Arbitrator noted her right middle finger did not make as full a fist as her other fingers. (Tr. 44). When asked why she was not wearing the braces as prescribed by Dr. Carroll, Ms. Lopez stated she needs to use a disinfectant because of the virus and gloves. (Tr. 45). She does not wear them because of the disinfectant. (Tr. 45). She only wears the braces at night. (Tr. 47). When asked how the accident changed her life, Ms. Lopez testified it totally changed her life. (Tr. 47). She stated she was very active all the time and had to place drapes and paint and she did everything. (Tr. 48). She cannot sleep as well, she cannot play with children in the park, like ball for example. (Tr. 48). She cannot carry heavy bags or open doors. (Tr. 48). She cannot open a bottle and she just does not drink water. (Tr. 48). She also reported feeling sad because she cannot do the jobs as before, not even at home. (Tr. 48).

On cross-examination, Ms. Lopez agreed she lived at 2938 W. 39th Place in Chicago when she was employed with Marriott in 2010. (Tr. 49). She later moved to another address in Chicago in 2013. (Tr. 50). Ms. Lopez testified she only had problems receiving mail at her address on 39th Place when she first moved to that location as some letters would not get there. (Tr. 51). This lasted only the first few months. (Tr. 51). She could not recall when she moved to the address at 2938 W. 39th Place, but believes she lived there for about 16 years. (Tr. 52). Ms. Lopez reviewed Respondent's Exhibit 26, a job application completed on May 9, 2002. (Tr. 53, Rx. 26). Ms. Lopez could not recall whether she completed the job application in her own handwriting, but noted some parts of the application appeared to be in her handwriting. (Tr. 54-55). She agreed she lived at 2938 W. 39th Place as of May 9, 2002. (Tr. 55).

Ms. Lopez testified she was born in Mexico. (Tr. 55). She agreed she came to the United States in 1972. (Tr. 55). She also agreed she was born in 1961. (Tr. 55). When asked whether she was approximately 11 years old when she came to the United States, Ms. Lopez testified she was 29 years old. (Tr. 55). She then asked why she was being asked that question. (Tr. 56). When questioned whether she came to the United States in 1972, she asked how old she is and stated she could not recall. (Tr. 56). When directly asked how old she was, she stated she is 60 years old. (Tr. 56). On further questioning, when asked whether she has been in the United States for approximately 31 years, Ms. Lopez replied she brought one of her children here with her when he was only four and he is 35 already. (Tr. 57). She stated her oldest child was born in 1980. (Tr. 57). When asked if that was the child she brought from Mexico, she then stated she brought five children from Mexico. (Tr. 57).

When questioned about her meeting with Edward Pagella 2014, Ms. Lopez asked, "who is that man? I don't know". (Tr. 57). When asked further if she met with Mr. Pagella to discuss whether she could be employed, Ms. Lopez stated she could not remember.(Tr. 57). Upon further questioning about the report reflecting Ms. Lopez met with Mr. Pagella on April 22, 2014, Ms. Lopez asked whether Mr. Pagella was the disability attorney. (Tr. 58). She could not recall who Mr. Pagella is, but she could recall she had an attorney for disability. (Tr. 58). When asked if she had a reason to dispute that she met with Mr. Pagella on April 22, 2014, she stated

she could not recall and asked whether he was for disability. (Tr. 59).

When questioned regarding the history she told the doctors, Ms. Lopez stated that she always told the truth, and she was just not going to lie because she wanted to be lazy and stay home. (Tr. 59).

Ms. Lopez stated she did not finish going to school, but she did attend some schooling in the United States. (Tr. 59-60). She attended a few days at Davis to learn the basics. (Tr. 60). The school helped her learn English. (Tr. 60). When asked whether she understands some English, Ms. Lopez replied, "sometimes yes, sometimes yes, sometimes nothing". (Tr. 60). Ms. Lopez stated sometimes she understands forms and sometimes she does not when she has to fill them out and she sometimes requires help. (Tr. 60-61).

When shown Respondent's Exhibit 1, Ms. Lopez stated she did not recognize the document and initially indicated she thought it was her handwriting on the document. (Tr. 61). She then stated she did not think it was her handwriting. (Tr. 61). When reviewing Respondent's Exhibit 2, Ms. Lopez reviewed the document and agreed it was completed on April 27, 2010. (Tr. 62). She claimed she completed this document with a lady from therapy. (Tr. 63). When questioned about the history she relayed to security on April 27, 2010 at Marriott, she agreed she stated her hand started to tighten and she had a burning sensation. (Tr. 63). She also testified her hands were very itchy she had a lot of pain, very strong pain and they were red. (Tr. 63). She also agreed she started using a new gel cleaner at work for about a month before April 27, 2010. (Tr. 64).

Ms. Lopez agreed if she wanted to take time off work, she would have to let her supervisor know. (Tr. 64). She would also have to call work if she were sick as well. (Tr. 65). In 2010, she recalled taking time off work when her sibling passed away. (Tr. 65).

Ms. Lopez stated she could not recall whether she was off work from April 24, 2010 through April 26, 2010 for a child's birthday and doctor's appointment. (Tr. 65). She did admit one of her children has a birthday on or about April 24 through April 26, 2010. (Tr. 66). She claimed she would not take the day off as she would need to ask for the date with plenty of time. (Tr. 66). She could not recall being late on April 27, 2010, on the date she claimed an injury at work. (Tr. 66). Ms. Lopez stated she did not believe she was late as she always started at 7:30 p.m. (Tr. 66-67). She agreed she had to clock in when she arrived and clock out when she left. Ms. Lopez stated she did not have reason to dispute the Marriott record showing she was late the morning of April 27, 2010. (Tr. 67).

With regard to her reported issues of April 27, 2010, Ms. Lopez stated she reported issues with her hands and neck when she went to security on that date. (Tr. 68). She also agreed she told the doctor at Concentra the truth as she always told the truth. (Tr. 68). When asked if the Concentra records were incorrect as those records do not include a history of issues with her neck, Ms. Lopez stated she told them about her neck because the pain went all the way up to her neck. (Tr. 69). Ms. Lopez indicated she did not understand why they did not include

everything she said as she always said the truth. (Tr. 70). She indicated the Concentra records are missing information if they do not list her neck as part of her complaints. (Tr. 70-71).

Ms. Lopez agreed Dr. Shukla examined her in December 2009 and diagnosed her with bilateral carpal tunnel syndrome. (Tr. 71). She also agreed she underwent EMG or nerve studies of her hands in 2009. (Tr. 72). She denied any issues with arthritis. (Tr. 72). She reported undergoing brain MRI studies after April 27, 2010. (Tr. 72-73). Ms. Lopez agreed Dr. Shukla's records were correct if the records included a prescription for Neurontin on December 29, 2009. (Tr. 73). When questioned whether Dr. Shukla's records documented left arm numbness on December 14, 2009 for two weeks, Ms. Lopez indicated this is not what she told him. She stated the numbness was along the tips of her hands and, if she put nail polish on her fingers, the numbness went away. (Tr. 73).

Ms. Lopez indicated she recalled going back to work with restrictions at Marriott. (Tr. 74). However, she tried to go back to work to do the job that she could not do. (Tr. 74). She recalled speaking with Rocio Villanueva on various occasions about coming back to work light duty. She also recalled receiving letters from Ms. Villanueva asking her to come back to work when her doctor released her to light duty restrictions. (Tr. 74-75). She identified a letter dated September 23, 2010 from Rocio Villanueva. (Tr. 75). She could not recall if she returned back to work on October 4, 2010, when she was instructed to do so. Ms. Lopez claims she did not receive a letter on October 15, 2010, marked as Respondent's Exhibit 22. (Tr. 77). She did not have any reason to dispute she received it, but she did not recall whether she got it and then noted maybe she did. (Tr. 77). She thought she recalled meeting with various people at Marriott on October 7, 2010 to discuss light duty restrictions. (Tr. 77). Ms. Lopez indicated she may have expressed difficulty doing light duty work before October 29, 2010, due to pain. (Tr. 78). She stated she was not able to stand up because of pain and she could not even fold bags. (Tr. 78). Ms. Lopez recalled receiving a letter from Robert Hawkins on April 24, 2012, marked as Respondent's Exhibit 23. (Tr. 79). She could not remember if she received another letter on May 14, 2012 from Robert Hawkins, identified as Respondent's Exhibit 24. (Tr. 80). She then stated sometimes she would just find letters on the floor as she only had a small mailbox. (Tr. 80). When asked whether she recalled Robert Hawkins offering her jobs at Marriott to return to work, she stated she did not recall very well. (Tr. 80). She then recalled these letters once she learned Robert Hawkins worked in Human Resources. (Tr. 81). She did admit to receiving the letters with the job offers. (Tr. 81). She also agreed it was her responsibility to let her employer know when she was released with restrictions to return to work. (Tr. 81). She testified doctors would give her a piece of paper so she could bring it. (Tr. 81). Ms. Lopez stated she always gave the notes to Rocio. (Tr. 82).

Ms. Lopez agreed Ms. Gwendolyn Simmons, an adjuster from Marriott, contacted her on May 13, 2010 to take a recorded statement. (Tr. 82). Ms. Lopez agreed she gave permission to record the telephone conversation. (Tr. 82). She also stated all of her answers were truthful. (Tr. 82). Ms. Lopez testified she understood what Ms. Simmons asked her through the aid of a translator. (Tr. 83).

Ms. Lopez testified Blue Cross Blue Shield is her group insurance through her husband. (Tr. 84). She testified Blue Cross Blue Shield paid for some of her medical treatment. (Tr. 84).

Ms. Lopez noted she could not recall the last day she worked at Marriott. (Tr. 87). She thought Robert Hawkins indicated she should return to work on April 30, 2012. (Tr. 88). She stated she could not return to work on that date due to pain in her hands. (Tr. 88). However, she testified that she went in on the next day on May 1, 2012. (Tr. 88). Ms. Lopez agreed she did not look for any jobs from May 1, 2012 through August 9, 2013. (Tr. 89).

When asked how she completed job applications listed on her job logs, Ms. Lopez stated she completed those by computer. (Tr. 90). Her daughter would help. (Tr. 90). She also would go to the places themselves. (Tr. 90). Ms. Lopez agreed she did not write on the job logs whether she applied in person or by computer. (Tr. 90).

When asked about her fall in 2009, Ms. Lopez stated she had low back pain. (Tr. 92). She could not recall if she had treatment for her low back in 2009. (Tr. 92). She did agree she saw Dr. Shukla for back pain on January 10, 2013. (Tr. 92). She could not recall if he referred her to Therapy Providers as she did not know the address. (Tr. 92-93). When asked whether she would agree that Dr. Shukla referred her there if those records reflect she saw him in 2013, Ms. Lopez indicated she agreed. (Tr. 93).

When reviewing Respondent's Exhibit 27, FMLA leave paperwork, Ms. Lopez agreed her signature was on page two of the document, but stated Rocio Villanueva helped her complete the rest of the document. (Tr. 95).

On redirect examination, Ms. Lopez indicated that she sometimes understands English. (Tr. 97). She testified she can read and write only if the words are small. (Tr. 97). She completed sixth grade in Mexico. (Tr. 97). She also testified her main complaints included her hand and her neck on April 27, 2010. (Tr. 98-99).

Testimony of Gwendolyn Simmons

Gwendolyn Simmons testified pursuant to subpoena on behalf of Respondent. (Tr. 101). Ms. Simmons stated she is currently employed at Gallagher Bassett Services as a senior resolution manager since October 14, 2014. (Tr. 101). She previously worked at Marriott Claims Services from February 1999 until October 2014. (Tr. 101-102). She worked her way up to a senior claims adjuster. (Tr. 102). On April 27, 2010, she worked as a senior claims adjuster. (Tr. 103). Her job duties included handling workers' compensation and general liability claims for Marriott Hotel Resorts and Suites. (Tr. 103-104). Ms. Simmons had to investigate claims for the associates, which included securing statements from the employer, statements from the associate, contacting the providers, determining compensability, analyzing the claim, and administering benefits to include medical benefits and lost time benefits. (Tr. 104). Ms. Simmons clarified "associates" meant the injured worker. (Tr. 104). She stated she mainly would obtain recorded statements or verbal statement of what occurred in the alleged

accident. (Tr. 104). If the associate was not represented by an attorney, she would obtain a recorded statement. (Tr. 105). She handled cases in Illinois. (Tr. 105). Generally, she would secure recorded statements for claims involving higher values or claims with immediate lost time, back injuries, shoulder injuries, knee injuries, repetitive injuries, and questionable claims so to speak. (Tr. 105).

Ms. Simmons described the process she used in obtaining a recorded statement. (Tr. 106). She had a mini tape recorder and cassette player attached to the phone. (Tr. 106). She would ask permission from the associate to record the conversation. (Tr. 106). If the associate did not give permission, she would still obtain a verbal statement. (Tr. 106).

Ms. Simmons recalled obtaining a recorded statement from Maria Del Carmen Lopez. (Tr. 106). Ms. Lopez was a housekeeper. Ms. Simmons handled her workers' compensation claim. (Tr. 106). Ms. Simmons testified she conducted her normal investigation which included obtaining a recorded statement from Ms. Lopez. (Tr. 107).

She testified the statement was obtained on May 13, 2010. (Tr. 107). Ms. Simmons recently reviewed the written transcription of the recorded statement as well as the audio tape of the conversation. (Tr. 107).

Ms. Simmons testified she, Ms. Lopez, and a translator were present on the phone line when she secured the statement. (Tr. 108). She completed a conference call with the vendor that they used to obtain translation services. Ms. Lopez told her she did not speak English and that is why she used a translator. (Tr. 108). Ms. Simmons identified Respondent's Exhibit 10 as the English version of the recorded statement she obtained from Ms. Lopez. (Tr. 109). She testified she compared this written statement to the audio recording of the same conversation on May 13, 2010. (Tr. 109). This written version was a true and accurate representation of the English translated answers from Ms. Lopez and English questions she asked Ms. Lopez. (Tr. 110). She also identified Respondent's Exhibit 11, which was the CD of the recorded statement. (Tr. 110). Ms. Simmons testified this was initially transcribed in the mini cassette and her office manager transcribed it to a CD to send it to the attorney for Marriott. (Tr. 110-111). Ms. Simmons confirmed she did not change anything said by Ms. Lopez. (Tr. 111). After she obtained a recorded statement, she placed the cassette in a manila slender envelope, sealed it, attached it to the record, the business record, which is in the file locked in her file cabinet. (Tr. 112). She stated it was her practice to secure all of her recorded statement in this manner. (Tr. 112). Ms. Simmons testified the file cabinet was always locked and she and the office manager were the only two people with keys. (Tr. 113). She testified the only time the cassette was removed was to give it to the office manager to transcribe it before it was sent. (Tr. 113). Ms. Simmons agreed there were no changes made to the cassette or to the CD when it was transcribed. (Tr. 113). She testified this audio version was a true and accurate copy of the conversation that occurred on that date. (Tr. 113).

When asked if there is anything that stood out during the recorded statement, Ms. Simmons recalled Ms. Lopez reporting itchiness to her hands from her work as a housekeeper. (Tr. 114-

115). Ms. Simmons testified Ms. Lopez admitted she wore gloves and stated she was using a new gel cleaning product for about a month. (Tr. 115). Ms. Simmons noted it sounded as if Ms. Lopez had an allergic reaction to the cleaning products or to the gloves so that is why she asked her about cleaning products and whether she wore gloves. (Tr. 115). She recalled Ms. Lopez reporting redness and itchiness, but she could not recall whether she said she had burning. (Tr. 116). Ms. Simmons testified Ms. Lopez told her she wanted to bite her hands and scratch them. (Tr. 116). She could not recall whether Ms. Lopez admitted to having treatment for her bilateral hands before this at incident work. (Tr. 117).

Medical Treatment Prior to April 27, 2010:

On December 14, 2009, Ms. Lopez presented to Dr. Shukla. She reported body aches for the past two months, fatigue, and left arm numbness for two weeks. On exam, she exhibited a positive Phalen's and a positive Tinel's test. He diagnosed her with carpal tunnel syndrome, hypertension, and high cholesterol. Her prescribed medications included Lyrica, Celebrex, Avapro, Metoprolol, Niaspan, and Ecasa. Dr. Shukla recommended a carotid duplex, echocardiogram, and EMG/NCV studies. (RX 7, PX 1).

Ms. Lopez underwent EMG/NCV studies with Tapas DasGupta on December 19, 2009. (RX 7). She reported on and off pain and paresthesias of her bilateral upper extremities for three weeks. The results demonstrated bilateral mild carpal tunnel syndrome involving predominantly the component of the nerve with no evidence of cervical radiculopathy or peripheral neuropathy.

On December 29, 2009, Ms. Lopez returned to Dr. Shukla. She reported dizziness since today with high cholesterol and high triglycerides as well as hypertension. He recommended she consider going to the emergency room for checkup. On exam, she exhibited a positive Tinel's and positive dizziness with positional changes. Dr. Shukla prescribed Neurontin.

Medical Treatment as of April 27, 2010:

Ms. Del Carmen Lopez presented to Concentra Medical Center on April 27, 2010. (PX 2). She stated through a translator, "I was washing the bathroom and started feeling a burning sensation on both hands," as well as itching. Ms. Lopez stated there was a new antibacterial soap at work and her pain is located on both palms and described as moderate, burning, warm, and itching and sore and ill-defined. Pain does not radiate. She denies paresthesias, numbness, weakness. Dr. Khojasteh Bahmanbeigi examined her, noting an essentially normal exam with the exception of mild erythema due to scratching and rubbing. He diagnosed her with contact dermatitis and hand pain. Dr. Bahmanbeigi discussed possible causes and recommended she avoid rubbing and scratching her hands, avoid irritants and moisturize the hands frequently. He prescribed hydrocortisone lotion and ibuprofen and referred her to primary care physician at the earliest convenient time. He authorized her off for the remainder of shift, with no restrictions and released her from care.

Ms. Del Carmen Lopez presented to Ryan Fuelleman, DC at Marque Medicos on May 4, 2010. (PX 3). Her complaints now included bilateral wrist, hand, digit pain and neck pain. She stated she experienced a great deal of pain, numbness and tingling in the wrists and fingers bilaterally. She works for a hotel where she does maid services and performs a lot of repetitive type work using her hands with a lot of pulling, gripping and lifting movements at work. She claims she has been dealing with the pain and discomfort for months, but always thought the pain would go away on its own. On April 27, 2010, the pain and discomfort became too intense and she could not take it anymore so she reported the pain and discomfort to her employer and they sent her to the doctor. The doctor told her she had an allergy and sent her back to work. She describes the pain in her neck as sharp and throbbing and increases with movement of her cervical spine. The pain in her wrists, hands and digits has a sensation of numbness, tingling, throbbing, and it is also sharp and increases with movement. The pain is worse in her upper extremities when she is gripping, pulling and lifting. Her upper extremity pain is 9/10, neck pain is 8/10, and she has a sensation of itching in her bilateral wrists, hands and digits at times. She has increased pain when she is relaxing after work. On exam, she reported tenderness to palpation over bilateral wrists, forearms, palms and digits. Her right wrist and digit range of motion was mildly restricted with pain in all planes of motion and she reported left wrist and digit pain with range of motion. She had a positive Phalen's bilaterally, reverse Phalen's bilaterally, Finkelstein's bilaterally, and Tinel's bilaterally for pain and paresthesia in the wrists and digits. She reports tenderness to palpation in the cervical spine at C3-7 bilaterally with mildly restricted cervical range of motion with pain at end ranges. She exhibited a positive cervical compression test and positive shoulder depression test bilaterally for pain and discomfort. Chiropractor Fuelleman recommended chiropractic care and physical therapy. He authorized her off work until May 10, 2010.

Ms. Lopez returned to Dr. Shukla on May 5, 2010. She complained of dizziness for a week and numbness in her bilateral hands. Dr. Shukla diagnosed her with carpal tunnel syndrome. He continued her prescription for Neurontin and noted she should undergo brain MRI studies, a physical therapy consultation EMG studies and see a cardiologist.

On May 5, 2010, she returned to Marque Medicos for chiropractic treatment. Chiropractor Fuelleman also referred her for EMG/NCV studies. On May 6, 2010, Chiropractor Fuelleman referred her for physical therapy, orthopedic and neurology consultations, and pain management. He recommended cervical MRI studies and MRI studies of her bilateral upper extremities. He authorized her off work for two weeks.

On May 8, 2010, Ms. Lopez underwent MRI studies of her brain at St. Jude Medical Clinic. The radiologist noted several non-enhancing foci of altered signal involving the cerebral white matter bilaterally. These are nonspecific findings, but in this middle age female raise the possibility of a demyelinating process such as multiple sclerosis. The lesions are somewhat more peripheral than expected for multiple sclerosis plaques, which are usually paraventricular in distribution. Differential diagnoses include foci of gliosis, which may be related to chronic ischemia, unlikely at age 49 unless there are predisposing factors, such as hypertension, vasculitis, or cardiac disease. These changes could also result from chronic sequelae of viral or

granulomatous process, Lyme disease, sarcoidosis, remote trauma, including barotrauma, and migraine headaches. There is no enhancement to suggest active inflammation or high-grade neoplasm. (PX 1).

On May 10, 2010, Marque Medicos authorized her off work until May 17, 2010 for bilateral wrist, hand, and digit pain as well as numbness, tingling, and cervicalgia. Ms. Lopez underwent x-rays of her bilateral hands and neck. On May 11, 2010, right hand x-rays showed avascular necrosis, left hand x-rays were unremarkable, and cervical x-rays demonstrated biomechanical alterations likely indicative of muscle spasm and/or other soft tissue injury.

At a physical therapy initial evaluation at Marque Medicos on May 14, 2010, Ms. Lopez reported bilateral hand, wrist and forearm pain while working as housekeeper at a hotel as well as considerable neck pain, worse on the right. Chiropractor Fuelleman also referred her for EMG/NCV studies again. On May 15, 2010, Farshad Barkhordar, DC performed EMG/NCV studies at Preferred Open MRI. The results revealed bilateral carpal tunnel syndrome right greater than left side with suspected agitation of the C6 and C7 nerves, most likely secondary to arthritic disorder of the right shoulder.

Dr. Shukla evaluated Ms. Lopez on May 17, 2010. She reported anxiety, dizziness, palpitations, headaches and nervousness. He recommended lab work, including an arthritis profile. Her medications included Naproxen and Flexeril. Dr. Shukla noted she had right carpal tunnel syndrome.

On May 17, 2020, Chiropractor Fuelleman referred her to pain management specialist, Dr. Engel and orthopedic hand surgeon, Dr. Wiesman. Ms. Lopez reported intense neck pain, 8/10, and wrist, hand and digit pain rated 8-9/10. She stated she improved somewhat with the current treatment rendered, but still experiences pain and discomfort in her neck and upper extremities. He recommended she discontinue manual therapy, but continue physical therapy. He recommended EMG studies again. She then underwent additional chiropractic treatment on May 19, 2010 with Ryan Fuelleman at Marque Medicos.

On May 21, 2010, additional EMG studies were performed at Marque Medicos by Francis McCaffery, DC. The results revealed electrophysiologic evidence of a neuropraxic lesion of the median nerve at or about the wrist (carpal tunnel) resulting in prolonged motor and sensory latencies and decreased conduction velocities of the sensory fibers through this region bilaterally. There was no evidence of involvement of the ulnar or radial nerves at this time. As of May 24, 2010, Marque Medicos authorized her off work through June 1, 2010 and recommended physical therapy.

On May 26, 2010, Ryan Fuelleman, DC evaluated Ms. Lopez. She continued to experience severe pain in her cervical spine and bilateral wrists, hands and digits. He referred her again to Dr. Weisman and recommended cervical MRI studies to rule out any disc pathology or other soft tissue pathology. He diagnosed her with bilateral carpal tunnel syndrome.

On May 27, 2010, Dr. Shukla examined her noting she had pain in her right wrist, but she had not started physical therapy. He completed a FMLA certification noting her condition commenced on April 27, 2010. (PX 1). He stated he first evaluated patient on May 5, 2010 for a diagnosis of carpal tunnel syndrome. She was unable to perform repetitive hand movement and should remain off work for 2 weeks, then start part-time at approximately 20 hours per week so she can attend physical therapy.

She underwent cervical MRI studies at Archer Open MRI on May 27, 2010. The results showed spondylotic changes throughout the cervical spine with disc protrusions from C4-5 through C6-7, including a 3 mm broad based protrusion at C5-6 combined with congenital narrowing to result in central stenosis with abutment of the ventral aspect of the spinal cord.

On June 1, 2010, Chiropractor Ryan Fuelleman reviewed the MRI and referred her to Dr. Wiesman. He authorized her off work from June 1, 2010 through June 7, 2010. She had chiropractic treatment on June 4, 2010 and June 7, 2010 at Marque Medicos.

Dr. Irvin Wiesman evaluated her hands at Marque Medicos on June 7, 2010. Her complaints included bilateral wrist pain, right significantly worse than left. She reported onset on April 27, 2010 while doing cleaning at work as a housekeeper. Ms. Lopez developed a numbness and pain in both of her hands with nocturnal paresthesia and clumsiness, right side greater than left as well as decreased range of motion of the right wrist. On exam, Dr. Wiesman noted some right trapezial trigger point tenderness, bilateral positive carpal compression test, Phalen's test, and Tinel's sign of both hands, right side worse than left. She exhibited decreased flexion on the right side of approximately 25° compared to the left with significant tenderness on the mid dorsal wrist on the right side. X-rays of the right wrist reveal advanced stage of Kienböck's disease with lunate collapse and fragmentation, while radiocarpal joint and lunate fossa appear to be pristine. EMG studies revealed bilateral carpal tunnel syndrome. He diagnosed her with advanced stage Kienböck's disease and bilateral carpal tunnel syndrome. He recommended surgical intervention for the Kienböck's disease, noting she would benefit from TRC if the lunate fossa does appear to be pristine, otherwise, she would need some type of partial wrist fusion. He gave her bilateral carpal tunnel splints and recommended she return to work on June 8, 2010 through July 25, 2010 with restrictions of no lifting greater than 5 pounds with right hand. He prescribed physical therapy pending surgery approval.

She continued to attend chiropractic treatment with Ryan Fuelleman at Marque Medicos on June 9, 2010. She reported improvement at another visit with Chiropractor Fuelleman on June 14, 2010. He recommended a consultation with pain management specialist, Dr. Engel, and authorized her off work from June 7, 2010 through June 21, 2010. Her diagnoses included carpal tunnel syndrome, cervical spine disc derangement, bilateral wrist/hand/digit pain and paresthesia, and cervicalgia. Ms. Lopez underwent chiropractic treatment on June 16, 2010.

She saw Dr. Andrew Engel from Medicos Pain and Surgical Specialists on June 17, 2010. Ms. Lopez reported bilateral wrist pain and right-sided neck pain, both rated at 6/10. At work, she felt a great deal of pain, numbness and tingling in her wrist and fingers bilaterally due to

repetitive type work using her hands with pulling, gripping, and lifting movements at work. She reported discomfort and pain for months and hoped the pain would go away, but on April 27, 2010 the pain and discomfort became unbearable. Dr. Engel noted decreased range of motion in her cervical spine with cervical flexion and extension both limited secondary to pain, left lateral rotation causes contralateral pain. Phalen's was positive bilaterally with Tinel's sign positive only on the right. He diagnosed her with hand pain, carpal tunnel syndrome, cervical herniated disc, and cervicalgia. Dr. Engel deferred to Dr. Wiesman regarding physical therapy orders and work status. Dr. Engel prescribed Mobic, Omeprazole, and Soma. He offered round-trip ground non-emergency and non-ambulance-based transportation to facilitate her physician visits and physical therapy appointments. Ms. Lopez denied neck, wrist and hand pain prior to the onset of her work-related injury.

She continued chiropractic treatment with Ryan Fuelleman, DC on June 18, 2010, June 21, 2010, June 23, 2010, June 25, 2010, June 28, 2010, and June 30, 2010. He authorized her off work from June 28, 2010 until July 5, 2010. She also attended a physical therapy re-evaluation on June 30, 2010. On July 5, 2010, July 7, 2010, July 9, 2010, July 12, 2010, she returned for chiropractic treatment with Chiropractor Fuelleman. He instructed her to return to work with restrictions on July 7, 2010 with maximum weight of 5 pounds, no forceful gripping or lifting, but defer to work status recommendations of Dr. Wiesman.

She returned to Dr. Wiesman on July 12, 2010. She reported no numbness and tingling with use of splints and physical therapy. On exam, she exhibited no trapezium tenderness, but had some tenderness over lunate bone of right hand. He recommended a proximal row carpectomy to prevent progression of Kienböck's disease. Dr. Wiesman recommended light duty as of July 13, 2010 with no lifting greater than 5 pounds with the right hand.

Chiropractic treatment continued with Ryan Fuelleman at Marque Medicos on July 14, 2010, July 19, 2010, and July 21, 2010. He noted improvement and she planned to consult with Dr. Robert Goldberg since she will no longer receive care from Dr. Wiesman.

On July 22, 2010, Stacy Pond, PA, evaluated Ms. Lopez at Medicos Pain and Surgical Specialists. She reported neck pain at 5/10, with pain into right shoulder, right hand and upper extremities, including the fingers. Her right hand is more painful than the left overall with cramping in her fingers. She previously had centralized neck pain, now it is only right-sided and her numbness has improved. She complained of dropping things particularly with the right hand due to weakness. Stacy Pond diagnosed her with severe right-sided neck pain with resolution of centralized neck pain, and persistent, right more than left, hand pain, numbness and weakness. In terms of treatment, she recommended follow-up with hand specialist, Dr. Robert Goldberg. She prescribed a C5-6 epidural steroid injection for her discogenic pain, recommended clearance before she undergoes anesthesia, refilled medications and authorized her off work as she is physically incapable of performing a full work duty and her employer has made it clear to her no work is available on restricted capacity. Dr. Sony Nandra of Medicos Pain and Surgical Specialists cleared her for treatment pending lab work on July 23, 2010.

She attended chiropractic visits with Ryan Fuelleman, DC, on July 23, 2010, July 26, 2010, July 27, 2010, July 30, 2010, August 2, 2010, August 4, 2010, August 9, 2010, August 11, 2010, August 12, 2010, August 18, 2010, and August 20, 2010. Her upper extremity pain remained 6/10 with her neck pain ranging from 4-5/10. On September 10, 2010, Marque Medicos instructed her to return to work with restriction of no lifting more than 10 pounds, sit/stand as needed, and no repetitive forceful gripping, lifting, pushing, or pulling.

She attended a physical therapy re-evaluation at Marque Medicos on September 22, 2010 with some improvement reported in hand function. She still reported a lot of pain, tingling and number in her hands, right greater than left. Her neck pain was significantly better. Her progress was slow and she claimed she attempted to return to work, but her employer would not accept the restrictions.

On September 29, 2010, she returned to Dr. Engel with right sided neck pain at 6/10 radiating to her right shoulder with bilateral wrist pain unchanged since previous visit. He recommended medications and homes exercises until she underwent wrist surgery. She remained on light duty for her neck with lifting up to 5 pounds. On October 4, 2010, she was referred to Dr. John Kotis for neck pain, bilateral hand pain, digit pain and numbness.

Dr. Kotis evaluated her on October 11, 2010 at Medicos Pain. She developed pain and numbness in both wrists on April 27, 2010 while working as a housekeeper. On exam, she did not have cervical spine tenderness and she exhibited full cervical range of motion. Dr. Kotis noted bilaterally positive carpal tunnel compression test, both positive Phalen's and Tinel's, right greater than left and pain with palpation over lunate bone. X-rays revealed advanced stage Kienböck's disease with lunate fragmentation and partial collapse. He diagnosed her with advanced stage Kienböck's disease and resolving bilateral carpal tunnel syndrome. He recommended MRI studies of her hand to evaluate integrity of lunate. Dr. Kotis opined she would benefit from a proximal row carpectomy of the lunate fossa. He restricted her to no lifting greater than 5 pounds, noting that her carpal tunnel symptomatology seemed to be improving.

On October 12, 2010, Ms. Lopez returned to Dr. Engel reporting no improvement in her pain. He recommended right C4-6 medial branch blocks. Dr. Engel opined her mechanism of accident is consistent with cervical facet syndrome since she had a lot of pushing and pulling with her right hand and arm leading to her cervical facet syndrome. He offered her roundtrip ground non-emergency and non-ambulance based transportation to facilitate her physician visits and physical therapy exercises. Her restrictions remained no lifting greater than 5 pounds.

Ms. Lopez underwent MRI studies of her right wrist on October 13, 2010 at Archer Open MRI. (PX 6). The results revealed a fracture of the lunate with one fragment displaced dorsally and one volarly. Edema was present in the volarly displaced fragment, which may indicate relatively acute or subacute fracture or possible avascular necrosis within the bone fragment. There was proximal migration of the capitate, torn scapholunate and lunotriquetral ligaments, intercarpal effusion, and a small interosseous ganglion involving the scaphoid and capitate.

On October 15, 2010, Dr. Sony Nandra at Medicos Pain and Surgical Specialists evaluated Ms. Lopez for cervical pain with right arm radiation. She was referred to pain service for treatment. Dr. Engel performed right C4, C5, C6 medial branch blocks on October 18, 2010.

Dr. Edward Goldberg evaluated Ms. Lopez's neck at the request of Respondent for a Section 12 exam on October 22, 2010. (RX 5). Ms. Lopez reported injuring herself while employed as a housekeeper for Marriott Hotels on April 27, 2010. She stated she was working in her third bathroom, and she was wiping and she developed pain and burning in her hands. She did not report any neck pain at that time. Subsequent medical treatment is reviewed. Petitioner complained of burning, numbness, and tingling in both hands. Dr. Goldberg stated he did not address her hands. She complained of right-sided neck pain in the area of the trapezius. It does not go distal. She denies any radicular pain or paresthesias. She denies previous cervical problems. Records do reflect that on 12/14/09, she was seen at St. Jude Medical Center with complaints of feeling tired, body aches for 2 months, and numbness for 2 weeks in the left upper extremity. Exam revealed full range of motion, although flexion was painful. Motor strength was 5/5 from C5-T1 except for finger flexors, extensors, and intrinsics. Dr. Goldberg opined there was no cervical spine injury. He stated there were no cervical spine complaints until she saw the chiropractor. Dr. Goldberg also stated if there was a cervical injury, which in his opinion there was not, it would be a cervical strain, for her burning, numbness, tingling sensations in the hands are not from any cervical etiology. Furthermore, he concluded her motor weakness was effort dependent and not specific to any dermatome. He reviewed her cervical MRI studies noting some annular bulging with minimal stenosis at C5-6. Dr. Goldberg opined her cervical condition is not due to the work accident and no treatment is required. He concluded the epidural injections and extensive chiropractic care were not warranted for her cervical spine. At most, she could have undergone 4-6 weeks of physical therapy, which could include chiropractic care, but nothing thereafter. She reached MMI, could work full duty and the treatment is not causally related to the alleged industrial accident.

On November 2, 2010, Ms. Lopez saw Dr. John Fernandez for a Section 12 exam for her bilateral hands. (RX 14). He obtained a history from Ms. Lopez and the medical records. Dr. Fernandez reviewed a job video of a Marriott housekeeper and a job description. Ms. Lopez stated her symptoms began on or around December 2009. She stated these symptoms began "very gradually." Ms. Lopez attributed her symptoms to her work activities as she stated the symptoms began when she was "cleaning rooms." She stated she was using a spray bottle a lot around that time and switching from hand to hand when she noted numbness and tingling in the fingertips, right slightly greater than left, with an increase in severe pain following that. Ms. Lopez reported the symptoms worsened, particularly with exposure to heavier activities such as those at work. She underwent EMG studies on December 9, 2009, which confirmed a diagnosis of carpal tunnel syndrome. She later underwent further evaluation and treatment through Marque Medicos and underwent repeat EMG testing on May 21, 2010, which again confirmed a diagnosis of bilateral carpal tunnel syndrome. She has been wearing short arm splints and she states that this helps a little. She has complaints of numbness and tingling in both hands, right greater than left. She states that this is "very mild." This apparently has improved, but is

moderately persistent, particularly with activities. Her major complaint has to do with right wrist pain and swelling with associated loss of motion and strength affecting the right wrist itself. She denied similar symptoms on the left. She specifically stated that she had not undergone any significant evaluation or treatment for her symptoms or problems before December 2009. She states that she did not report the problem until April 2010 because she thought it would "go away on its own." Dr. Fernandez reviewed the enclosed job description and job video showing job duties which included emptying trash bins, changing linens, cleaning the bathroom, dusting and vacuuming the room as well as stocking a cart. All of these activities were varied, but the activities involved use of both hands with modest repetition and force.

On exam, she reported subjective paresthesia primarily affecting the median nerve distribution of the index and middle fingers in both hands, right greater than left, definite irritability of the median nerve in both wrists, right greater than left with positive Tinel's, positive Phalen's, and positive median nerve compression test. She reported tenderness to direct palpation along the right wrist dorsally at the radiocarpal joint with pain, accentuated on forced extension/flexion, some crepitus, and Watson maneuver elicited a moderate increase in pain with crepitus. X-rays revealed abnormality only of the right wrist with significant foreshortening of the lunate indicative of Kienböck's disease with collapse. MRI studies from October 13, 2010 revealed advanced evidence of Kienböck's disease with significant involvement of the lunate and collapse indicative of avascular necrosis. Dr. Fernandez diagnosed her with right wrist Kienböck's disease, Stage III/IV, and bilateral wrist carpal tunnel syndrome, right greater than left, EMG positive. Dr. Fernandez opined there is a causal relationship between Ms. Lopez's work activities as a housekeeper with Marriott and the development of her carpal tunnel syndrome in both hands. This was primarily secondary to exposure to repetitive gripping and grasping with moderate force and repetition in both hands over the previous 8 years. He stated there is an effect from the underlying Kienböck's disease to the right wrist, which is not work-related. Specifically, regarding the Kienböck's disease of the right wrist, Dr. Fernandez did not find there was a causal relationship or contribution from her work activities to that condition. He noted Kienböck's disease is avascular necrosis of the lunate. In most cases, it is idiopathic unless associated with some type of significant trauma. He recommended restrictions from forceful or highly repetitive use. Dr. Fernandez also recommended at least one cortisone injection for the carpal tunnel syndrome. If she did not respond to the injection or did not have lasting response, consideration could be given for a second injection or proceeding with surgical intervention. With reference to the Kienböck's disease, He stated it is likely she will require surgical intervention, specifically either a fusion or a proximal row carpectomy.

On January 12, 2011, Ms. Lopez presented to Dr. Charles Carroll at Northwestern Orthopedic Specialists. (PX 10). Her daughter translated. According to Dr. Carroll, she has been under the care of Dr. Engel concerning both of her hands. She is a right-hand dominant housekeeper who injured her left wrist on April 27, 2010 while wiping in the third bathroom and she developed burning in the hands. Studies showed evidence of avascular necrosis as well as bilateral carpal tunnel syndrome. Currently, she is working on a modified schedule. On exam, her right wrist was quite painful with about 20° of flexion and extension, tenderness over the lunate on the right, but not the left with evidence of avascular necrosis of the right lunate. He diagnosed her

with bilateral carpal tunnel syndrome. Dr. Carroll noted the carpal tunnel syndrome did appear to be related to her work activities, but seemed to be responding to conservative care. He recommended splinting at this point, but, if that is not successful, then she should consider carpal tunnel release of the right wrist. He noted this will not change all of her wrist pain as she has the avascular necrosis. Although her left wrist may require surgery in the future, he stated she should go slowly at this point. Dr. Carroll stated she was able to work with a 5-10 pound lifting restriction while wearing a brace as it relates to her carpal tunnel syndrome.

At a follow-up visit with Dr. Carroll on March 30, 2011, she reported worsening of her right hand pain. She continued to work light duty. She stated she cannot raise a glass of water without holding it with two hands. He recommended bilateral carpal tunnel releases and continued light duty work restrictions of no lifting more than 5 pounds with use of splints. On April 11, 2011, she presented to Dr. Carroll to schedule her right carpal tunnel release on April 26, 2011. He stated she would be authorized off work on the date of surgery. She underwent a right open carpal tunnel release with microneuroplasty on April 26, 2011 at Northwestern Memorial Hospital. Dr. Carroll recommended occupational therapy after surgery. On April 29, 2011 she presented to Northwestern Orthopaedic Institute for an initial occupational therapy evaluation. Dr. Carroll re-evaluated her on May 6, 2011. She had no complaints and he instructed her to slowly progress activities to normal as tolerated with scar massage in one week. He authorized her off work and recommended continued occupational therapy. She attended ten occupational therapy visits from May 6, 2011 through June 17, 2011. At times, she reported some improvement, but had ongoing complaints of pain in her fingers. On June 17, 2011, she reported pain in occupational therapy from her neck all the way down, 4/10 at best, 7/10 at worst, 5/10 on average.

Dr. Carroll saw her again on June 17, 2011. She denied numbness and tingling, but reported bone pain from the avascular necrosis not covered by workers' compensation. Her exam was essentially normal with the exception of pain over her lunate consistent with avascular necrosis. Dr. Carroll authorized her off work, recommended additional occupational therapy and over the counter medications as needed. He indicated she should schedule a left carpal tunnel release when approved. Ms. Lopez attended 10 additional occupational therapy visits from June 24, 2011 through August 12, 2011 with ongoing complaints of severe neck pain, sensitivity in her hand, and pain going down her legs to her foot.

When she saw Dr. Carroll on August 17, 2011, she reported stiffness, persistent left hand complaints, and pain in her fingers. She was not ready to undergo surgery for her left hand yet. He examined her right shoulder, noting her rotator cuff and deltoid strength are below normal with pain in shoulder. Her right wrist exam revealed less than full motion in all planes and tenderness over lunate, right more so than left. Dr. Carroll diagnosed her with right CTS stable following injury and surgery, left carpal tunnel syndrome, and avascular necrosis, right greater than left. He recommended occupational therapy as a home program, continued follow-up with Dr. Engel for her neck and shoulder and a left carpal tunnel release when she was ready. He discussed radial shortening as a possibility for her avascular necrosis and instructed her to return to work with restrictions of no lifting greater than 5 pounds, no repetitive movements

and use of a splint with Advil for pain.

Dr. Engel saw her on August 29, 2011 at Medicos Pain and Surgical Specialists. She reported her pain is worse than previous visit, now 6/10 versus 5/10. She had right carpal tunnel release on April 26, 2011 and reported pain along the right side of her neck radiating down her right arm to the wrist. Pain medication helps while moving her neck and using her right arm makes the pain worse. On exam, Dr. Engel noted decreased range of motion in her cervical spine, with extension limited secondary to pain, right lateral rotation causes ipsilateral pain, left lateral rotation causes contralateral pain, and she has pain to palpation in her right trapezius and right splenius cervicis musculature. He diagnosed her with cervical facet syndrome, cervical herniated disc and carpal tunnel syndrome. Dr. Engel referred her to Dr. Erickson, a neurosurgeon noting she has a disc herniation that could be causing her right-sided neck pain that radiates down her arm as she had diagnostic and confirmatory medial branch blocks demonstrating the medial branch nerve was the root cause of her neck pain. He then recommended medial branch radiofrequency ablations with Dr. Erickson's approval to see if that helps decrease her neck pain prior to surgery. The patient wished to speak with Dr. Erickson first. He prescribed medication management, continue restricted duties at work for her neck, and follow up for restrictions from Dr. Carroll as well. She declined the radiofrequency ablations at a follow-up visit with Dr. Engel on September 27, 2011. He issued continued restrictions for her neck.

On September 30, 2011, Ms. Lopez saw Dr. Robert Erickson at Medicos Pain and Surgical Specialists. He scheduled her for an anterior cervical decompression and fusion from C5-C7. He authorized her off work.

On October 11, 2011, Dr. Fernandez re-evaluated Ms. Lopez for a repeat Section 12 exam. He noted she underwent surgery on April 26, 2011, consisting of an open right wrist carpal tunnel release. She reported significant pain involving the right wrist with associated weakness and local swelling with some symptoms in her left hand of numbness and tingling indicative of carpal tunnel syndrome. Her left hand symptoms remained stable. He diagnosed her with right wrist Kienböck's disease with severe collapse. He opined she recovered from her right wrist carpal tunnel syndrome following the release, while her left wrist symptoms remain relatively mild and stable. He pronounced her at MMI with regard to her right-sided carpal tunnel syndrome and the carpal tunnel release surgery. She still exhibited significant active Kienböck's disease, which was not causally related to her occupation. This remained her major limiting problem. Dr. Fernandez noted if she did not wish to undergo a left carpal tunnel release, she reached maximum medical improvement. He further opined that she should not undergo a functional capacity evaluation as it is would be very difficult to distinguish the non-work related component of her Kienböck's disease from the carpal tunnel syndrome and carpal tunnel release surgery in terms of residual complaints. He further stated Ms. Lopez had a previous diagnosis of bilateral carpal tunnel syndrome for which she underwent a right carpal tunnel release surgery, which has resolved. Her symptoms on the left remain stable and may require surgery. However, her major current limitations and disability relate to her Kienböck's disease, which he cannot causally relate to her work activities. For those reasons, she reached MMI and

may attempt to return to full duty work without restriction or limitations, but she still has issues related to the Kienböck's that should be treated outside of the workers' compensation arena.

At a visit on November 22, 2011, Dr. Carroll indicated Ms. Lopez presented to follow-up for her left hand. She still noted pain on right and her hand falls asleep almost every day, with some itching as well. Her function remains unchanged. Ms. Lopez now elected to undergo the left carpal tunnel release. He instructed her to work with restrictions in the meantime of no lifting more than 5-pounds, no repetitive activities, and she must be allowed to wear splints. He would follow her avascular necrosis.

Dr. Peter Kallas cleared her for the left carpal tunnel surgery on December 12, 2011 after evaluating her due to hypertension. On December 15, 2011, she underwent an open left carpal tunnel release with microneuroplasty of the median nerve at Northwestern Memorial Hospital. Following surgery, she remained off work and attended occupational therapy at Northwestern Orthopaedic Institute with an initial evaluation on December 19, 2011. Dr. Carroll saw her on December 28, 2011. She reported no complaints. He instructed her to slowly progress activities to normal as tolerated, start massaging the scar in one week and continue occupational therapy. He authorized her off work. On February 28, 2012, Dr. Carroll saw her again. (PX 12). Her hand was doing better, but she remained tender over incision. He instructed her to continue therapy for range of motion and strength, wear a brace and remain off work. At a therapy visit on March 2, 2012, she reported bilateral upper extremity pain from her hands into her shoulders and neck at a 7/10. She returned to therapy on March 12, 2012 indicating she missed last week due to flu. She denied any change in pain or function since last session. She attended a few occupational therapy visits from March 14, 2021 through March 23, 2012. On March 23, 2012, the therapist noted her participation and independence with activities of daily living appears limited by neck pain moving down her arms. She exhibited minimal changes in functional use of left upper extremity.

On April 18, 2012, Dr. Carroll examined her. She denied numbness or tingling and her function had increased. Ms. Lopez still had deep bone pain, but it was diminished. Her sensation improved. There were no changes on the right and she was not wearing her brace today. He discussed housekeeping work and noted she may return to work with splints and 20 pound lifting restrictions bilaterally. The braces were needed to protect the avascular necrosis and lunate. He recommended she continue her home exercise program. Dr. Carroll completed the Marriott form stating she can work as a housekeeper with restrictions of 10-20 pound bi-manual lifting, wearing braces and varying job tasks. On May 9, 2012, she returned to Dr. Carroll reporting increased pain with a short return to work with radiation noted to head and neck and decreased function. On exam, her shoulders, upper arms, elbows, forearms, wrists, and hands exam were all within normal limits with exception of pain in carpus over each lunate. Dr. Carroll released her to return to work with restrictions of 5 pounds of lifting with each hand, use of braces as needed and he declined to issues any restrictions related to travel to work or opening a bathroom door. He mentioned additional carpal tunnel surgery will not change her condition and he would follow wrist pain from the lunate issue at this time. Nine days later, she returned to Dr. Carroll on May 18, 2012. She reported sensitivity in her palms and some

subjective stabbing pain into arms with pain in carpal bones. He prescribed a FCE which was scheduled on May 24, 2012 to decide final restrictions. Dr. Carroll completed FMLA paperwork with a leave of absence requested until December 1, 2012 which would change as needed after the FCE. In the meantime, he noted she could continue working with a 5-pound lifting restriction and braces.

Ms. Lopez underwent a FCE at Elite Physical Therapy on May 25, 2012. (PX 13). The therapist deemed the results valid, noting she was able to perform a two hand maximum/occasional lift of 10 pounds, placing her at the sedentary demand level. She demonstrated significant deficits performing the physical demands outlined on her job description, most notably with the repetitive reaching, fingering/handling and push/pull tolerances that are required to perform her essential job demands.

Dr. John Fernandez saw Ms. Lopez for another Section 12 exam on June 19, 2012. Ms. Lopez informed Dr. Fernandez she was released to return to work on April 30, 2012. Upon returning to work, she noticed an increase in symptoms of pain while "opening a door" and she then went home on May 1, 2012. She reported continued complaints following her left carpal tunnel release with numbness and tingling in "the whole hand." She reported she is even worse in some ways with pain in the palm itself at the incision site, "cramping" in the forearm musculature bilaterally, left greater than right. Dr. Fernandez noted her symptoms seem to be much more global with radiation and referral proximally along the arms, including up into the right arm axilla, as well as the paracervical spine and neck area. She has continued complaints of wrist pain, right greater than left, rated as an 8/10. On exam, Ms. Lopez reported subjective complaints of paresthesias, more global, involving the forearm and the upper arm itself, including up into the hand, but involving "the whole hand" and "all the fingers." However, her two-point discrimination was 5 mm throughout the fingertips in both hands. Provocative testing was negative. She had complaints of general weakness and she actually registered nearly a 0 on grip strength testing in either hand. Dr. Fernandez noted she was not even able to perform rapid exchange which was somewhat non-physiologic and nonorganic nor could he explain this issue. On exam, there were no obvious areas of atrophy or motor dysfunction on testing, but she did exhibit significant weakness subjectively. There was some swelling along the wrists, right greater than left which he described as somewhat fusiform and global. Ms. Lopez reported tenderness along the wrist, both dorsal and palmar, right slightly greater than left, tenderness also along the myofascial planes of the forearm, left greater than right, particularly proximally near the elbow. X-rays of the right wrist revealed significant findings consistent with Kienböck's disease with very advanced and severe findings. He also noted some changes of the joint on the left wrist indicative of possible inflammatory arthropathy. Dr. Fernandez stated she had surgeries for bilateral carpal tunnel with significant pain and dysfunctional complaints in the upper extremities involving the hands, wrists, forearms, and the arms in general including up into and including the neck. He did not have a good or complete diagnosis for those complaints, but he opined within a reasonable degree of certainty that these complaints are no longer related to the carpal tunnel syndrome. Dr. Fernandez also commented about the overwhelming subjective complaints, while the only objective findings include the substantial radiographic findings, right greater than left, primarily involving the

Kienböck's disease. In addition to her grip strength nearly registering 0, without the ability to do any rapid exchange, she also had significant disability seen on her DASH questionnaire where she registered a 76.6. He stated this is somewhat out of alignment given the objective findings. He concluded she absolutely reached maximum medical improvement with no further or ongoing care or treatment related to the carpal tunnel syndrome and the carpal tunnel release surgeries. He opined her current complaints are not related to the carpal tunnel syndrome and the findings are no longer in an anatomic distribution. She exhibited no focal irritability or provocative findings indicating local compressive neuropathy. Dr. Fernandez noted she had successful surgeries releasing pressure of the nerve at the wrist. He opined it is possible her pain complaints originated from another area, including the neck, or she has some type of myofascial pain syndrome and/or inflammatory arthropathy, as evidenced by the x-rays including the evidence of Kienböck's disease. He opined those are not related to work. Dr. Fernandez did not question whether or not Ms. Lopez continues to have significant pain complaints or even dysfunctional complaints involving the right hand or arm or even the left side, but could not relate this to her carpal tunnel syndrome or work. She reached MMI from her carpal tunnel release surgeries with no signs of symptoms of residual carpal tunnel syndrome related to the work component. From a work standpoint, he opined she can work full duty capacity without restriction or limitation related to the carpal tunnel syndrome and the carpal tunnel release surgeries. This, however, has nothing or little to do with her overall general complaints involving both upper extremities which are not fully explained, but are definitely not work-related. He continued to hold the opinion her Kienböck's disease is not work-related and at this time would hold the opinion that her current complaints and disabilities are not work-related.

Ms. Lopez returned to Dr. Engel on July 3, 2012. Her neck pain was 6/10, slightly improved. Dendracin cream improved her pain. On exam, Spurling's test positive on the right, negative on the left. Tinel's test was negative bilaterally at the wrist and Phalen's test was negative bilaterally as well. Cervical range of motion limited with extension and flexion, secondary to pain with reported tenderness to palpation over the right trapezius. Dr. Engel diagnosed her with a herniated cervical disc and carpal tunnel syndrome. He noted he needed the results from the FCE and once she was discharged from Dr. Carroll, she would be a candidate for surgery with Dr. Erickson. He authorized her off work for her cervical herniated disc.

Ms. Lopez saw Dr. Engel on August 9, 2012. Her pain complaints remained the same. Her exam remained the same as well. He authorized her off work and noted she may be a candidate for an anterior cervical decompression fusion when she is discharged from care by Dr. Carroll.

Dr. Carroll re-evaluated Ms. Lopez on September 26, 2012. She was last seen on May 18, 2012. She reported some right-hand numbness along the dorsum up to her neck with pain in her shoulders. Her past medical history was significant for depression, osteoarthritis, chronic back pain, carpal tunnel syndrome, and a right wrist injury. On examination, she exhibited full range of motion bilaterally of her wrists. She reported tenderness of the carpal region with no provocative testing positive for carpal tunnel syndrome. Dr. Carroll diagnosed her with bilateral carpal tunnel syndrome, impingement of the shoulders, and cervical pain. He recommended

occupational therapy one to two times per week for four to six weeks and instructed her to return as needed. With regard to her work status, he noted she should check with her primary care doctor with regard to her neck and shoulder, but she was at MMI for her hands.

Dr. Engel examined Ms. Lopez on December 20, 2012. She reported pain 7/10, slightly worse on the right. She also had pain in her bilateral wrists. Upon examination, Spurling's test was positive on the right, negative on the left and she had limited range of motion of her cervical spine. He instructed her to follow-up with Dr. Erickson as she needed surgery.

On January 9, 2013, Ms. Lopez returned to Dr. Shukla, her primary care doctor. She reported back pain diffusely, chronic and constant. Her symptoms gradually started two weeks earlier. She exhibited a positive straight leg raising test, tenderness over the right cervical spine and tenderness in the lumbar spine as well as pain in her right foot with a small cyst along the top of her right foot. Dr. Shukla diagnosed her with radiculopathy, ganglion cyst, neck pain and pain in the back. He referred her for physical therapy and to a podiatrist to evaluate the cyst.

On April 8, 2013, Ms. Lopez presented to Dr. Laura Jawidzik. (PX 16). She reported right shoulder and neck pain. According to the records, she was injured at work three years earlier and had surgery on her hands. She also reported falling at work in the bathroom in August 2009 and stated she could not get up. She denied striking her head. Ms. Lopez reported immediate symptoms with limping, pain in her groin, and pain in her low back and butt. She denied seeking medical attention right away. Ms. Lopez reported difficulty opening doors, tying her shoes, and opening water bottles. She stated she has trouble turning her head due to pain. She denied prior MRI studies or x-rays of her shoulder. Her pain improved with therapy. Her medications included Oretic, Cardura, and aspirin. Upon examination, she exhibited numbness, tingling, slurred speech, dizziness, and difficulty walking. Her blood pressure is 160/100. Motor exam was 5/5 in all extremities bilaterally with some giveaway weakness. Strength was full with encouragement. Sensory exam was normal to pin prick with diminished sensation to pin in digits one and two of both hands. Passive range of motion of the shoulder was full bilaterally and active range of motion was full although when asked to raise her arm she seemed limited. Tinel's sign at the wrists was negative bilaterally. The doctor reviewed several EMG reports that suggested bilateral carpal tunnel syndrome and possible C6-C7 radiculopathy on the right. Dr. Jawidzik diagnosed her with bilateral carpal tunnel syndrome and neck pain. She could not find much objectively wrong with her on exam except she held her right arm/shoulder stiffly. The doctor noted Ms. Lopez could relax when asked. She stated her shoulder is positioned this way due to pain. The doctor referred her for cervical MRI studies and x-rays of the right shoulder.

On April 22, 2013, Ms. Lopez underwent MRI studies at Rush University Medical Center. The radiologist noted severe degenerative changes at C5-6 with a broad-based right asymmetric disk osteophyte complex indenting the spinal cord and contributing to severe spinal canal stenosis. Severe foraminal narrowing was present on the right at C4-5 and bilaterally at C5-6. The films were not compared to prior MRI studies.

Dr. Shukla authored a work note on May 6, 2013 indicating Ms. Lopez remained under his care

and she was able to return to work with a two-hand occasional lift of 10 pounds from floor to chest.

Ms. Lopez returned to Dr. Jawidzik on July 23, 2013. She completed physical therapy in May, but denied any improvement. She reported neck pain into her right arm and hand. She felt as if her right side was weak, including her arm and leg. When she walks, she experienced pain in the low back into her leg. She has trouble cutting food and dropped things out of her hands. She reported using hot patches and lidocaine gel for the neck. On examination, her blood pressure was166/92. Pin sensation was normal at today's visit. Dr. Jawidzik again noted she objectively did not detect much in terms of weakness on exam. She suggested a referral to a pain management specialist for possible injections in the neck and suggested Ms. Lopez could also seek a surgical opinion regarding the spinal stenosis if pain management did not help. Dr. Jawidzik encouraged Ms. Lopez to continue her physical therapy exercises at home.

On August 20, 2013, Ms. Lopez presented to Dr. Ezequiel Mendez. (PX 15). She reported she felt sad, worried, and depressed and unable to sleep for two months. Her blood pressure was 140/82. He diagnosed with hypertension, hyperlipidemia, and depression. He ordered blood work and instructed her to take Prozac.

On October 28, 2013, Ms. Lopez presented to Dr. Marie Fisfalen. (PX 17). She reported major depression and anxiety since 2010 after an accident at work. She worked as a cleaning staff and slipped, fell down on her back during her work shift and heard her back/neck crack as she was getting up from the floor. She has had pain and severe carpal tunnel since and forced to stop work and her family has been financially unstable. She reported brain fog, lack of focus, depressive mood, crying spells, lack of motivation and a blunted affect. She has been taking medication for pain and Prozac for depression without decrease in symptoms.

Ms. Lopez returned to Dr. Fisfalen on November 18, 2013 for a psychiatric evaluation after a referral by her lawyer. She reported she was unable to work due to neck, shoulder, and back pain as well as carpal tunnel syndrome. Dr. Fisfalen diagnosed with adjustment disorder with depressed mood, rule out major depressive disorder single episodes, chronic pain, hypertension, carpal tunnel syndrome with surgery, cervical facet syndrome, cervical disc herniation and noted she is mother to seven children. She recommended lab tests.

On December 12, 2013, Dr. Fernandez authored an addendum report after reviewing the FCE. He noted he could not find any disclosed validity measurements. Normal dynamometric measurements are used and these were not applicable as they were bilateral upper extremity diagnoses. There was only observed “self-limiting behavior” which was used for consistency efforts. Otherwise, there was no disclosed validity measurements he could find in the report. Dr. Fernandez stated even Dr. Carroll documented in his notes there was no evidence of residual carpal tunnel syndrome as her two point discrimination was 5 mm in all of the digits and there was no provocative testing noted for carpal tunnel syndrome. There is simply no objective evidence of carpal tunnel syndrome or the residuals of carpal tunnel syndrome. Therefore, any residual complaints and symptoms would not be attributable to that condition.

Dr. Fernandez's opinions remained the same following his review of the FCE. He commented how the FCE report simply states Ms. Del Carmen Lopez continues to have residual complaints which place her at a sedentary physical demand level, but the report does not specify what exactly is leading to those functional complaints. Further, based on his evaluation, it appears that much of this can be subjectively generated and does not have much objective basis based on what he saw, so the FCE is very limited with regard to that issue.

Ms. Lopez continued treating with her primary care doctor, Dr. Mendez and with Dr. Fisfalen. On July 8, 2016, Ms. Lopez reported right lumbar pain radiating to her right leg. She was referred to an orthopedic doctor.

On May 8, 2017, Dr. Fisfalen evaluated Ms. Lopez, noting she is an unemployed, married, Spanish-speaking female from Mexico who was referred to the clinic by her lawyer. She felt good, more relaxed. She still had right sciatica with tingling in her hands and arms and remained limited in her daily activities. She denied any past psychiatric history. Past medical history is significant for bilateral carpal tunnel surgery in both hands. Her current medications included ibuprofen 200 mg, aspirin, Simvastatin and Doxazosin.

At a visit with Dr. Fisfalen on January 3, 2018, Ms. Lopez followed up for medication management. She noted sadness and depression occasionally, once or twice a week due to not working for the last eight years (due to carpal tunnel) and bilateral hand symptoms affect daily activities such as cleaning. Stress is relieved by going to church and playing with her grandkids. Dr. Fisfalen noted her mood remained depressed.

At another visit with Dr. Fisfalen on March 6, 2019, Ms. Lopez reported she has a hearing in April. She reported chronic pain in the right side of her body to Dr. Fisfalen, noting that she cannot take care of her grandchildren, work, or open bottles. She began to cry. She stated she is on disability and ten years ago she injured her back at work. She reported that she enjoys gardening and taking care of plants in her apartment and going to church as well as taking care of her grandchildren.

Deposition of Dr. Charles Carroll

The parties proceeded with the evidence deposition of Dr. Charles Carroll on November 13, 2013. (PX 36). Dr. Carroll testified he is licensed to practice medicine in Illinois. He also attended a hand surgery fellowship at the Indiana Hand Center from 1987 to 1988. (PX 36 at 5). Dr. Carroll noted Ms. Lopez developed difficulty with their hands and pain specifically in the area of her left wrist on or about April 27 of 2010. (PX 36 at 8). This pain started while cleaning a bathtub. She sought treatment and there was a question of an allergy. (PX 36 at 8-9). Dr. Carroll testified he first saw her on January 12, 2011. (PX 36 at 7). He diagnosed her predominantly with carpal tunnel syndrome, although she also had avascular necrosis of the lunate, which did not seem as severe as the carpal tunnel syndrome. (PX 36 at 10). Dr. Carroll testified her bilateral carpal tunnel syndrome was causally related to her work activities even though he had not seen a job description of any kind. (PX 36 at 10-11). Dr. Carroll reviewed the

operative report on April 26, 2011, detailing her right carpal tunnel release and noting substantial scarring was present due to an inflammatory process adhering to the nerve, but the nerve had not been scarred in a permanent fashion. (PX 36 at 13-14). He testified he performed a similar surgery on the left hand on December 15, 2011. (PX 36 at 14). Dr. Carroll stated he saw her on April 18, 2012 and she appeared to be improving. (PX 36 at 16). He recommended she wear bilateral wrist splints to protect her wrists and return to work with lifting up to 25 pounds bilaterally. (PX 36 at 17). He referred her to her primary care physician for some other health issues. (PX 36 at 17). Dr. Carroll noted she returned to work and saw him on May 9, 2012. (PX 36 at 18). She alleged increased pain during a very short return to work with no evidence of numbness or tingling and radiation of pain toward her head and neck. (PX 36 at 18). Dr. Carroll testified she reported discomfort with palpation of one of the carpal bones in the center of her wrist where she had difficulty with avascular necrosis, which had been stable with some occasional symptomatic flares. (PX 36 at 18). Dr. Carroll testified he referred her for a functional capacity evaluation and instructed her to continue wearing her braces. (PX 36 at 19). He saw her on May 18, 2012 when she reported a decrease in her pain with increased motion and her function had improved. (PX 36 at 20). She denied shoulder or elbow complaints and still had pain related to the carpal or wrist bones. (PX 36 at 20). He restricted her to no lifting more than five pounds while using braces. (PX 36 at 20–21). Dr. Carroll testified he last saw her on September 26, 2012 and reviewed the functional capacity evaluation she underwent on May 25, 2012. (PX 36 at 21). He pronounced her at maximum medical improvement and issued permanent restrictions of using braces as necessary, 10-pounds bi-manual lifting, or lifting between five to ten pounds with each hand alone. (PX 36 at 22-23). Dr. Carroll explained these restrictions were necessary based on the residuals of the disease process, the discomfort she had relative to the avascular necrosis, and the development of some neck and shoulder pain. (PX 36 at 23).

On cross-examination, Dr. Carroll was unable to testify when Ms. Lopez's right hand carpal tunnel syndrome occurred. (PX 36 at 24). He believed those symptoms appeared over time, but he did not see her until a later date, so he could not testify with primary knowledge about the onset of her right-hand symptoms. (PX 36 at 24). When asked which medical records he reviewed, Dr. Carroll stated he may have seen records from Dr. Fernandez and Dr. Engel at Marque Medicos (PX 36 at 25). He testified Dr. Engel treated her for carpal tunnel and maybe the avascular necrosis of the lunate, but he could not definitely speak to what Dr. Engel treated her for as he could not independently remember. (PX 36 at 25-26). Dr. Carroll did not have an opportunity to review any x-rays of either her hands or wrists to determine whether avascular necrosis was present as of April 27, 2010. (PX 36 at 26). Dr. Carroll agreed he did not review a job description. (PX 36 at 28). He could not recall the validity testing, if any, documented in the FCE as he did not have the report in front of him at his deposition. (PX 36 at 29). Dr. Carroll testified the FCE would speak for itself so if the therapist thought it was valid, it looked pretty reasonable to him. (PX 36 at 30). He could not recall who referred Ms. Lopez to him. (PX 36 at 30). When asked which conditions he treated, Dr. Carroll noted he kept track of the avascular necrosis, he treated her carpal tunnel syndrome, but he deferred anything regarding her neck to her primary care physician. (PX 36 at 31). Dr. Carroll agreed he did not treat her for the avascular necrosis, nor has he rendered any opinions regarding her avascular necrosis, but the

splints may have helped that condition. (PX 36 at 33). He stated he would not offer opinions on that condition. (PX 36 at 33). Dr. Carroll testified his recommendation to wear splints was due to both the residuals of carpal tunnel and her avascular necrosis. (PX 36 at 33). Dr. Carroll stated her permanent restrictions were for the avascular necrosis and the carpal tunnel, more than the neck and shoulder issues. (PX 36 at 34). When asked whether her carpal tunnel syndrome improved after the surgeries, Dr. Carroll noted her sensation got better, her median nerve became less sensitive, and her use of her hands improved. (PX 36 at 34). Dr. Carroll discussed his office notes at the final visit on September 26, 2012 ,where he noted her pain was global on exam and stated it was throughout the whole area and not localized in one particular place, so it was difficult to determine exactly which structure was causing all of her pain. (PX 36 at 35). When asked about his notes referencing no provocative tests for carpal tunnel syndrome at the final visit in September 2012, Dr. Carroll explained this meant the carpal tunnel syndrome had now improved and she no longer had provocative physical findings of carpal tunnel syndrome. (PX 36 at 36). Dr. Carroll testified her grip strength was ten pounds in each hand when he saw her on September 26, 2012. (PX 36 at 38). Dr. Carroll was unaware how long she attempted to return to work in 2012 as he never got an accurate representation if it was a couple days or a couple weeks, so he could not comment. (PX 36 at 39).

Deposition of Dr. John Fernandez

The parties proceeded with the evidence deposition of Dr. John Fernandez on March 7, 2014. (RX 14). Dr. Fernandez testified he is licensed to practice medicine in the State of Illinois. He is also board certified in orthopedic surgery, hand and microsurgery. (RX 14 at 5-6). Dr. Fernandez stated he treats carpal tunnel syndrome and performs carpal tunnel releases. (RX 14 at 8). When he first examined Ms. Lopez on November 2, 2010, she informed him her symptoms began in December 2009 with no history of an event or trauma. (RX 14 at 10). She attributed her symptoms to her work activities, specifically “cleaning rooms". (RX 14 at 10). Ms. Lopez informed Dr. Fernandez she used a spray bottle a lot around that time and switched from hand-to-hand when she noticed numbness and tingling, right greater than left, with severe pain. (RX 14 at 10). She also noticed pain and swelling in her right wrist. (RX 14 at 10). Dr. Fernandez testified he is fluent in Spanish and the DASH questionnaire was administered to Ms. Lopez in Spanish. (RX 14 at 11).

At the time of his initial evaluation on November 2, 2010, Ms. Lopez’s complaints included numbness and tingling in both hands, right greater than left. (RX 14 at 12-13). She reported loss of motion and strength in the right wrist itself, which she did not have on the left. (RX 14 at 13). Her past medical history was significant for hypertension, some arthritis, and thyroid disease. (RX 14 at 13). Dr. Fernandez stated thyroid disease could be a factor in the development of carpal tunnel syndrome. (RX 14 at 13-14). He described her as a 5'2", 150 pound, 49-year-old, right-hand dominant female. (RX 14 at 14). During his examination, she exhibited neurologic complaints consistent with carpal tunnel syndrome including positive Phalen's test, Tinel's sign, and a median nerve compression test. (RX 14 at 15). There was no significant atrophy or paralysis of the thenar intrinsic muscles, and she did not have any sensory loss, meaning her two-point discrimination was 5 mm. (RX 14 at 15). She also exhibited a

positive Watson's maneuver, which suggested instability between the scaphoid and lunate bones. (RX 14 at 16). Ms. Lopez had objective loss of motion by half of normal on the right only. (RX 14 at 16). X-rays of both wrists and hands were obtained. (RX 14 at 17). Right hand x-rays showed significant evidence for Kienböck's disease with collapse and foreshortening of the lunate bone on the right. Dr. Fernandez explained that Kienböck's disease is also referred to as avascular necrosis of the lunate bone. This results from loss of blood supply to that bone, causing the bone to eventually die. (RX 14 at 18). This condition has a relatively guarded prognosis. (RX 14 at 18). Dr. Fernandez noted this condition may occur bilaterally, but that is extremely rare. (RX 14 at 19). When asked about the cause of this disease, Dr. Fernandez stated most cases are idiopathic, meaning there is no known cause. This condition has also been associated with traumatic conditions, like major dislocations or fractures at the wrist. (RX 14 at 19). It may also be associated with types of coagulopathic diseases, such as sickle cell disease, or result from use of certain medications, such as high-dose steroids. (RX 14 at 20). Dr. Fernandez noted there may be a genetic predisposition to avascular necrosis. (RX 14 at 20). Dr. Fernandez reviewed MRI studies of her right hand obtained on October 13, 2010 (RX 14 at 21). The MRI films revealed Kienböck's disease with collapse of the lunate consistent with avascular necrosis, which appeared to be stage IIIA or IIIB. (RX 14 at 21). He noted a CT scan could confirm the stage for sure as it was fairly advanced. (RX 14 at 21).

Dr. Fernandez testified he diagnosed her with bilateral carpal tunnel syndrome, EMG positive, right greater than left, as well as right wrist Kienböck's disease stage III or stage IV. (RX 14 at 22). He opined her bilateral carpal tunnel syndrome was related to the work activities he viewed on the job video as well as those duties outlined in the job description. (RX 14 at 23). Dr. Fernandez testified her Kienböck's disease was not related to her activities as a housekeeper. (RX 14 at 23). He concluded she should undergo bilateral carpal tunnel releases if she did not respond to conservative treatment. (RX 14 at 24). He also noted she may require surgical intervention in the future for Kienböck's disease, including either a proximal row carpectomy or a fusion. (RX 14 at 24). Dr. Fernandez confirmed any treatment for her Kienböck's disease was not related to her work activities. (RX 14 at 25). With regard to the carpal tunnel syndrome, he concluded she could return to work with restrictions of no force or repetition, but those restrictions should improve with treatment and she would eventually get rid of those restrictions. (RX 14 at 25). However, Dr. Fernandez testified there was a poor prognosis with regard to her Kienböck's disease as there would likely be permanency involved with that condition. (RX 14 at 25). If she underwent surgery for the Kienböck's disease, it would be difficult for her to return to work as a housekeeper on a permanent basis. (RX 14 at 28).

Dr. Fernandez testified about the second report he authored after he evaluated Ms. Lopez on October 11, 2011. (RX 14 at 29). At that time, she had undergone an open right carpal tunnel release on April 26, 2011 with significant pain complaints related to the right wrist, including weakness and local swelling. (RX 14 at 29). His physical examination revealed continued evidence of carpal tunnel syndrome on the left and loss of motion with pain and swelling on the right related to the Kienböck's disease. (RX 14 at 30). Dr. Fernandez noted her neurologic symptoms had resolved on the right and her x-rays revealed continued evidence of Kienböck's

disease, which a progressed to a severe collapse. (RX 14 at 30-31). Dr. Fernandez opined she had reached maximum medical improvement related to the right carpal tunnel syndrome itself although she continued to have significant problems with regard to the Kienböck's disease. (RX 14 at 32). He opined she had not reached maximum medical improvement for her left carpal tunnel syndrome as she required further treatment, specifically surgery. (RX 14 at 32-33). If she chose not to undergo surgery for the left carpal tunnel syndrome, Dr. Fernandez noted she would be at MMI. (RX 14 at 34). He concluded she could resume her full duties. (RX 14 at 34). Dr. Fernandez stated a functional capacity evaluation would not be beneficial from the carpal tunnel standpoint as there was no objective basis you could measure in light of her pretty significant Kienböck's disease, which would result in fairly significant limitation if she underwent an FCE. (RX 14 at 34-35).

Dr. Fernandez discussed his third report, authored after he examined Ms. Lopez on June 19, 2012. (RX 14 at 35). He noted Ms. Lopez had now undergone a left open carpal tunnel release by Dr. Carroll on December 15, 2011 and she was discharged to work by Dr. Carroll on April 30, 2012. (RX 14 at 36). However, she told him she returned to work and "opened a door" when she noticed an increase in pain and symptoms and then went home on May 1, 2012. (RX 14 at 36). Her complaints included minimal improvement with continued residual numbness and tingling of the "whole hand". She felt in some ways worse with pain in the palm at the incision site as well as cramping. This was on her left side. (RX 14 at 36-37). Her symptoms radiated up the arms to the paracervical area and neck area. She had complaints of wrist pain bilaterally, right greater than left. (RX 14 at 37-38). He administered a DASH questionnaire in Spanish which is a subjective questionnaire determining levels of disability. Ms. Lopez scored a 76.6 which is moderate to severe. (RX 14 at 38). Dr. Fernandez clarified how the DASH questionnaire actually does not allow you to specify whether you are more limited in one hand versus the other, or more limited with regard to her carpal tunnel versus Kienböck's disease. (RX 14 of 39). Her sensory exam revealed subjective complaints of numbness and tingling involving all the fingers as well as the whole hand, which was nonspecific or non-physiologic. (RX 14 at 40). Provocative testing for carpal tunnel syndrome was negative in terms of the median nerve and ulnar nerve, including a negative Tinel's, negative Phalen's, and a negative median nerve compression test. (RX 14 at 40). Dr. Fernandez performed a motor examination, which included grip strength testing. (RX 14 at 41). Dr. Fernandez noted her grip strength nearly registered zero bilaterally, which was very unusual. (RX 14 at 40). He stated he tried to perform rapid exchange grip testing, but she was not able to really perform that, which again was very unusual. (RX 14 at 42). He did not have a physiologic reason why she could not do that as there were no signs of atrophy, no signs of motor dysfunction, and just a lot of subjective complaints and weakness. (RX 14 at 42). While he noted swelling in the right wrist, it was not specific to any particular part of the wrist, and she exhibited some tenderness along both wrists at the dorsum, or top. (RX 14 at 42-43). Her range of motion was full at both elbows and both forearms, but both wrists were limited to 30/30, which was worse than his last exam. (RX 14 at 43). He obtained x-rays with findings of advanced Kienböck's disease on the right, with new findings on the left of what appeared to be an inflammatory arthropathy. (RX 14 at 44). Dr. Fernandez noted this was not related to Kienböck's disease, nor was it related to osteoarthritis, but it could have been related to something like rheumatoid arthritis, psoriatic

arthritis, or lupus. (RX 14 at 44-45). At the time of his evaluation on June 19, 2012, Dr. Fernandez noted his diagnosis changed as she no longer had carpal tunnel syndrome as her surgeries relieved her complaints. (RX 14 at 46). He did still note Kienböck's disease in the right wrist and possible inflammatory arthropathy in the left wrist, but she also had a lot of pain complaints he could not explain. (RX 14 at 46). She reported pain radiating to the neck, the upper arms, the forearms, and the elbow with weakness.

When asked about the FCE on cross-examination, Dr. Fernandez stated he did not need an FCE to determine that a woman with severe Kienböck's disease would require some type of restriction, likely light duty or sedentary in nature. (RX 14 at 68-69). He agreed Dr. Carroll issued work restrictions at the last visit on September 26, 2012, which Dr. Fernandez did not dispute were necessary, but Dr. Fernandez did not relate those restrictions to her carpal tunnel syndrome. (RX 14 at 70). When questioned further about the validity of the FCE, Dr. Fernandez noted he is not disagreeing with what the therapist used to assess validity, specifically stating Ms. Lopez exhibited no self-limiting behavior, but he stated the FCE should be classified as what it is, a 2 ½ to 3-page FCE with not a ton of information. (RX 14 at 80-81).

Deposition of Edward Pagella

The parties proceeded with the evidence deposition of Edward Pagella on April 16, 2015. Mr. Pagella testified he is a vocational rehabilitation consultant. (PX 37 at 4-5). He has a certified rehabilitation counseling certification and he is an LCPC or licensed clinical professional counselor. (PX 37 at 5). He also received his Master's degree in 1987 in rehabilitation counseling. (PX 37 at 5). Mr. Pagella is employed as a vocational rehabilitation consultant with Health Connection since 1989 and he is also the president of the company. (PX 37 at 7). Mr. Pagella noted petitioner's attorney requested he perform a study to evaluate the employability of Ms. Lopez. (PX 37 at 9). He met with Ms. Lopez on April 22, 2014. (PX 37 at 10). He initially concluded she was unable to speak any English when he first sat down with her, so he needed to provide a translator. (PX 37 at 10). He also reviewed some medical records from Dr. Carroll, the functional capacity evaluation from Elite Physical Therapy, and the job log sheet. (PX 37 at 11-12). In addition, Mr. Pagella later reviewed a vocational assessment from Eric Flanagan. (PX 37 at 13). Mr. Pagella noted the functional capacity evaluation showed Ms. Lopez had the ability to perform work at a sedentary level. (PX 37 at 14). He reviewed her educational history and noted she went to school in Mexico only up to the sixth grade, and she is able to read and write in Spanish, but not in English. (PX 37 at 15). She had no training or certifications and no computer skills. (PX 37 at 15-16). Her employment history reflects she was a housekeeper at Marriott and Embassy Suites since 2001. (PX 37 at 16). Mr. Pagella stated that, given her restrictions from the functional capacity evaluation and Dr. Carroll, he had an opinion within a reasonable degree of vocational certainty whether those precluded Ms. Lopez from returning to work as a housekeeper. (PX 37 at 18). He discussed sedentary work which would be available including clerical occupations in an office setting and telemarketing positions, noting most of those positions require use of your hands. (PX 37 at 20-22). He concluded there was no work out there for her given her limited education, inability to read, write and speak the English language and her restrictions. (PX 37 at 22-23). Mr. Pagella discussed the job logs Ms.

Lopez kept and noted any additional job seeking would be futile as any job seeking in general would have been futile. (PX 37 at 27-28). He stated the job log demonstrated Ms. Lopez did not know what she was doing while searching for jobs. (PX 37 at 28).

Mr. Pagella discussed the report of Eric Flanagan and noted that a certified rehabilitation consultant should be making the opinions outlined by Mr. Flanagan. (PX 37 at 29). When asked whether Mr. Flanagan was a certified rehabilitation counselor, Mr. Pagella admitted he had no idea. (PX 37 at 29). He further stated the positions located by Mr. Flanagan could not be performed by an individual who cannot read, write, or speak the English language, specifically referencing fast food workers, retail salesclerks, and grocery salesclerks. (PX 37 at 31-32).

On cross-examination, Mr. Pagella agreed he met with Ms. Lopez on one occasion. (PX 37 at 36). Mr. Pagella could not state whether he reviewed more records from Dr. Carroll or just the record of her visit on September 26, 2012. (PX 37 at 36-37). He believed he reviewed physical therapy notes, but he could not remember, and stated those notes would not be relevant for him anyway. (PX-37 at 38-39). Mr. Pagella testified he saw Dr. Fernandez's report discussed in Mr. Flanagan's report, but he did not review Dr. Fernandez's actual reports. (PX 37 at 44-45). Mr. Pagella would not agree his opinions were not based on a complete picture of all the facts in this case. (PX 37 at 45). As a certified rehabilitation consultant, he testified he is bound by the claimant with regard to what she feels she is capable of doing as well as bound by the treating physician. (PX 37 at 45-46). He agreed he is not qualified to state whether the functional capacity evaluation was objective. (PX 37 at 46). Mr. Pagella testified her diagnosis was bilateral carpal tunnel syndrome as that is the diagnosis he obtained off the operative reports. (PX 37 at 46).

Mr. Pagella stated Ms. Lopez was healthy prior to her claimed work related injury on April 27, 2010. (PX 37 at 47-48). When asked if her bilateral hands were the only part of her body at issue when she saw him, Mr. Pagella stated he believed they were according to the doctor's diagnosis. (PX-37 at 47-48). When asked how long he spent with Ms. Lopez, he responded it typically takes him an hour and a half to two hours for an employability study. (PX 37 at 49). When asked again how long he spent with Ms. Lopez, Mr. Pagella could not describe an exact amount of time. (PX 37 at 49). He continued to assert it typically takes him between an hour and a half to two hours to do a vocational assessment. (PX 37 at 49). Mr. Pagella noted that he did not review the actual job description of a housekeeper, but this would not change his opinion as he knows what they do. (PX 37 at 51-52). When questioned further about her duties as a housekeeper, Mr. Pagella testified Ms. Lopez had to lift between 40 to 60 pounds, since she would likely lift 40 pounds with regard to a bucket with water and a mop. (PX 37 at 52). He stated she would also have to be able to push it and/or lift it and it is his understanding she is required to lift a 5-gallon bucket and carry it while it is full of water. (PX 37 at 52-53).

When asked whether Ms. Lopez submitted applications to any of the employers listed on the job logs, Mr. Pagella stated he did not know. (PX 37 at 54-55). He also did not know if any of the employers were hiring. (PX 37 at 55). Mr. Pagella stated he accepted Ms. Lopez's statement that no employers wanted to hire her. (PX 37 at 56). He also stated he did not rely on the job

logs in forming his opinions, even though he stated in his report the fact no one wanted to hire her further verified his opinion there is no stable or suitable occupation for her to perform. (PX 37 at 53-56). Mr. Pagella classified the job logs as a diligent job search for someone who does not read, write, or speak English and who was not provided with assistance (PX 37 at 56-57). Mr. Pagella admitted he did not verify her statement that she had no computer skills. He testified it would not matter to him because she needs to utilize her bilateral upper extremities on a repetitive basis for computers and she did not have the ability to do so. (PX 37 at 61). Mr. Pagella stated he has engaged in vocational rehabilitation with Spanish-speaking individuals, but he was able to place them because they were able to utilize their hands. (PX 37 at 62).

Deposition of Eric Flanagan

The parties proceeded with the evidence deposition of Eric Flanagan on June 10, 2015. (RX 15). Mr. Flanagan testified he is a certified rehabilitation counselor employed by Encore Unlimited since February 2011. (RX 15 at 4, 6). He also has a Master's of Science degree in Rehabilitation Psychology. (RX 15 at 5). Mr. Flanagan testified he is a licensed clinical professional counselor in the State of Illinois. (RX 15 at 6). While employed as a vocational consultant at Encore, he assesses individuals' disabilities to determine whether they are able to return to the work force. (RX 15 at 6). He helps them find competitive employment with job search activities. Mr. Flanagan also completes job analyses and labor market surveys. (RX 15 at 6-7).

Mr. Flanagan testified he authored a report regarding Ms. Lopez on September 11, 2014 at the request of Respondent. (RX 15 at 8). He reviewed job logs, a report from Edward Pagella, as well as some medical documentation. (RX 15 at 9). Mr. Flanagan testified he reviewed reports from Dr. Fernandez as well as details of other medical treatment within those IME reports. (RX 15 at 11). Mr. Flanagan stated he obtained Ms. Lopez's employment history from Mr. Pagella's report, and she did not have a resume or additional skills according to that report. (RX 15 at 13). Mr. Flanagan noted Ms. Lopez was released to return to work in a light duty capacity in April 2012 and then full duty following the June 19, 2012 IME with Dr. Fernandez. (RX 15 at 14).

Mr. Flanagan testified he reviewed the job logs completed by Ms. Lopez in detail and it appeared she was merely asking employers if they were hiring, but she did not complete job applications. (RX 15 at 15). He testified there were 39 job contacts within one square mile of her home in Brighton Park. Sixteen of the businesses listed in the job logs were located within the same one mile stretch of Archer Avenue. (RX 15 at 17). Mr. Flanagan stated Ms. Lopez was inactive in her job search for 22 months between June 19, 2012 and September 10, 2014. (RX 15 at 18). Mr. Flanagan testified his opinion is that Ms. Lopez is employable based on Dr. Fernandez's IME releasing her to return to work full duty. (RX 15 at 20-21). In placing individuals in the Chicagoland area, Mr. Flanagan stated he has had the opportunity to help place Spanish-speaking individuals without high school diplomas, as well as Polish-speaking and others individuals from Eastern Europe who do not have high school diplomas. (RX 15 at 21). He testified there are sedentary type of assembly job positions on the lighter side as well as other positions where he has placed individuals with carpal tunnel syndrome who have required accommodations. (RX 15 at 21-22). Mr. Flanagan noted Ms. Lopez's job search was

not diligent or appropriate for an individual making an attempt to return to work in the metropolitan area based on the small volume of contacts, the limited area where she searched for jobs, as well as the fact there was nothing to confirm she actually submitted applications. (RX 15 at 24).

Deposition of Robert Hawkins

The parties proceeded with the deposition of Robert Hawkins on October 7, 2016. (RX 16). Mr. Hawkins testified he is employed at the Intercontinental Chicago Hotel. (RX 16 at 4). He previously worked at Chicago Marriott Downtown for 30 years. (RX 16 at 5). He then retired from Marriott and started to work at the Intercontinental Chicago Hotel. (RX 16 at 6). While employed at Marriott, he first worked as a Director of Human Resources Operations and eventually became the Director of Human Resources, the position he held in 2010. (RX 16 at 5).

His job duties at Marriott included handling compensation, benefits, recruiting, labor relations, and standard tasks related to human resources. (RX 16 at 6). Mr. Hawkins testified when an associate had a workers' compensation claim, the initial report of injury would go through loss prevention in the security department. (RX 16 at 7). After that, the associate would work immediately with the hotel nurse. It would be his responsibility to work with the nurse as well as the associate to make sure the associate knew what was happening. (RX 16 at 7). Mr. Hawkins stated there were approximately six individuals he supervised in the human resources department at Marriott in 2010. (RX 16 at 7). He stated Ms. Lopez was eventually terminated in 2013 after she failed to report to work. (RX 16 at 10).

In addition to working with the hotel nurse and the director of loss prevention, he would work with HR generalists, including Rocio Villanueva and Kim English. (RX 16 at 10). Mr. Hawkins stated he did not verbally contact Ms. Lopez about returning to work as English is not her primary language. (RX 16 at 11). He stated Rocio Villanueva spoke Spanish and she would speak with Ms. Lopez verbally. (RX 16 at 11). Mr. Hawkins testified he mainly communicated with Ms. Lopez by letter. (RX 16 at 11). He identified a letter marked as Deposition Exhibit 1 which he created and sent to Ms. Lopez, instructing her to return to work on Monday, April 30, 2012. (RX 15 at 12). He testified her restrictions were outlined in the letter as well as what shift she was required to work, which was her regular duty shift. (RX 16 at 12-13). Mr. Hawkins stated she would earn the same amount of pay she would earn as a housekeeper. He was not sure whether this letter was also sent in Spanish. If he did not send a letter in Spanish, he would have Rocio follow-up with a phone call and she would speak to Ms. Lopez in Spanish. (RX 15 at 13). Mr. Hawkins stated he believes Ms. Lopez attempted to return to work, but he could not recall as there were several times she was scheduled to return to work where she did not return and other times she was scheduled to return and she did return. (RX 16 at 13-14). He agreed the attendance records kept by the hotel would verify when she returned to work. (RX 16 at 14).

Mr. Hawkins also identified a May 14, 2012 letter sent to Ms. Lopez outlining another offer of work and stating she was expected to return to work on May 21, 2012. (RX 15 at 15). He

stated they would send the letters two ways to make sure the associate received the information as standard practice. (RX 15 at 15). They would also follow up with phone calls to make sure the employee knew what was expected. (RX 15 at 15). Mr. Hawkins testified this letter was sent to her address at 2938 W. 39th Place in Chicago and he assumes she received it. (RX 16 at 16). Mr. Hawkins testified he would sit in on meetings when Ms. Lopez would come to the hotel with Rocio and the team present. (RX 16 at 17).

On cross-examination, Mr. Hawkins said he did not supervise Ms. Lopez when she performed her restricted duties. (RX 16 at 21). He agreed he mentioned the work restrictions from Dr. Carroll, but he did not reference the current work statuses from Dr. Engel or Dr. Erickson in the letters he wrote. (RX 16 at 22).

Deposition of Rocio Reyes-Dominguez

The parties proceed with the deposition of Rocio Reyes-Dominguez on October 7, 2016. Ms. Reyes-Dominguez testified she was previously known as Rocio Villanueva. (RX 17 at 4). She has been employed at Chicago Marriott Downtown since June 2, 2003. (RX 17 at 4). Ms. Reyes-Dominguez currently works as an HR generalist and she held this position in 2010. (RX 17 at 5). As an HR generalist, she deals with payroll, leaves of absence, and recruiting. (RX 17 at 5). Currently, her job duties are slightly different than they were in 2010. (RX 17 at 5).

Ms. Reyes-Dominguez testified she speaks Spanish, and she manages leaves of absence for all employees including management. (RX 17 at 6). She stated she is familiar with Ms. Lopez. Ms. Reyes-Dominguez believes Ms. Lopez started working for Marriott in May 2002 and she was terminated in 2013. (RX 17 at 6). Ms. Reyes-Dominguez stated Ms. Lopez claimed a work injury around May 2010 and she managed her leave of absence paperwork. (RX 17 at 7-8). Ms. Reyes Dominguez indicated Ms. Lopez was not approved for short-term disability, but she did complete the forms. (RX 17 at 9).

Ms. Reyes-Dominguez testified Ms. Lopez required assistance with translation and her daughter Alejandra would sometimes come with her to work if she needed assistance. (RX 17 at 10). Ms. Reyes-Dominguez stated she met Ms. Lopez's daughter personally and she spoke English and Spanish. (RX 17 at 10-11). Ms. Reyes-Dominguez testified she believed Ms. Lopez's daughter lived with Ms. Lopez as when she called Ms. Lopez's home phone number, the daughter would answer the phone. (RX 17 at 11). She also stated she was always in contact with Ms. Lopez as that is the way she does it with her leave of absences. (RX 17 at 11). Ms. Reyes-Dominguez testified she would tell the associate I have your return-to-work form and you can start working on this date so now it is your responsibility to contact the manager for scheduling purposes. (RX 17 at 11).

Ms. Reyes-Dominguez testified she would also send written communication, especially when there was no answer to her phone calls. (RX 17 at 12). She identified Rocio Deposition Exhibit 1, which was a letter dated September 9, 2010 created by her. (RX 17 at 13). She testified she sent this letter by regular mail and certified mail. Later, they started sending letters to Ms.

Lopez by FedEx. (RX 17 at 14). Ms. Reyes-Dominguez stated they added FedEx when they were not able to contact Ms. Lopez and she claimed she did not get the letters (RX 17 at 14). This letter notified Ms. Lopez that her original return to work was scheduled on August 9, 2010, but she submitted an extension so the letter was sent a month later. (RX 17 at 15).

Ms. Reye-Dominguez also identified Rocio Deposition Exhibit Number Two, which was a letter dated September 23, 2010 reminding Ms. Lopez she had been released to return to work on September 20, 2010. (RX 17 at 17-18). Despite attempting to contact Ms. Lopez multiple times, Ms. Reyes-Dominguez had not received documentation extending Ms. Lopez's leave as of September 20, 2010. (RX 17 at 19). Ms. Reyes-Dominguez also identified her handwriting on the letter reflecting that, as of October 4, 2010, Ms. Lopez still had not shown up for work. (RX 17 at 20). Ms. Reyes-Dominguez testified she tried to contact Ms. Lopez on October 4, 2010 and she eventually got in touch with her daughter around 6:00 p.m., who identified herself as Alejandra Lopez. (RX 17 at 20). She asked Ms. Lopez's daughter to have Ms. Lopez call the hotel. (RX 17 at 21).

Ms. Reyes-Dominguez identified another letter she created, dated October 15, 2010, requesting Ms. Lopez return to work on October 29, 2010. (RX 17 at 22-23). This was another offer of light duty work outlining what job she would be performing. (RX 17 at 23). Ms. Reyes-Dominguez stated she also identified the prior attempts to get Ms. Lopez back to work in this letter, but Ms. Lopez still had not returned to work. (RX 17 at 24-25). She testified Ms. Lopez would say she could not work. (RX 17 at 25).

Ms. Reyes-Dominguez testified about the attendance system used by Marriott, Marpay Services, where the associates used their ID or a manual punch to enter the punches. (RX 17 at 27-28). Marpay would keep track of the punches automatically and the information would go into the system. (RX 17 at 28). The system eventually changed in 2011 to another system called BlueCube.

Ms. Reyes Dominguez testified she had difficulty getting in touch with Ms. Lopez during her leave of absence as her voicemail was full. (RX 17 at 29). Ms. Reyes-Dominguez also testified Ms. Lopez told her she was traveling to Mexico at times during her leave of absence. (RX 17 at 30). She stated Ms. Lopez indicated she was unable to work even when the light-duty was available and restrictions from her doctors indicated she could work. (RX 17 at 30).

CONCLUSIONS OF LAW

The Arbitrator adopts the above findings of material fact in support of the following conclusions of law:

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

Ms. Lopez alleges repetitive trauma involving her bilateral hands, wrists and neck manifesting

on April 27, 2010. On that date, she reported pain in her fingers with itchiness. She testified her hands were very red and she could not stand the pain. She presented for treatment at Concentra Medical Center and the doctor diagnosed her with an allergic reaction. The Concentra records do not mention neck pain. Over a week later, she came under the care of Marque Medicos and now complained of bilateral wrist, hand, digit pain, and pain radiating up to her neck.

At trial, Ms. Lopez admitted she had issues with her bilateral hands prior to April 27, 2010, confirming she underwent EMG studies in December 2009. She testified she sought treatment with Dr. Shukla, her primary care doctor, whose records show a diagnosis of carpal tunnel syndrome before April 27, 2010. Ms. Lopez stated she fell on her back in 2009, but this was unrelated to the incident on April 27, 2010.

Respondent's Exhibit 2 is an Associate Statement stating Ms. Lopez was cleaning rooms using Windex when she started to feel her hands tighten up and feel like they were burning. She was not sure if it was from the Windex or what. On page two, Ms. Lopez signed this document. On page three, the areas of her hands where she reported problems were circled. This statement does not mention neck pain. (RX 2).

Respondent's Exhibit 3 is the Associate Injury/Illness Report completed by Marriott security on April 27, 2010. This report reflects Ms. Lopez began her workday at 7:30 a.m. and while cleaning a room, her hand started to tighten, and she also had a burning sensation. According to this report, "LPO Rogers asked what happened and she said she really was not sure, but while using the Windex spray is when she felt this in her hands (left and right). LPO Rogers sent Ms. Lopez to the Concentra Clinic where she will see a doctor and return to work with papers on her next workday". (RX 3). This report reflects both hands were included as the body part affected. (RX 3). Again, there is no mention of issues involving her neck.

Respondent's Exhibit 4 is the Supervisor's Accident Investigation Report reflecting Ms. Lopez had dermatitis involving both hands and she received medical attention from Concentra Medical Center. Jose Melesio was listed as the supervisor investigating this accident on April 28, 2010. He noted she had a possible reaction to a chemical. (RX 4).

On May 13, 2010, a recorded statement was obtained by the Marriott adjuster, Gwendolyn Simmons, from Ms. Lopez by phone with the assistance of a Spanish interpreter. (RX 5). Ms. Lopez testified around 9:30 a.m. on April 27, 2010, she was cleaning. She took out the trash and removed the towels and everything from the bathroom and then cleaned the bathroom. When she cleaned the bathroom, her fingers started to hurt and then she started doing the bed and she felt a lot of pain in her fingers. She did not know what happened. The palms of her hand were very red, and she had a lot of pain. Ms. Lopez stated she continued doing her job and her hands were still very red and itchy, especially the palms of her hands. (RX 5). Ms. Lopez did not mention experiencing this pain while using Windex spray. (RX 5). When asked whether she noticed this condition on her hands prior to work that day, Ms. Lopez stated she did not. (RX 5). She also informed Ms. Simmons she worked the day before. (RX 5). Respondent's Exhibit

25 shows Ms. Lopez was actually off work from April 24, 2010 through April 26, 2010 for her kid's birthday and a doctor appointment.

Ms. Lopez confirmed she had gloves on her hands when she cleaned the bathroom. She stated she wanted to bite her hands because they were very itchy. (RX 5). She testified she started using a gel product to disinfect and it had been used for approximately one month only. Ms. Lopez testified she worked until 5:00 p.m. and was instructed to make a report to security before she punched out. (RX 5). She then went to Concentra. Ms. Lopez stated the doctor told her it was an allergy. (RX 5). Ms. Lopez stated she did not work after May 2, 2010 and she went to Marque Medicos on May 4, 2010 telling them she had a lot of itchiness and a lot of pain and numbness in her hand. (RX 5).

When asked about the onset of pain and numbness in her hand, Ms. Lopez stated the onset occurred "since that day when I started feeling a lot of pain. But I kept working". (RX 5). When further questioned whether this was the first time she felt pain to her hands, Ms. Lopez responded, "yes, ma'am". (RX 5). This is not true as Ms. Lopez clearly had complaints involving her hands in December 2009 for which she underwent EMG/NCV studies and prescription medication for a confirmed diagnosis of carpal tunnel syndrome. When asked what body part was injured, Ms. Lopez stated "okay, it's the palm of my hands, my fingers. And now I start feeling like a pain in my neck and going to my elbow – the pain. And my doctor said that maybe my neck hurts because of the situation with my hand". Ms. Simmons asked Ms. Lopez if she had any other injuries outside of her hand and she responded, "I feel like a stabbing pain from my fingers going up all the way up to my elbow. I don't feel that very often, but I'm feeling this other pain." (RX 5). Ms. Lopez indicated she also saw her primary care doctor for this condition after April 27, 2010, in addition to occupational health and Marque Medicos. (RX 5 at 12-13). She noted saw her doctor last week and he sent her to have studies because her high blood pressure is out of control. (RX 5). She stated he also sent her for a study of her head and the nerves of her hands to find out why her hands are numb and she has the pain. (RX 5 at 13).

When questioned whether Ms. Lopez had any conditions involving her hands prior to May 27, Ms. Lopez stated, "just the normal, not pain to complain." The question was then corrected to ask whether prior to April 27, 2010 she had any pain. Ms. Lopez did not change her answer or add anything at that time. (RX 5 at 14). Again, Ms. Lopez did not disclose her prior treatment in 2009 to Ms. Simmons when asked about prior issues with her hands.

At trial, Ms. Lopez described her job duties. She claimed the trash weighed 50 pounds, which is not supported by the written job description or the job video. (RX 12 and 13). Ms. Lopez also stated the guests would help her throw out the trash.

The Arbitrator finds inconsistencies with Ms. Lopez's testimony and exaggerated complaints throughout her medical treatment. Ms. Lopez could not explain certain missing information in the accident report and medical records, such as the lack of documented neck pain initially or why she did not disclose her prior hand issues to her employer or Ms. Simmons. There are also varying histories as to what she was doing when she first felt hand pain. At times, she stated

she was not sure what happened, while other times she said she used a Windex spray or cleaned a dirty bathtub.

An 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). Both elements must be present at the time of the claimant's injury in order to award compensation. Illinois Bell Telephone Co. v. Industrial Comm'n, 131 Ill. 2d 478, 483 (Ill. 1989). An injury is said to "arise out of" one's employment when there is a causal connection between the employment and the injury. The "in the course of" element refers to the time, place, and circumstances under which the accident occurred.

Ms. Lopez mentioned issues with her fingers as well as itchiness and redness of her palms while working on April 27, 2010. Even though she admitted to having treatment for her hands in 2009 at trial, she did not inform her employer she had been having issues with her hands for months nor did she tell the adjuster, Gwendolyn Simmons, about treatment for her hands prior to April 27, 2010 when she gave the recorded statement on May 13, 2010. It is clear from the medical records Ms. Lopez had carpal tunnel syndrome and left arm numbness as of December 14, 2009. She underwent EMG studies in December 2009 with a diagnosis of bilateral carpal tunnel syndrome. Dr. Shukla also prescribed Lyrica, Celebrex, and Gabapentin when he diagnosed her with carpal tunnel syndrome in 2009.

After considering all of the evidence, it is clear Ms. Lopez reported issues with her bilateral hands on April 27, 2010, which may have been present since December 2009. The Arbitrator finds that her work activities on that date, either use of the Windex spray or cleaning the dirty bathtub, aggravated her pre-existing bilateral carpal tunnel syndrome. However, the Arbitrator does note some inconsistencies given Ms. Lopez's selective disclosure regarding her prior hand issues.

With regard to her claim of an accident involving her neck, the Arbitrator notes Ms. Lopez did not report any specific trauma to her neck, nor did she have immediate complaints of neck pain with no documented neck pain on the accident reports or treatment at Concentra. There is no indication she felt immediate neck pain while performing her job duties and nothing regarding a mechanism of injury to support a neck injury. The Arbitrator finds Ms. Lopez failed to prove either a specific trauma or repetitive trauma involving her neck on April 27, 2010.

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

Ms. Lopez reported pain in her fingers as well as burning, itching and redness of her palms on April 27, 2010. She did not immediately report issues with her neck due to her job duties or any specific incident involving her neck on April 27, 2010.

A claimant must give notice of an accident to the employer "as soon as practicable, but not later than 45 days after the accident." 820 *ILCS* 305/6(c). The giving of notice to the employer within 45 days of the accident pursuant to Section 6(c) of the Act is jurisdictional and a

prerequisite of the right to maintain a proceeding under the Act. Ristow v. Industrial Commission, 39 Ill. 2d 410, 413 (Ill. 1968). A claim is barred if no notice whatsoever is given. Gano Electric Contracting v. Industrial Commission, 260 Ill. App. 3d 92, 96 (Ill. 1994).

The Arbitrator finds Ms. Lopez provided proper notice of problems involving her hands on April 27, 2010 to her employer. The Arbitrator notes upon review of the initial medical records and accident reports, Ms. Lopez apparently was diagnosed with an allergic reaction involving her hands. Later, she was diagnosed with carpal tunnel syndrome. However, there was no mention of complaints involving her neck or a specific injury to her neck in the initial accident reports and treatment records from Concentra. She did have issues with complaints of left arm numbness and a prior fall in 2009. Ms. Lopez eventually mentioned neck complaints and/or radiating pain within 45 days to her doctors, but it is unclear whether she notified her employer about her claimed neck injury within the 45 days required by Section 6(c) of the Act.

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

Ms. Lopez alleges repetitive trauma to her bilateral hands, wrists, and neck manifesting on April 27, 2010. There is a question as to whether all of these conditions are related to her work activities on that date. Both Dr. Charles Carroll and Dr. John Fernandez provided causation opinions regarding her hands and were deposed. Dr. Edward Goldberg also provided a causation opinion with regard to her neck.

The Arbitrator notes both Dr. Fernandez and Dr. Carroll opined Ms. Lopez's bilateral carpal tunnel syndrome was caused or aggravated by her work activities as a housekeeper. Dr. Fernandez was aware of her prior treatment in 2009, he reviewed a job video and he also reviewed the job description. Dr. Carroll never reviewed a job description or job video and he was one of many hand surgeons who evaluated Ms. Lopez. She also saw Dr. Kotis, Dr. Robert Goldberg, and Dr. Wiesman after referrals from Marque Medicos. Based on a review of the medical records and the deposition testimony of both doctors, the Arbitrator finds Ms. Lopez's bilateral carpal tunnel syndrome is causally related to her work activities on April 27, 2010. The Arbitrator notes Dr. Fernandez pronounced her at maximum medical improvement for her right carpal tunnel syndrome on October 11, 2011 and she could perform her full duties. At that time, she had not undergone a left carpal tunnel release as she was not ready to do so. Dr. Fernandez noted she was at MMI for her left carpal tunnel syndrome if she did not have surgery and she could work full duty.

Ms. Lopez then decided to undergo a left carpal tunnel release on December 15, 2011. Following that surgery, Dr. Carroll did not note any residual carpal tunnel issues at a visit on April 18, 2012. He released her to return to work with restrictions including use of a brace to protect the avascular necrosis issue. She returned to Dr. Carroll on May 9, 2012 complaining of increased pain with a short return to work, with pain to head and neck, radiation of pain, and decreased function. Dr. Carroll noted her shoulder, upper arm, elbow forearm, wrist and hand exam all within normal limits with exception of pain in the carpus over each lunate. Dr. Carroll then issued restrictions of no lifting more than 5 pounds with use of brace as needed and no

restrictions related to travel to work or opening a bathroom door were offered.

At a follow-up IME on June 19, 2012, Dr. Fernandez noted unexplained findings on exam as Ms. Lopez registered almost a zero with grip testing although there were no obvious areas of atrophy or motor dysfunction in her hands. She also was unable to perform rapid exchange, which Dr. Fernandez could not explain. He concluded she had a negative exam related to her bilateral carpal tunnel syndrome. Her current diagnoses of right Kienböck's disease and possible left inflammatory arthropathy noted on x-rays were not related to her work injury. Dr. Fernandez confirmed she could work full duty, but cautioned her unrelated Kienböck's disease would likely necessitate restrictions. The Arbitrator notes Ms. Lopez's bilateral hand conditions are no longer causally related to her alleged work injury as of June 19, 2012 when she saw Dr. Fernandez. Her bilateral carpal tunnel syndrome had resolved by that time.

The Arbitrator finds Ms. Lopez reached maximum medical improvement as of Dr. Fernandez's evaluation on October 11, 2011 for her right carpal tunnel syndrome. With regard to her left carpal tunnel syndrome, the Arbitrator finds Ms. Lopez definitely reached maximum medical improvement at the time he evaluated her on June 19, 2012, although it appears she reached MMI earlier as Dr. Carroll did not recommend further treatment for her bilateral carpal tunnel syndrome when he saw her on April 18, 2012 and May 18, 2012.

The Arbitrator further notes Ms. Lopez has Kienböck's disease in her right hand, or avascular necrosis of the lunate bone, with some evidence of a possible inflammatory arthropathy in her left hand. Dr. Carroll did not relate her avascular necrosis to her work injury. Dr. Fernandez also explained in detail why this condition was not causally related to her accident on April 27, 2010, as Kienböck's is usually idiopathic in nature. Dr. Fernandez opined the possible inflammatory arthropathy in her left hand is unrelated to her work injury. The Arbitrator does not find Ms. Lopez's right Kienböck's disease related to her alleged work injury on April 27, 2010. In addition, the Arbitrator does not find the possible inflammatory arthropathy in her left hand/wrist causally related to the April 27, 2010 accident.

With regard to her neck, the Arbitrator notes Dr. Edward Goldberg evaluated her neck on October 22, 2010 at the request of Respondent pursuant to Section 12 of the Act. When Dr. Goldberg saw her, she exhibited no evidence of cervical radiculopathy. She confirmed she did not report any neck pain on April 27, 2010 to Dr. Goldberg, and instead stated she developed pain and burning in her hands on that date. At trial, Ms. Lopez claimed to have fallen on her back in 2009, but she did not mention this to Dr. Goldberg. Dr. Goldberg did document in his report records showing numbness for two weeks in her left upper extremity when she saw Dr. Shukla on December 14, 2009. Dr. Goldberg opined there was no cervical spine injury, and she did not have any complaints until she saw the chiropractor. He also noted the sensations in her hands were not coming from her cervical spine. On examination, Dr. Goldberg did not note any motor weakness specific to any dermatome and found it effort dependent. Upon review of her cervical MRI studies, he noted some annular bulging with minimal stenosis at the C5-6. Dr. Goldberg opined her cervical condition is not due to a work accident and no further treatment was required. Based on all of the credible evidence, the Arbitrator does not find Ms. Lopez's

neck condition causally related to the accident on April 27, 2010.

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 expenses?

Ms. Lopez submitted medical bills she claims are outstanding (PX 18-35). There is also a Fee Schedule Exhibit from Petitioner reflecting $82,288.62 is owed by Respondent, which includes $385.00 to Petitioner in out-of-pocket payments, $1,510.00 to Equian, and $80,393.62 in outstanding bills. Respondent also submitted a Fee Schedule Exhibit showing no further bills are owed according to the full defense version (RX 18A) given the disputes in this matter.

The Arbitrator will address each bill submitted by Petitioner. Respondent also provided medical payments screens reflecting medical payments made. (RX 9). Based on the payment screens, the Arbitrator finds the alleged outstanding medical bill. ($195.77-PX 18) from Concentra Medical Center has been paid. There was a discount of $6.77 with a payment of $189.00. (RX 9).

Petitioner claims there are outstanding bills from Marque Medicos in the amount of $28,724.00 after application of the Fee Schedule, with total incurred charges of $54,915.70 including charges for physical therapy ($30,594.00), chiropractic treatment ($3,314.00), neurology ($20,445.70) and miscellaneous charges, which represent charges for non-emergency transportation ($552.00). (PX 19). The Arbitrator declines to award the portion of the bill for transportation on May 11, 2012 ($552.00), as there is no indication she was restricted in any way requiring such transportation as a result of her related carpal tunnel syndrome.

With regard to the rest of the charges from Marque Medicos, the Arbitrator finds this treatment unreasonable, unnecessary, and unrelated to her bilateral carpal tunnel syndrome with the exception of initial office visit and subsequent visits with the hand specialists already paid by Respondent, even though the sheer amount of those visits with three different hand specialists appeared excessive. The Arbitrator finds that the rest of this treatment was not reasonable, necessary, or related to the alleged work incident and the resultant bilateral carpal tunnel syndrome. Specifically, the Arbitrator relies upon Dr. Fernandez's opinion as to what treatment was indicated as of November 2, 2010 for her bilateral carpal tunnel syndrome. This treatment only included bilateral injections into her carpal tunnel for diagnostic purposes, followed by one additional injection in both wrists if she did not have a lasting effect from the first. If there was no improvement after the injections, Dr. Fernandez opined she could then proceed with carpal tunnel releases followed by six post-operative therapy visits, which she underwent with Dr. Carroll.

The Arbitrator also declines to award any treatment at Marque Medicos related to her neck. The Arbitrator also notes she underwent EMG/NCV studies of her hands twice in less than a week, first on May 15, 2010 at Preferred Open MRI (paid by Blue Cross Blue Shield), and then on May 21, 2010 at Marque Medicos. As indicated above, the Respondent should hold Ms. Lopez harmless for the EMG/NCV studies performed on May 15, 2010, but the Arbitrator does

not award the second set of EMG/NCV studies repeated on May 21, 2020. The Arbitrator also notes Dr. Shukla, her primary care doctor referred her for the first set of EMG/NCV studies and was treating her for her bilateral carpal tunnel complaints in 2009 and 2010. (PX 1). In fact, Dr. Shukla prescribed medications and referred her for tests for her bilateral carpal tunnel syndrome after April 27, 2010, even though Ms. Lopez testified at trial she did not know what to do after going to Concentra so she walked around and found Marque Medicos.

With regard to the alleged outstanding bills from Medicos Pain and Surgical Specialists ($24,535.22, PX 22), the Arbitrator finds this treatment unrelated to her bilateral carpal tunnel syndrome, as well as unreasonable and excessive. Again, the Arbitrator relies on the treatment recommendations of Dr. Fernandez for her related carpal tunnel syndrome and does not see how pain management, chiropractic treatment, and excessive physical therapy is indicated for that condition. The majority of this treatment pertained to her unrelated neck condition even though her hands were mentioned at times in the records.

The Arbitrator notes Respondent paid for treatment with multiple hand specialists affiliated with Marque Medicos, yet is unclear from the records why Ms. Lopez needed to see all of these hand specialists including Dr. Robert Goldberg, Dr. John Kotis, and Dr. Irvin Wiesman. Ms. Lopez claims the bill from Dr. Robert Kotis ($375.00, PX 24) remains outstanding. Respondent paid this bill in the amount of $343.56 with a discount of $31.44, with no balance outstanding. It is unclear whether Ms. Lopez claims the bill from Dr. John Kotis remains outstanding ($434.00). However, the Arbitrator notes Respondent paid this bill in the amount of $350.83 with a discount of $83.17. (RX 9). Finally, Respondent paid the bill from Dr. Irvin Wiesman ($800.00), in the amount of $590.59 with a discount of $209.41. (RX 9).

Ms. Lopez claims the bill from Specialized Radiology Consultants remains outstanding ($152.00, PX 20). The Arbitrator finds the x-rays of the hands included on that bill should be paid (total charges of $100.00) pursuant to the Fee Schedule in the amount of $98.82, but the bill for the cervical x-rays is not awarded.

Ms. Lopez also included a bill from Preferred Open MRI, which reflects payments made by Blue Cross Blue Shield. It is unclear if this was marked as a medical bill exhibit. Charges included a brain MRI unrelated to her claimed accident and EMG/NCV studies on May 15, 2010. It is unclear what amount was paid the related EMG/NCV from the statement, but the statement shows a total paid of $3,250.00 for all charges by Blue Cross Blue Shield. The Arbitrator finds Respondent shall hold Ms. Lopez harmless for any paid charges related to the EMC/NCV studies only.

Ms. Lopez claims there is an outstanding bill from Archer Open MRI (PX 21). These charges include MRI studies of her cervical spine on May 27, 2010 and MRI studies of her hand on October 13, 2010 to evaluate her Kienbock's disease. The Arbitrator declines to award these charges as they are unrelated to her injury on April 27, 2010.

Ms. Lopez claims there is an outstanding bill from Prescription Partners due to medication

prescribed by Dr. Andrew Engel ($9,251.23, PX 23). The Arbitrator declines to award this bill given the nature of her accepted condition (carpal tunnel syndrome), the fact her primary care doctor already had prescribed medications prior to April 27, 2010 including Lyrica, Celebrex and Gabapentin, and also because Arbitrator does not find these medications related to her accepted carpal tunnel syndrome.

Similarly, Ms. Lopez claims there is an outstanding bill from Industrial Pharmacy Management ($3,738.72, PX 28). The Arbitrator declines to award this bill given the nature of her accepted condition (carpal tunnel syndrome) and also because Arbitrator does not find these medications related to her accepted carpal tunnel syndrome.

Ms. Lopez also claims a bill from Metro Anesthesia Consultants remains outstanding ($2,640.00, PX 25). This bill is for injections she received into her cervical spine including medial branch blocks on October 18, 2010 and on November 8, 2010. The Arbitrator declines to award this bill as this treatment is not related to her work injury.

Ms. Lopez produced another bill for her neck from American Center for Spine and Neurosurgery ($1,200.00, PX 29) for treatment with Dr. Erickson. The Arbitrator finds this bill unrelated to her claim and declines to award the bill.

With regard to the bill from Lake County Neuromonitoring for repeat EMG/NCV studies performed at Medicos Pain and Surgical Specialists, these studies involved her cervical spine and were ordered by Dr. Robert Erickson ($5,500.00, DOS: 9/30/2011, PX 30). The Arbitrator declines to award this bill as it is unrelated to her claim as it involves her neck.

Ms. Lopez claims there are outstanding bills from Northwestern Medical Faculty Foundation and Northwestern Memorial Hospital for her surgeries, treatment with Dr. Carroll and occupational therapy after surgery (PX 26 and 27). It is unclear given Respondent's payments to both Northshore University and Northwestern whether there are truly charges outstanding or just balance billing, which is prohibited. (RX 9). Based on the billing documentation submitted and Petitioner's Fee Schedule Exhibit, it is unclear what charges, if any, remain outstanding. The Arbitrator is unable to award any bills based on what was submitted by Ms. Lopez.

The Arbitrator declines to award the medical bills from Sinai Medical Group detailing her treatment with a psychiatrist, Dr. Fisfalen, with dates of service of January 3, 2014 through April 4, 2018. This treatment is not related to the incident on April 27, 2010. The Arbitrator further notes this treatment was outside her choices of two doctors and their subsequent chains of referral as there is no indication any of her doctors referred her to Dr. Fisfalen. (PX 34). In fact, the records state Ms. Lopez was referred by her attorney. (PX 34). Ms. Lopez's first choice of doctors was Marque Medicos with her second choice was Dr. Shukla. There is no indication either of those choices or their subsequent referrals sent Ms. Lopez to Dr. Fisfalen.

Further, the Arbitrator declines to award the bill from St. Jude Medical Center for a date of service of March 20, 2013. (PX 33). The Arbitrator notes there are no medical records showing

this date of service is related to her accident on April 27, 2010 and she reached MMI long before this treatment occurred. (PX 1).

Ms. Lopez also submitted a bill from the Therapy Providers of America for therapy pursuant to a referral by Dr. Mendez where Ms. Lopez reported neck and back pain. The Arbitrator declines to award this bill as it is for treatment not related to the alleged work accident on April 27, 2010. The Arbitrator notes Ms. Lopez testified she had back pain from a fall in 2009 and finds her neck pain unrelated to her work accident on April 27, 2010.

Ms. Lopez claims the bill from Elite Physical Therapy remains outstanding for the FCE on May 25, 2012. (PX 31). The Arbitrator declines to award this bill based upon the opinions of Dr. Fernandez wherein he stated a functional capacity evaluation was not necessary to assign restrictions given her unrelated underlying severe condition of Kienböck's disease which would surely result in restrictions unrelated to the work injury. Dr. Fernandez opined she could resume her full duties with regard to her bilateral carpal tunnel syndrome. (RX 14).

K. What temporary benefits are in dispute?

Respondent's Exhibit 8 outlines temporary total disability ($23,566.53) and temporary partial disability payments ($1,533.19) made to Ms. Lopez. Respondent also paid an advance of $2,334.42 on November 2, 2010. This check was issued following a hearing in order to obtain a continuance for an IME. There were also checks issued after the parties met in 2017 to discuss the calculated average weekly wage. At that time, the parties agreed to a slightly higher average weekly wage. Respondent then issued one check for the difference of $108.88 for temporary partial disability benefits and one check in the amount of $742.72 on April 25, 2017 to pay the difference for TTD benefits at the proper rate agreed by the parties. Regardless of the agreement as to the average weekly wage, the parties disagree about the periods for which TTD, temporary partial, and maintenance benefits are owed.

TTD benefits:

Ms. Lopez claims she is entitled to TTD benefits from May 4, 2010 through October 28, 2010, from April 26, 2011 through April 30, 2011, and from May 2, 2012 through September 26, 2012 for a total of 99 4/7 weeks.

Respondent disputes additional TTD benefits are owed and questions whether TTD should have been paid at times given the medical evidence. In reviewing the medical evidence and testimony regarding the return to work offers, the Arbitrator finds there are mixed periods of time where Ms. Lopez was off work for multiple conditions. The majority of the work status slips in the records pertain to her unrelated cervical condition. Based on Dr. Goldberg's opinions, the Arbitrator declines to award any TTD for her cervical issues or any work status notes pertaining to those issues.

The Arbitrator notes there were some periods immediately after April 27, 2010 where Ms.

Lopez was authorized off work and TTD is owed. Specifically, the Arbitrator finds TTD was owed from May 4, 2010 through June 7, 2010 (35 days). On June 7, 2010, she was released to return to work with restrictions for her hands per Dr. Wiesman. Chiropractor Fulleman also authorized her off work again as of June 7, 2010 for multiple diagnoses including her cervical issues. The Arbitrator finds she was able to work light duty as of June 7, 2010, but it is not clear if she attempted to work light duty or whether work was available. Chiropractor Fulleman continued to authorize her off work for multiple diagnoses until July 7, 2010, at which time he released her with light duty restrictions, while at the same time deferring work status recommendations to Dr. Wiesman. Dr. Wiesman agreed she could work with restrictions at a visit on July 13, 2010 through August 9, 2010. On July 22, 2010, there is note from Dr. Engel's PA, Stacy Pond, PA-C, stating no light duty work available by employer so she is off work now. On September 10, 2010, Chiropractor Fulleman concluded she could work with restrictions as of September 20, 2010 with no lifting, pushing, pulling greater than 10 pounds and no repetition, forceful gripping, lifting, pushing, or pulling.

The Arbitrator notes it is clear light duty was available at Marriott as of September 20, 2010 for her hands. As of September 20, 2010, the Arbitrator finds no further TTD was owed as Ms. Lopez reportedly planned to update her work restrictions and did not return to work as instructed on September 20, 2010. (RX 17). Therefore, additional TTD would be owed from June 8, 2010 through September 19, 2010 (104 days) as there is no indication Ms. Lopez had reached MMI yet and it does not appear her restrictions could be accommodated until September 20, 2010. The Arbitrator realizes Ms. Lopez apparently did not feel she could return to work at that time.

Dr. Engel indicated she could work with light duty restrictions from September 29, 2010 through November 3, 2010 for her cervical herniated disc of no lifting more than 5 pounds. As of October 11, 2010, Dr. Kotis concluded she could work with a five pound lifting restriction for her Kienbock's disease. Dr. Engel continued the 5 pound restrictions for her cervical facet syndrome on October 12, 2010 through October 18, 2010 and from October 20, 2010 through November 3, 2010. As of November 3, 2010, Dr. Engel indicated she could return to work with 10 pounds of lifting for her cervical facet syndrome.

On November 2, 2010, Dr. Fernandez indicated Ms. Lopez could work with restrictions of no forceful or highly repetitive use. He also stated if she underwent surgery, he anticipated full duty at 6 to 12 weeks following each carpal tunnel release. However, following her first carpal tunnel release on April 26, 2011, Dr. Carroll clearly kept her off work for quite some time. On June 17, 2011, Dr. Carroll recommended Ms. Lopez proceed with the left carpal tunnel release and he kept her off work following her first surgery. She did not schedule her second surgery as she said she was not ready. Dr. Carroll finally released her with light duty restrictions as of August 17, 2011, almost 4 months after her right carpal tunnel release. As of October 11, 2011, Dr. Fernandez confirmed Ms. Lopez was able to work full duty and reached MMI following her right carpal tunnel release. In fact, he originally stated she should have reached MMI and returned to work full duty 6-12 weeks after surgery. If she did not schedule her left carpal tunnel release, Dr. Lopez concluded she was at MMI and could work full duty.

After the IME with Dr. Fernandez on October 11, 2011, Ms. Lopez eventually decided to undergo a left carpal tunnel surgery on December 15, 2011. As Dr. Fernandez said she could work full duty as of his exam on October 11, 2011 and she reached MMI if she did not have the left carpal tunnel release, the Arbitrator declines to award TTD from October 11, 2011 through December 14, 2011.

The Arbitrator finds it reasonable for Ms. Lopez to be authorized off work completely following both of her carpal tunnel release surgeries for 12 weeks, which is the higher end of what Dr. Fernandez suggested was appropriate before a full duty return to work and MMI. The Arbitrator finds Ms. Lopez was entitled to TTD for 12 weeks following each of her carpal tunnel release surgeries (first surgery: April 26, 2011-July 18, 2011) and (second surgery: December 15, 2011 through March 7, 2012). It is clear her unrelated Kienbock's and cervical issues were contributing to her continued restrictions following those surgeries. The Arbitrator finds Ms. Lopez reached MMI for her second carpal tunnel release surgery 12 weeks after the procedure as discussed by Dr. Fernandez. (RX 14). After March 7, 2012, no additional TTD benefits are owed. Although Dr. Carroll did not release her to return to work with restrictions until April 18, 2012, he stated she may work with splints and a 20-pound restriction for bilateral lifting and braces to protect the AVN issue/lunate. The Arbitrator finds any ongoing restrictions beyond the 12 weeks post-op recommended by Dr. Fernandez are unrelated to her carpal tunnel syndrome.

In summary, the Arbitrator awards TTD benefits from May 4, 2010 through September 19, 2010 (139 days or 19 6/7 weeks), from April 26, 2011 through July 18, 2011 (84 days or 12 weeks), and from December 15, 2011 through March 7, 2012 (84 days or 12 weeks). The Arbitrator finds a total of 43 6/7 weeks of TTD are owed, totaling $17,063.50. As the Respondent paid 23,566.53 in TTD benefits, there is an overpayment of $6,503.03.

Temporary Partial Disability Benefits:

The Arbitrator finds Respondent paid temporary partial disability benefits from February 19, 2011 through April 25, 2011 ($1,553.19) and no further TPD benefits are owed. There is no evidence from Ms. Lopez why temporary partial disability benefits should have been paid from October 29, 2010 through April 24, 2011.

Maintenance benefits:

Ms. Lopez claims she is entitled to maintenance benefits as of September 27, 2012 through the trial date (454 6/7 weeks). The Arbitrator finds Ms. Lopez was capable of resuming her full duties as outlined above pursuant to Dr. Fernandez's opinions for her causally related bilateral carpal tunnel syndrome. The Arbitrator declines to award any maintenance benefits.

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

Ms. Lopez sustained bilateral carpal tunnel syndrome as a result of her work activities manifesting on April 27, 2010. She underwent surgical releases of each hand. Both Dr. Fernandez and Dr. Carroll noted resolution of her carpal tunnel symptoms following surgery, although she had persistent subjective complaints. Dr. Fernandez opined Ms. Lopez was capable of resuming her full duties with regard to her work-related bilateral carpal tunnel syndrome. He did caution Ms. Lopez would require work restrictions from the perspective of her unrelated right Kienböck's disease/avascular necrosis of the lunate bone. Dr. Carroll imposed permanent work restrictions in 2012. He testified those restrictions were in part related to her Kienböck's disease and in part to her carpal tunnel syndrome, even though he admitted during his deposition that her carpal tunnel symptoms had resolved at the time of his last evaluation on September 26, 2012.

Ms. Lopez claims she is unable to work as a housekeeper as a result of her work accident. The Arbitrator finds her inability to work unrelated to her bilateral carpal tunnel syndrome based upon all of the evidence. The medical evidence suggests Ms. Lopez exaggerated her subjective complaints, which was also evident during her testimony at trial as well.

The Arbitrator finds Ms. Lopez was released to resume her full duties for her related bilateral carpal tunnel syndrome in 2011 for her right hand and in 2012 for her left hand by Dr. Fernandez. In 2012, Dr. Carroll and Dr. Fernandez both noted no evidence of ongoing nerve compression in either hand. In 2013, Dr. Jawidzik also noted very little objective issues on exam, documenting limitations which were effort dependent. In light of all of the evidence, the Arbitrator finds Ms. Lopez is entitled to permanent partial disability benefits to the extent of 20% loss of use of the right hand (41 weeks at the PPD rate of $350.16 = $14,356.56) and 20% loss of use of the left hand (41 weeks at the PPD rate of $350.16 = $14,356.56), pursuant to Section 8(e)9 of the Act.

As Respondent paid an advance of $2,334.42 and overpaid TTD in the amount of $6,503.03, the total amount owed for permanency is $19,875.67 ($28,713.12 minus advance of $2,334.42 and credit for TTD overpayment of $6,503.03 = $19,875.67).

M. Should penalties or fees be imposed upon Respondent?

After considering the totality of the circumstances including the factual evidence, the medical evidence, the testimony, and the legitimate disputes in this case, the Arbitrator declines to award Penalties under Sections 19(k) and 19(l), or Fees under Section 16.

It is evident the initial reporting of this claim appeared to be an allergic reaction and Respondent eventually secured a Section 12 examination while paying an advance of TTD to address causation. Once causation was established, Respondent paid for appropriate benefits related to her bilateral carpal tunnel syndrome. While there were disputes regarding ongoing benefits, Respondent reasonably relied upon the medical opinions of Dr. Fernandez and Dr.

Goldberg to support the denial of medical treatment and benefits.

N. Is Respondent due any credit?

The Arbitrator finds Respondent is entitled to a credit for all TTD ($23,566.53) and all TPD ($1,533.19) paid, as well as the advance paid in the amount of $2,334.42. (RX 8). As TTD benefits are awarded in the amount of $17,063.50, Respondent is also entitled to a credit of $6,503.03 for the overpayment of TTD ($23,556.53 paid minus $17,063.50 owed = $6,503.03).

The Arbitrator also finds Respondent is entitled to a credit for all medical bills paid in the amount of $52,060.35. (RX 9). The Arbitrator notes Respondent paid hospital charges totaling $25,428.69, physician charges totaling $15,615.66 ($15,780.22 minus $164.56 charge paid for IME from Midwest Orthopaedics on 10/11/2011 that should not have been included in this section), and other charges for the surgery on April 26, 2011 in the amount of $11,016.00.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	13WC011107
Case Name	Pedro Calderon v. The Zone Honda Kawasaki
Consolidated Cases	13WC015937; 13WC019843
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0022
Number of Pages of Decision	29
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	David Menchetti
Respondent Attorney	Micaela Cassidy

DATE FILED: 1/19/2024

/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

PEDRO CALDERON,

Petitioner,

vs. NO: 13WC011107

THE ZONE HONDA KAWASAKI,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review under §19(b) having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, notice, causation, temporary total disability, medical expenses, "All reviewable issues" and "Any and all issues raised by the Transcript/Exhibits at Arbitration," and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, but makes clarifications as outlined below. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

We correct the spelling of Petitioner's surname to "Calderon" (instead of "Caledron") on the first page of the Decision form sheet. We also correct a scrivener's error on page 20 in the third sentence of the third paragraph by inserting the word "not" between the words "did" and "report."

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed July 5, 2022, is hereby affirmed and adopted with the clarifications noted above.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $35,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

January 19, 2024

/s/ *Maria E. Portela*

SE/
O: 11/21/23
49

/s/ *Amylee H. Simonovich*

/s/ *Kathryn A. Doerries*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	13WC011107
Case Name	Pedro Calderon v. The Zone Honda Kawasaki
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	26
Decision Issued By	Rachael Sinnen, Arbitrator

Petitioner Attorney	Eduardo Salgado
Respondent Attorney	Micaela Cassidy

DATE FILED: 7/5/2022

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

/s/ Rachael Sinnen, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Pedro Caledron
Employee/Petitioner

v.

The Zone Honda Kawasaki
Employer/Respondent

Case # **13** WC **11107**

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

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **6.23.12**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**28,116.67**; the average weekly wage was $**969.54**.

On the date of accident, Petitioner was **47** years of age, ***married*** with **0** dependent children.

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

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

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

ORDER

Respondent to pay Petitioner directly, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act, for the outstanding medical services to the bilateral inguinal hernia, that was submitted into evidence, from the following providers: Dr. Valero, MacNeal, and Suburban Surgical Associates, and Dr. Favor.

Respondent to pay Petitioner directly for 2 4/7 weeks of TTD benefits (8.2.13 through 8.19.13) at a weekly rate of $646.36.

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.

JULY 5, 2022

Signature of Arbitrator

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Pedro Calderon	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Case No. 13WC015937
The Zone Honda Kawaski	)	consolidated with
	)	Case No. 13WC011107
	)	Case No. 13WC019843
Respondent.	)	

FINDINGS OF FACT

This matter initially proceeded to hearing on February 21, 2019, in Chicago, Illinois before Arbitrator Tiffany Kay on Petitioner's Request for Hearing pursuant to Sections 19b and 8a of the Illinois Workers Compensation Act ("Act"). The hearing continued on May 22, 2019, and again on July 22, 2019, before Arbitrator Kay. The hearing was finalized on March 22, 2022, before Arbitrator Rachael Sinnen. Issues in dispute include accident, notice, causation, medical bills, temporary total disability ("TTD"), and prospective medical. Arbitrator's Exhibit ("Ax") 5-7.

Petitioner's Medical History

Petitioner was treating with Dr. Valero for depression, elevated cholesterol, and other medical conditions. Medical records from July 2010 note that he had a history of depression and problems with work. (RX A, p. 80). On March 5, 2012, Petitioner presented to Dr. Valero with complaints of pain radiating into the left arm beginning a month ago while he was in Mexico. (RX A, p. 66).

Petitioner's Job Duties

Petitioner testified that he was employed by Respondent as a salesperson in 2012 with job duties consisting of maintaining the showroom clean as well as to move motorcycles in and out of the showroom floor to display. (Transcript 2: Pg. 34) Petitioner indicated that the motorcycles were usually moved outside in the mornings between 10 to 15 minutes prior to opening the store at 10:00 AM. (Transcript 2: Pg. 34, 35) Petitioner also confirmed that he was employed by Respondent as a salesperson in 2013 with duties requiring him to maintain the showroom clean as well as to move motorcycles in and out of the showroom floor to display. (Transcript 2: Pg. 34).

4.30.12 Date of Accident (13WC15937)

On April 30, 2012, Petitioner arrived at The Zone Honda Kawasaki at 9:10 AM to commence his customary opening duties. (Transcript 2: Pg. 42) Once there Mr. Calderon performed a preliminary cleaning of the store before assisting with moving motorcycles outside the store to display. This included moving a 2012 Honda Gold Wing. (Transcript 2: Pg. 43, 44) The Petitioner testified to moving a Honda Gold Wing and losing control of the bike. Petitioner further indicated that while trying to prevent the bike from falling he overexerted his left arm causing injury to his left elbow. (Transcript 2: Pg. 44 – 46) The incident was witnessed by other fellow coworkers who were present at the time of injury including, but not limited to, Francisco Hernandez. (Transcript 2: Pg. 46)

Petitioner stated he notified his manager Ricardo Diaz immediately upon his manager arriving. According to Petitioner, this was approximately ten minutes after the accident occurred. (Transcript 2: Pg. 47) Mr. Calderon described speaking with Mr. Diaz about the incident directly in front of Mr. Pavilonis as well as other coworkers, including Francisco Hernandez. (Id.)

Petitioner's Medical Treatment Post 4.30.12

After the alleged work injury on April 30, 2012, the Petitioner presented to Dr. Elsa Valero on May 16, 2012, after noticing a bump on the upper part of his left elbow. (Transcript 2: Pg. 48-49) Dr. Valero's notes indicate Petitioner was working at a dealership and was seeking treatment after experiencing left elbow pain for the last two week from frequently pushing motorcycles. (PX19, Pg. 249) On exam, he exhibited tenderness and loss of range of motion to the left elbow. He was prescribed Naprosyn and sent for a left elbow X-ray at MacNeal Hospital. The X-ray to the left elbow was negative. (T2, pp. 48-49; RX3, PP 59-61; RX1, pp 34).

This treatment, and all his treatment was placed through Blue Cross / Blue Shield HMO, his wife's group health insurance pursuant to her employment by El Milagro (T2, pp. 61-62, T3, pp. 123-124).

6.23.12 Date of Accident (13WC11107)

Petitioner testified that he continued to work for Respondent including on the morning of June 23, 2012 (Transcript 2: Pg. 50) According to Petitioner he arrived at The Zone Honda Kawasaki at 9:10AM and assisted with moving motorcycles from the showroom outdoors for display. (Transcript 2: Pg. 51) While moving a Honda Gold Wing motorcycle, Petitioner testified that he lost control of the bike and he fought to keep the motorcycle from falling. Unfortunately, Petitioner was unable due to the weight of the motorcycle. (Transcript 2: Pg. 52) At the time Petitioner stated he felt horrible pain to his elbow from trying to keep the motorcycle from falling. (Transcript 2: Pg. 53) In addition Petitioner indicated he felt horrible pain to his abdominal area and pain radiating to his lower back. (Id.) Petitioner indicated he notified his manager Ricardo Diaz as soon as he arrived on June 23, 2012 (Transcript 2: Pg. 53, 54) Mr. Calderon further indicated that Francisco Hernandez was present when he provided notice of the accident to Mr. Diaz. (Transcript 2: Pg. 54)

Petitioner's Medical Treatment Post 6.23.12

After the alleged injury at work on June 23, 2012, the Petitioner did not seek treatment until seeing Dr. Valero on June 28, 2012. He did not report any accident while working on June 23, 2012. Rather, he reported left lateral elbow pain for the past two months after he fell on a motorcycle and used his left arm to pick it up. He also reported abdominal pain for the past eight days, with mild dysuria and pain in the ventral penis. Dr. Valero recommended orthopedic consult for the left elbow and for the abdominal/scrotal pain a scrotal ultrasound, urinalysis, and prostate testing. (T2, p. 56; PX3, pp. 57-59).

The Petitioner next saw Dr. Valero on July 10, 2012. (T2, P. 57; PX3, pp. 54-57). He reported stress after making a mistake on the sale of a motorcycle. He reported that a motorcycle had fallen one day previous causing pain in his right leg. He reported left facial numbness for the previous week. He was referred for a CT scan to the abdomen/pelvis, blood work and was prescribed Xanax for stress. (PX3, pp. 54-57).

The Petitioner saw Dr. Tariq Iftikhar of Riverside Orthopedics on July 17, 2012. He reported that he was right hand dominant, and had injured his left elbow seven weeks previous, and again two weeks previous while lifting a motorcycle. On exam, he was markedly tender over the lateral aspect of his left elbow, at the extensor carpi radialis brevis. He received an injection from Dr. Iftikhar. He was advised that if pain recurred, physical therapy may be ordered, and in extreme cases surgery considered. (T2, pp. 57-59; RX3, pp. 26-28).

On July 19, 2012, the Petitioner had a CT of the abdomen/pelvis at MacNeal. He did not return to Dr. Valero until August 27, 2012 with complaints of ongoing abdominal pain and left elbow pain. He was referred for ultrasound studies to the abdomen and right testicle, which were performed on September 4, 2012. The Petitioner followed up with Dr. Valero on November 5, 2012. He complained of right lower quadrant pain for several months. Dr. Valero referred him to general surgeon to assess bilateral inguinal hernia. (T2, pp 59-60; RX1, 35, 39, 44-45; PX3, pp. 50-54).

The Petitioner did not next see Dr. Valero until March 11, 2013 and he complained of right hip and right lumbar pain for one year, stress, anxiety, and loss of sleep. He reported low back pain while in Mexico, of one month duration, for which he had obtained diclofenac in Mexico. He requested referral to an orthopedic for a repeat left elbow injection. He admitted he had never followed up with general surgery regarding bilateral inguinal hernias. Dr. Valero referred him for a lumbar MRI, to Dr. Iftikhar for his left elbow, and to general surgery for bilateral inguinal hernias. (PX3, pp. 46-50; RX1, p. 47). The lumbar MRI performed at MacNeal on March 18, 2013 disclosed mild degenerative change with mild right facet arthrosis at L4-5 with adjacent soft tissue edema. (T2, p. 60; RX1, pp 46, 49; PX3, pp. 46-50).

On March 20, 2013, the Petitioner saw Dr. Iftikhar for his left elbow. He reported seven months' relief from the cortisone injection in July 2012. He requested and received an injection in the lateral left elbow. He was advised to consider a tennis elbow brace with activity, and to return as needed. (T2, pp. 61-62; RX3, pp.29-30).

On April 12, 2013, the Petitioner saw Dr. Francisco Espinosa regarding low back pain, which he related to activity at work in June 2012 moving a 750-pound motorcycle that began to tip. He reported that as he tried to prevent it from falling, he injured his back. He admitted to a history of having injured in low back eighteen years prior, and the condition lasted six years. Dr. Espinosa found his neurological examination to be normal, and noted he complained of tenderness to the right low back, but not "specifically". Dr. Espinosa stated his main problem was mild facet arthropathy at L4-5 on the right that required no surgery. He offered the Petitioner facet injections. (T2, pp. 62-64; PX8, 11-12).

On April 23, 2013, the Petitioner saw Dr. Kiran Chekka at MacNeal for facet joint injections from L4-S1 due to "arthritis". On May 8, 2013, he reported 85% relief of his low back pain following the facet injections. He was referred for physical therapy at MacNeal. (T2, pp. 65-67, 71; RX1, pp 51, 53-54, 63, 65-67). The Petitioner participated in physical therapy for his low back at MacNeal in May 2013. (T2, p.72; RX1, pp. 73, 89, 75, 82-85).

On May 6, 2013, the Petitioner presented to Dr. Elizabeth Canelas at Pro Salud Medical Center for a psychiatric evaluation. He reported an eighteen-year history of psychiatric issues. He reported stress and feeling "let down" by a problem that had happened at work for Respondent, after he learned in September 2012 that there was no retirement account. He felt betrayed and that money had been stolen from him. He reported that he took a vacation in September 2012 and was then laid off until March 2013. He complained that there was no need for the employer to lie to him and let him believe he had a retirement account. (PX10, p. 8).

On May 8, 2013, Petitioner returned Dr. Chekka right-sided low back pain with radiation into the right lower extremity. (PX2, Pg. 64) Petitioner rated his low back pain to be 10 out of 10 and was diagnosed with lumbosacral facet syndrome, lumbar degenerative disease, low back pain, and myofascial pain. (Id.) Dr. Chekka recommended Petitioner hold off on any further injections but did advise to commence physical therapy. (PX2, Pg. 65)

Petitioner was seen on May 17, 2013, for physical therapy related to complaints of right sided lumbar pain that started from trying to hold a motorcycle from falling. (PX2, Pg. 76) Petitioner indicated that he also felt pain through his right testicle and through his abdominal that developed into hernias. (PX2, Pg. 76) Petitioner further reported that since the incident occurred, he has noticed an onset of urological problems. After speaking with Dr. Valero, Petitioner was told to hold off on physical therapy until his urological symptoms were properly diagnosed by urologist. (PX2, Pg. 76) Petitioner returned to Physical therapy on May 20, 2013, indicating that he was feeling pain 2 out of 10 after his prior injection. (Id., Pg. 79) The next physical therapy appointment occurred on May 23, 2013. At therapy, Petitioner indicated that his low back pain felt better, but that he would still feel pain while pushing motorcycles at work. (PX2, Pg. 79)

5.25.13 Date of Accident (13WC19843)

The Petitioner testified that on May 25, 2013, he turned his heel while at work. As he would every other day, he started sweeping the floors and mop the second floor from the top to the bottom of the steps. The stairs were wet, and he slipped with his foot at the edge of the last step

and fell injuring his feet. (T2, pp. 72-73). He had injured his right foot/ankle. His injury was witnessed by Ricardo Diaz, his manager. (T2, p. 74).

The Petitioner was shown a copy of an Employer's Report of Injury pertaining to the May 25, 2013 right ankle injury. The Petitioner admitted that it was his handwriting and that the signature looked like his but was not sure. He stated that he did not remember filling the report out or signing it. (T3, pp 69-170).

Petitioner's Medical Treatment Post 5.25.13

On May 28, 2013, the Petitioner told his therapists at MacNeal that he had twisted his right ankle at work two days previous. (RX1, p. 84). Petitioner did indicate that he was seen by his primary physician Dr. Elsa Valero on May 30, 2013. (Transcript 2: Pg. 75) Per the treating records, Petitioner was a walk-in patient with complaints of acute right ankle pain. (PX19, Pg. 226) Mr. Calderon was diagnosed with right ankle pain and was recommended an ace wrap and medication. (Id., Pg. 228)

Thereafter Petitioner returned to see Dr. Elizabeth Canelas for ongoing psychiatric care on June 5, 2013. (PX 10, Pg. 4) At this time Petitioner reported to Dr. Canelas hurting his ankle at work and was provided an off work note for the day along with a recommendation for ongoing individual therapy. (Id., Pg. 4, 5) Petitioner also advised Dr. Canelas that he felt the owner of Zone Honda was mistreating him. (PX 10). He stated that he felt more pressure at work and did not feel like he was selling bikes as well. (PX 10).

Petitioner testified that on June 6, 2013, and again on June 10, 2013 he attended physical therapy appointments prior to seeing Dr. Valero on June 17, 2013. (Transcript 2: Pg. 78) At that time a podiatry referral was provided for right ankle joint pain. (PX2, Pg. 96)

On June 19, 2013, Petitioner attended a pain management evaluation with Dr. Kiran Chekka with reports of excellent relief post six weeks from right-sided L4-5 and L5-S1 facet injection. (PX2, Pg. 98) Petitioner reports using a brace provided at physical therapy at work to push motorcycles which has been helping. (Id.) In addition, Petitioner reported having lost his footing going down a set of stairs at work when he twisted his ankle. (Id.) Dr. Checkka diagnosed Petitioner with lumbosacral facet syndrome, lumbar degenerative disc disease, low back pain and myofascial pain. Injections were not recommended given Petitioner's reports of relief with the previous injection, but additional physical therapy was prescribed. (Id., Pg. 99) Petitioner was also recommended to continue to wear his brace at work. (Id.)

At the recommendation of Dr. Valero, Petitioner was seen by Cynthia Mercado, DPM of Freedom Foot Clinic on June 25, 2013. (PX11, Pg. 6) Petitioner reported symptoms of right sided Achilles tendon pain with burning, cracking, crepitations and instability. Dr. Mercado diagnosed Petitioner with an open fracture of the calcaneus, distal sprain of the tibiofibular ligament, and tarsus enthesopathy. (PX11, PG. 7) Petitioner was placed off work for two weeks, provided voltaren gel for inflammation, prescribed an ankle brace, and recommended an injection as well as an MRI. (PX11. Pg. 7, 8)

Petitioner attended his initial physical therapy appointment at MacNeal Hospital on July 8, 2013 for a twisted ankle injury occurring on May 25, 2013. (PX2, Pg. 100) The following day on July 10, 2013, Petitioner underwent a right ankle MRI remarkable for edema like signal around the anterior talofibular and calcaneofibular ligaments suggestive of a sprain. (PX2, Pg. 121, 315)

Petitioner continued to follow up with Dr. Elizabeth Canelas for ongoing psychiatric care on July 10, 2013. (PX10, Pg. 3) During the evaluation Petitioner reported using his back brace to reduce his pain and further indicated that he is taking medication to treat his ankle pain and inflammation. (Id.) On July 10, 2013, Petitioner also reported to Dr. Canelas that the owner wants to move to a new location, and that he was still upset about what the owner did to him. (PX 10). He also stated that he was forgetting the names of clients which was unlike him. (PX 10).

On July 11, 2013, Petitioner returned to MacNeal Hospital for ongoing physical therapy. (PX2. Pg. 102) Petitioner reported pain after being on his feet for long periods of time. (Id.) Petitioner continued with therapy by attending an additional therapy session occurring on July 16, 2013. (PX2, Pg. 102)

The initial consultation for bilateral inguinal hernias with Dr. Robin L. Favor of Suburban Surgical Associates occurred on July 15, 2013. (PX9, Pg. 6) According to the history taken by Dr. Favor, Petitioner sustained bilateral inguinal hernias, while working with a motorcycle that fell on him, approximately one year ago. Dr. Favor noted that when Petitioner tried to lift the motorcycle, he reported feeling a sharp pain in his lower abdomen radiating to both groins. (Id.) Petitioner stated he felt extreme discomfort with a bulge over the first ten days that subsequently abated a little, but symptoms have persisted. (Id.) Mr. Calderon was diagnosed with bilateral inguinal hernia and recommended a laparoscopic repair with mesh that was scheduled for August 2, 2013. (PX9, Pg. 7)

On July 19, 2013, Petitioner followed up with Dr. Elsa Valero regarding ongoing left elbow pain. (PX19, Pg. 133) Petitioner was diagnosed with left elbow lateral epicondylitis along with provided a referral for a urologist. (Id., Pg. 133 – 135)

Petitioner returned to see Dr. Mercado of Freedom Foot Clinics on July 19, 2013 with complaints that his right ankle felt like his bone was moving around. (PX11, Pg. 10) A review of the MRI revealed sinus tarsitis and lateral AFTL and CFL sprain of the right ankle. (Id.) Dr. Mercado recommended Petitioner continue to use his ankle brace, continue taking medications, continue with physical therapy, and advised to return to work full duty. (PX11, Pg. 10 - 13) Petitioner was provided with an injection to the ankle and referred to a rheumatologist for evaluation on account that Petitioner was not responding well to conservative care. (Id., Pg. 15, 16)

On July 19, 2013, July 23, 2013, and again on July 25, 2013 Petitioner continued to attend physical therapy appointments at MacNeal Hospital. (PX2, Pg. 104, 116) Thereafter, Petitioner had his initial rheumatology evaluation with Dr. Syed Rizvi of Vanguard Medical Group on July 31, 2013. Mr. Calderon reported experiencing pain in his right ankle for the last two months after he injured it. (PX19, Pg. 129) Since then pain has been off and on with a range of 4 or 5 out of 10. (Id.) Petitioner was diagnosed with monoarthrits and provided with an off work note for July 31, 2013. (Id.)

At the recommendation of Dr. Elsa Valero, Petitioner was seen by Dr. Iftikhar of Riverside Orthopedics on July 23, 2013, for an evaluation of Petitioner's ongoing left elbow complaints. (PX5, Pg. 9) Mr. Calderon reported relief from the last injection for several months but advised the pain had returned. Per the treating report, it was noted that the constant use of Petitioner's elbows to move motorcycles at work has been contributing to Petitioner's on-going condition. (Id.) Petitioner was recommended to start physical therapy and commence an anti-inflammatory regimen. Dr. Iftikhar further recommended Petitioner wear a tennis elbow brace and to moderate his activities. (Id.) According to Petitioner's testimony, the possibility of surgery was also discussed. (Transcript 2, Pg. 86)

Petitioner underwent bilateral inguinal hernia surgery with mesh on August 2, 2013, with Dr. Robin Favor at MacNeal Hospital. (PX9, Pg. 9, 10)

On August 7, 2013, Petitioner had a follow up psychiatric appointment with Dr. Elizabeth Canelas of Pro Salud Medical Center. Petitioner indicated he was recovering from surgery and felt better since he had not been talking to the owner where he works. (PX10, Pg. 2) Petitioner was again encouraged to obtain individualized therapy. (Id.) Petitioner also advised Dr. Canelas that the owner refused to give him his bonus of $300. (PX 10).

The next rheumatology appointment with Dr. Rizvi occurred on August 14, 2013 at which time Petitioner followed up regarding ongoing ankle problems and joint pain since he sustained a twisting ankle injury. (PX19, Pg. 123) Dr. Rizvi diagnosed Petitioner with sprain of the calcaneofibular ligament and recommended Petitioner continue with physical therapy along with Meloxicam. (Id., Pg. 125)

The next appointment with Dr. Favor occurred August 15, 2013, for the purposes of a post-operative evaluation. Petitioner indicated that he was feeling well after surgery with minimal pain. (PX9, Pg. 11) Dr. Favor specified that Petitioner was status post laparoscopic inguinal hernia repair and was ok to return to normal activity commencing on August 19, 2013. (Ids., Pg. 12, 14)

Petitioner returned to see Dr. Cynthia Mercado of Freedom Foot Clinic on August 16, 2013 with complaints of ongoing popping like sensation in the right ankle. (PX11, Pg. 17) MRI showed mild sprain of the ATFL and the CFL in the right ankle. (Id.) Petitioner was diagnosed with a sprain of the right ankle and recommended to finish his rheumatology appointments. Petitioner was further encouraged to resume physical therapy and wear his ankle brace. (Id.) Petitioner was also provided with a referral for a second opinion regarding ongoing podiatry services. (Id., Pg. 19)

On August 16, 2013 Petitioner continued with physical therapy for his right ankle with MacNeal Hospital. Petitioner had additional physical therapy appointments in August of 2013 occurring on the 19th, 22nd, 23rd, 26th, 28th, and on the 30th. (PX2, Pg. 134 – 141) Petitioner continued to go to physical therapy during September of 2013 attending appointments on the 4th, 6th, 10th, 12th, 17th, 19th 24th, and on the 26th. (Id., Pg. 211 -218). Petitioner was discharged from therapy on September 27, 2013. (Id., Pg. 221)

On August 23, 2013, Petitioner commenced physical therapy for his left elbow at the recommendation of Dr. Iftikhar at MacNeal Hospital. (PX2, Pg. 196) At the therapy evaluation, Petitioner indicated he felt pain rated 5 out of 10 with activity. (Id.) Thereafter, Petitioner had additional physical therapy appointments on August 26th, 28th and 30th of 2013. Petitioner went on to have additional therapy for his left elbow on September 4th, 10th, 12th, 17th, and on the 19th of 2013. (PX2, Pg. 201 - 203, 208)

Petitioner returned to see Dr. Elizabeth Canelas for an additional psychiatric evaluation on August 26, 2013. At this time Petitioner indicated that the Respondent had closed its business. (PX10, Pg. 1) Petitioner further indicated that he was still recovering from surgery and has started therapy for his arm. (Id.)

The following appointment concerning Petitioner's elbow condition occurred with Dr. Elsa Valero on September 30, 2013. Petitioner was instructed to follow up with Dr. Iftikhar regarding possible left elbow surgery given the lack of substantial relief from physical therapy and two injections. (PX19. Pg. 118)

Thereafter, Petitioner followed up with Dr. Valero on November 25, 2013, with recurrent left elbow and lower back pain since his work accident. (PX19, Pg. 209) Petitioner demonstrated limited range of motion to the left elbow. (Id.) Dr. Valero provided Petitioner with a diagnosis of left elbow pain with movement and provided a referral to Dr. Iftikhar for a second orthopedic opinion. In addition, Petitioner was diagnosed with lumbosacral radiculitis. (Id., Pg. 211)

On November 27, 2013, Petitioner was evaluated by Dr. Iftikhar of Riverside Orthopedics with complaints of unresolved left elbow epicondylitis. (PX5, Pg. 17) Petitioner was diagnosed with recurring lateral epicondylitis of the left elbow and possible recent onset of ulnar neuropathy of the left elbow. (Id.) Dr. Iftikhar recommend an MRI of the left elbow, an EMG, an NCV and indicated surgery was an option since conservative care has been exhausted at this time. However, Dr. Iftikhar referred Petitioner for a second opinion given the lack of uniform response from surgical release of the tennis elbow. (Id.)

Mr. Calderon obtained a left elbow MRI on November 30, 2013, from MacNeal Hospital. (PX5, Pg. 21) Per the results Petitioner had moderately large left elbow effusion along with avulsion of the main collateral ligament. (Id.) As for the EMG, it was performed on December 5, 2013, by Neurologic Care Associates and showed no evidence of median, ulnar, or radial mononeuropathy in the left upper extremity. (PX2: Pg. 313 – 314)

Petitioner followed up with Dr. Iftikhar on December 16, 2013. According to Dr. Iftikhar there is no evidence of any neuropathy on the EMG and NCV studies. (PX5, Pg. 23) However, according to the MRI, Dr. Iftikhar indicated it showed an avulsion of the radial collateral ligament as well as epicondylitis. (Id.) This dual pathology, according to Dr. Iftikhar explained the lack of response to conservative care. Due to the complexity of the situation, Petitioner was referred for a second opinion. (Id.)

On December 10, 2013, Petitioner attended an additional pain management appointment with Dr. Kiran Chekka of MacNeal Hospital. (PX2, Pg. 227) According to Dr. Chekka, Petitioner's

symptoms have once again become functionally limiting and are affecting his quality of life. Dr. Chekka noted Petitioner had a gradual regression of his symptoms since the injection on April 23, 2013. (Id.) Petitioner was recommended to repeat a right L4-5 and L5-S1 facet joint injection and to consider a radiofrequency ablation if he does not improve with injections. (PX2, Pg. 227, 228) On February 11, 2014, Petitioner underwent a right L4-5 and L5-S1 facet injection performed by Dr. Chekka. (PX2, Pg. 235)

Acting on the advice of Dr. Iftikhar, Petitioner had an orthopedic evaluation with Dr. Michael J. Hejna of Orthopaedic Associates of Riverside on February 21, 2014. (PX6, Pg. 2 & PX5, Pg. 25) The treating report indicates Petitioner was seen for left elbow complaints subsequent a work accident occurring in 2012. (PX6, Pg. 2) Dr. Hejna also indicated Petitioner suffered from chronic radial collateral ligament tear with significant pain. As for treatment, Dr. Hejna concluded Petitioner would benefit from reconstruction of the ligament tear. (Id.)

Petitioner returned to see Dr. Chekka on March 4, 2014, for ongoing treatment for Petitioner's L4-5 and L5-SI complaints. (PX1, Pg. 2) Petitioner again endorsed that his ongoing functional deficits are a function of a work-related injury when lifting a motorcycle at work. (Id.) In addition, Petitioner indicated that since the last injection, he has been able to function much better. Petitioner was diagnosed with suffering from lumbar facet syndrome, myofascial pain, and low back pain. (PX1, Pg. 3) Dr. Chekka recommended Petitioner be fitted for a lumbosacral orthotic brace to restrict his range of motion and reduce pain and to continue physical therapy. (Id.)

On April 4, 2014, Mr. Calderon returned to Dr. Hejna for a follow consultation regarding Petitioner's ongoing left elbow complaints. According to Dr. Hejna, Petitioner did not want to consider surgical reconstruction of the collateral ligament. (PX6, Pg. 6) Rather, Petitioner requested an injection to keep his symptoms from flaring in the future. At this time, Dr. Hejna provided an injection of Depo-Medrol 40mg with 1cc of Marcaine into Petitioner's left elbow. (Id.)

Petitioner returned to see his primary physician Dr. Elsa Valero on July 15, 2014 with complaints of ongoing right ankle complaints aggravated by activity. (PX3, Pg. 25) Dr. Valero diagnosed Mr. Calderon with right foot / ankle pain and prescribed Petitioner acetaminophen as well as codeine tablets for pain. (Id., Pg. 27)

Petitioner returned to see Dr. Elsa Valero regarding ongoing low back pain on December 19, 2014. (PX3, Pg. 22) According to Dr. Valero's report Petitioner reported having a history of low back pain worsened by a bike accident. Petitioner was diagnosed with displacement of lumbar intervertebral disc with myelopathy and recommended he follow up with pain clinic. (PX3, Pg. 24) In addition, Dr. Valero recommended Petitioner obtain an additional lumbar spine MRI. (Id.) Petitioner was also diagnosed with ongoing left elbow joint pain without relief from therapy. Petitioner was again provided with a referral for orthopedic care. (Id.)

The lumbar MRI recommended by Dr. Valero occurred on December 24, 2014, at MacNeal Hospital. (PX1, Pg. 6) The MRI had remarkable findings at L4-5 as well as L5-S1 that were similar in nature to past lumbar exams.

Thereafter, Petitioner returned to see Dr. Hejna of Orthopaedic Associates of Riverside on January 6, 2015, with ongoing left elbow complaints. (PX6, Pg. 8) According to Dr Hejna, Petitioner aggravated his symptoms while assisting his brother who is a mechanic. (Id.) Dr. Hejna indicated that Petitioner's complaints were from epicondylitis and that reconstruction of the ligament was not warranted (Id.) However, Dr. Hejna advised that Petitioner may require surgery to treat his epicondylitis if his symptoms could not be controlled. Petitioner was provided with an injection of Depo-Medrol and Marcaine to the left elbow. (PX6, Pg. 8)

On March 11, 2015, Petitioner returned to see his primary physician Dr. Elsa Valero with ongoing complaints of lower back pain. Petitioner was diagnosed with displacement of lumbar intervertebral disc without myelopathy and recommended he follow up with the pain clinic. (PX3, Pg. 18 – 21) Petitioner again followed up with Dr. Valero on April 15, 2015 with ongoing complaints of low back pain. (PX3, Pg. 15, 16) Dr. Valero diagnosed Petitioner with a prolapsed lumbar intervertebral disc and referred Petitioner for a neurological consult. (PX3, Pg. 18)

Mr. Calderon was seen for a neurological evaluation for his low back complaints on April 22, 2015, with Dr. Francisco J. Espinosa of Neurological Surgery & Spine Surgery. (PX8, Pg. 13) Petitioner was diagnosed with persistent low back pain with recent MRI imaging showing significant facet arthropathy bilaterally at L5-S1 and on the right at L4-5. (PX8, Pg. 15) Dr. Espinosa again recommended Petitioner obtain facet blocks followed by rhizotomy if successful. (Id.) Dr. Espinosa specified that the facet blocks should be aimed at L4-5 on the right and L5-S1 bilaterally and provided Petitioner a referral for pain management. (Id., Pg. 15, 16) If Petitioner's symptoms persist, Dr. Espinosa stated Petitioner should return to consider having the rhizotomy done openly with surgery. (Id., Pg. 15)

Petitioner was evaluated on June 11, 2015, by Dr. Herbert Engelhard III at the University of Illinois Hospital & Health Systems at the request of Dr. Elsa Valero for right-sided back pain and leg pain. (PX7, Pg. 1) According to Petitioner his symptoms started in June of 2012 and has been treated conservatively with medications, therapy, and injections since. (Id.) However, recently his condition has worsened and has only been able to work part-time. Dr. Engelhard III reviewed Petitioner's MRI imaging and indicated it was remarkable for a herniated disk at L5-S1. (PX7, Pg. 2) Petitioner was diagnosed with a lumbar disk herniation with radiculopathy at L5-S1 and recommended a diskectomy or possible steroid injections (Id.) In addition, Dr. Engelhard III recommended Petitioner obtain a revised lumbar MRI as well as light duty lifting restrictions for work. (Id., Pg. 2)

A repeat lumbar MRI was obtained by Petitioner on June 17, 2015 at MacNeal Hospital. (PX1, Pg. 10) The results were interpreted during Petitioner's follow up appointment with Dr. Engelhard III on July 15, 2015. (PX7, Pg. 6) Dr. Engelhard III indicated that a review of the recent MRI showed signs of mild degenerative changes and some foraminal stenosis without radicular symptoms. (Id.) Petitioner was diagnosed with chronic musculoskeletal pain. According to Dr. Englehard III, although Petitioner does have some stenosis it did not correspond to any radiculopathy. (Id.) Dr. Engelhard III recommended Petitioner follow up with his primary physician as well as trigger point injections or facet injections, but not a rhizotomy. (Id., Pg. 7)

The following evaluation with Dr. Valero did not occur until July 2, 2015. (PX3, Pg. 12) At that time Petitioner made complaints of ongoing right foot pain with mild relief from the last injection administered by Dr. Mercado. (Id.) Petitioner was diagnosed with right foot and ankle pain and was prescribed oxycodone for pain relief.

Thereafter, Petitioner returned to Dr. Mercado of Freedom Foot Clinic on July 15, 2015 with ongoing complaints of right ankle instability secondary to a right ankle sprain in 2013. (PX11, Pg. 20) According to Dr. Mercado, these kinds of injuries lead to instability of the ankle. Surgery was discussed along with additional conservative measures such as the use of bracing and a tens unit. (Id.) Petitioner was diagnosed with a sprain of the distal tibiofibular ligament of the right ankle, tibialis tendinitis, as well as ankle and tarsus enthesopathy. (Id., Pg. 21) Dr. Mercado recommended Petitioner return to work with light duty restrictions for eight weeks and obtain a second opinion with Dr. Nick Anderson to further evaluate a lateral ankle stabilization procedure. (Id., Pg. 22, 23)

Petitioner returned to see Dr. Michael J. Hejna on November 24, 2015, with complaints of ongoing left elbow lateral epicondylitis pain with ligament tear. (PX6, Pg. 11) The prior injection in January provided relief of symptoms for approximately 3 to 4 months. (Id.) Dr. Hejna diagnosed Petitioner with left elbow epicondylitis and provided an injection of Depo-Medrol and Marcaine. (Id.) Petitioner was instructed to return should this injection fail to control his symptoms.

Petitioner testified that he was sent to four independent medical evaluations, including an appointment with Dr. George B. Holmes Jr. of Midwest Orthopaedics at Rush. (Transcript 2: Pg. 117, 118) Petitioner testified that his evaluation with Dr. Holmes Jr. occurred on January 20, 2016. (Transcript 2: Pg. 118)

On March 11, 2016, Petitioner returned to see his primary physician Dr. Elsa Valero with ongoing complaints of left elbow pain. Dr. Valero diagnosed Petitioner with left elbow and again provided Petitioner with an orthopedic referral. (PX3, Pg. 8) Petitioner was treated by Dr. Dennis A. Williams for an orthopedic evaluation of the left elbow at the request of Dr. Valero on March 28, 2016. (PX19, Pg. 39) Per Dr. Williams, Petitioner arrived with complaints of ongoing left elbow pain since lifting a motorcycle in 2012. Pain was rated to be a 6 out of 10 during the evaluation. Petitioner was diagnosed with left elbow lateral epicondylitis. (PX19, Pg. 41) Dr. Williams did not recommend additional injection to Petitioner's elbow but did recommend a debridement of the lateral epicondylar area and fixation of the tendon. (Id. Pg. 41)

Petitioner returned to see Dr. Valero on June 27, 2016 and complained of right heel and back pain. Dr. Valero diagnosed Petitioner with displacement of lumbar intervertebral disc without myelopathy and advised to follow up with the pain clinic. (PX19, Pg. 33) Petitioner followed up again with Dr. Valero on November 3, 2016, at which point he was diagnosed with abdominal pain. (PX19, Pg. 28) Thereafter, Petitioner was seen by Dr. Valero on April 6, 2017. (Id., Pg. 22) Dr. Valero provided Petitioner with a diagnosis of ongoing abdominal pain with lumbosacral radiculopathy. (Id., Pg. 23)

On August 15, 2017, Petitioner returned to see Dr. Valero with complaints that included low back pain. (PX19, Pg. 16) Dr. Valero provided Petitioner with a diagnosis of displacement of lumbar intervertebral disc without myelopathy and lumbosacral radiculopathy. (Id., Pg. 17)

Petitioner was seen by Dr. Elsa Valero on April 24, 2018 for a right foot Xray. According to the results Petitioner had mild degenerative joint disease of the first MTP joint without fracture. (PX20, Pg. 55 – 59)

On November 14, 2018 Petitioner was again evaluated by Dr. Cynthia Mercado of Freedom Foot Clinic. At this time Petitioner was diagnosed with peroneal tendinitis, pain in the right leg, sprain of unspecified ligament of the right ankle and lesion of plantar nerve. (PX20, Pg. 62) Dr. Mercado provided Petitioner with a recommendation of physical therapy with a focus on deep message / kneading of the right foot to break up cicatrix scar tissue from nerve entrapment. (Id.)

On November 26, 2018 Petitioner was seen at MacNeal Hospital for an initial physical therapy. (PX20, Pg. 66, 68) Thereafter, Petitioner had an additional session on November 30, 2018 and on December 4th, 6th, 7th, 11th 13th, 14th, 18th, 20th, and the 24th of 2018. (Id., Pg. 76, 78 - 87) Petitioner continued with his prescribed therapy appointments by attending a final session on January 2, 2019. (PX20, Pg. 90)

Thereafter, Petitioner was seen by Dr. Nicolas Anderson of MacNeal Hospital on February 28, 2019. Dr. Anderson diagnosed Petitioner with a stress fracture of the right foot, instability of the right ankle, and a right ankle ligament strain. (PX20, Pg. 106) Petitioner was seen for a right foot MRI and of the right lower extremity on March 1, 2019. (Id., Pg. 110, 111) The right ankle MRI confirmed the following impressions: third metatarsal shaft bone marrow edema with signs of stress injury; second metatarsal shaft bone marrow edema with sings of possible stress injury; and intermetatarsal trace edema. (Id., Pg. 110)

The next appointment with Dr. Valero occurred on December 11, 2019 with Loyola Medicine. (PX25, Pg. 160) Petitioner had general complaints of right wrist pain and congestion and was diagnosed with lumbar radiculitis and right wrist pain. (Id., Pg. 166)

On April 28, 2020, Petitioner was again seen by Dr. Valero with ongoing complaints of back pain via a telephonic office visit. (PX25, Pg. 184 – 191) According to Dr. Valero's notes Petitioner was diagnosed with lumbar radiculitis and prescribed 325mg oxycodone tablets for pain relief. (Id., Pg. 190) Petitioner returned to Dr. Valero on August 5, 2020, for a medication refill appointment and was diagnosed with lumbar radiculitis. (Id., Pg. 195 - 200) In addition, Petitioner was provided with a new prescription for 325mg oxycodone tablets. (Id., Pg. 200)

Thereafter, Petitioner returned to Dr. Valero on September 29, 2020, with ongoing complaints of low back and right-hand pain. (PX25, Pg. 207) According to Dr. Valero, Petitioner was suffering from chronic low back pain thar radiated into the right leg. (Id., Pg. 208) Dr. Valero provided Petitioner with a diagnosis for spinal stenosis of the lumbar region without neurogenic claudication and spinal stenosis of the lumbosacral region. (Ids., Pg. 211) Petitioner was provided with a referral for a lumbar MRI and recommended to follow up with Orthopaedics Associates of Riverside. (Id., Pg. 211 & 212)

Petitioner presented to Loyola Medicine for a lumbar MRI on September 30, 2020. (PX25, Pg. 226) The findings were suggestive of multilevel lumbar spondylosis most evident at L5-S1 that has progressed since June 17, 2015. (Id.)

On July 23, 2021, Petitioner returned to Loyola Medicine for a follow up appointment with ongoing low back pain. Petitioner was diagnosed with spinal stenosis of the lumbar region without neurogenic claudication and chronic right foot pain (PX23, Pg. 7) According the provider, Petitioner reported suffering a work injury in 2012 to his low back when he was carrying a heavy item and hurt his low back. (PX23, Pg. 9) In addition the reports indicates that since the accident the Petitioner has gone onto disability and is currently working 16 hours a week. (Id.) A recommendation was provided for skilled physical therapy to address Petitioner's functional limitations. (Id., Pg. 15) Therapy commenced on September 1, 2021, and continued through October 22, 2021 with Loyola Medicine. (Id., Pg. 21 -173)

Section 12 examiner: Dr. Prasant Atluri

Petitioner was evaluated on January 15, 2016 by Dr. Prasant Atluri of Hand to Shoulder Associates. On physical examination Dr. Atluri noted Petitioner had tenderness over the lateral epicondyle and the ECRB tendon origin. A review of the November 30, 2013 left elbow MRI showed signs of damage to the lateral ulnar collateral ligament. Dr. Atluri diagnosed Petitioner with left elbow derangement, radial collateral ligament rupture, and left elbow lateral epicondylitis. (RX13, Transcript Pg. 30) According to Dr. Atluri, the mechanism of injury reported by Petitioner was plausible for causing or contributing to his left elbow condition. Specifically, Dr. Atluri argued Petitioner's identified mechanism of injury represented a classic mechanism for inuring the lateral elbow. Meaning at the time of injury Petitioner's elbow was in an at-risk position, which includes a semi extended position of the elbow with forearms pronated so that the palms are facing downward and arms away from the body, subject to a sudden unexpected load. (RX13, Pg. 33) Given the evidence presented Dr. Atluri concluded Petitioner suffered an acute elbow injury in 2012 that did not resolve. (RX13, Pg. 34) As for whether additional care was needed, Dr. Atluri suggested Petitioner had yet reached MMI as of the date of his evaluation on January 15, 2016. (RX13, PG. 34, 35)

Regarding Petitioner's ability to work, Dr. Atluri indicated Petitioner should avoid forceful gripping with his left arm and refrain from lifting, pushing, and pulling greater than 2 pounds and further advised Petitioner had yet to reach maximum medical improvement. With regards to Petitioner's care, Dr. Atluri indicated that overall Petitioner's treatment had been reasonable, and that Dr. Hejna's recommended surgery was a viable option for Petitioner to achieve MMI. (RX13, Pg. 47, 48) As for the kind of surgery to be performed, Dr. Atluri indicated it would depend on the stability of joint. If the elbow was stable, then a lateral epicondylar release would be appropriate. However, if the joint was unstable then an open lateral ulnar collateral ligament repair or reconstruction would be appropriate along with the tennis elbow release. (RX13, Pg. 50, 51)

Section 12 examiner: Dr. Stanford Tack

The Petitioner underwent an independent medical evaluation by Dr. Stanford Tack for his back on January 29, 2016. The Petitioner testified that Dr. Tack spent about 30 minutes with him for the independent medical evaluation. He did not remember whether Dr. Tack spoke with him about prior workers' compensation cases. (T2, p. 118-119). Dr. Tack testified via an evidence deposition on May 16, 2018. (RX12). He stated that the Petitioner provided a history of having lost control of a motorcycle on June 23, 2012 causing left elbow pain, and abdominal pain. He reported losing no time from work until a hernia surgery (August 2, 2013). He reported a consultation with Dr. Francisco Espinosa, and referral for injections. He reported having had multiple MRI studies. He admitted having had low back pain twenty years previous. (RX12, pp. 8-10). Dr. Tack reviewed MRI imaging from March 18, 2013, December 23, 2014 and June 17, 2015. He stated that all the MRIs indicated degenerative changes with slight progression. (RX12, pp. 10-11). Dr. Tack stated that the Petitioner's lumbar condition and treatment was unrelated to the events of June 23, 2012. More specifically he testified that on June 28, 2012, he did not complain of his low back. On July 10, 2012, he complained of his right leg after an incident the day prior, but no low back pain. On August 27, 2012 he complained of pain in his rib cage, but no low back pain. On November 5, 2012 he complained of right lower quadrant pain and was diagnosed with an inguinal hernia. On March 11, 2013, he complained of low back pain for the past month. Dr. Tack concluded that the Petitioner's low back condition was unrelated to the events on June 23, 2012. He assessed no work restrictions or surgical intervention was necessary. (RX12, pp. 13-16).

Section 12 examiner: Dr. Stephen Boghossian

Thereafter, Petitioner was evaluated by Dr. Stephen P. Boghossian on February 8, 2016, for the purpose of an independent medical evaluation. According to Dr. Boghossian, Petitioner reported a work accident in June of 2012 while trying to move a heavy motorcycle and lost control. (PX15, Pg. 8) Upon trying to keep the motorcycle from falling, Petitioner reported feeling pain in his lower abdomen that radiated to his back. (PX15, Pg. 8) Dr. Boghossian diagnosed Petitioner with bilateral inguinal hernias more likely than not caused by his work injury. With respect to ongoing care, Petitioner will not require further care and will not need restrictions. However, the need for surgery was related to his employment accident with Respondent in June of 2012. (Id.)

Petitioner's Witness: Francisco Hernandez

The first witness presented by the Petitioner was Mr. Francisco Hernandez, a co-worker at The Zone Honda Kawasaki. He worked as a salesperson with the Petitioner on April 30, 2012 and June 23, 2012. (T1, pp. 28-29).

Mr. Hernandez stated that The Zone Honda Kawasaki sold motorcycles, both new and used. He stated that the motorcycle involved in both incidents was "top of the line, the biggest motorcycle that Honda has". Mr. Hernandez testified had the Gold Wing weighed between 900 and 933 lbs. Mr. Hernandez testified to Petitioner's Exhibit #18, a photograph of a Honda Gold Wing motorcycle and was also shown Petitioner's Exhibit #17, a printout of the Honda Gold Wing

specifications for 2012 identifying the weight of said motorcycle to be between 904 lbs. and 933 lbs. (T1, pp. 29, 31-32, 34-35).

Mr. Hernandez testified that on April 30, 2012, he witnessed Petitioner move motorcycles into a display at The Zone Honda Kawasaki. He explained that the employees had to take motorcycles outside, and Petitioner grabbed the Gold Wing, his left arm/hand failed him. He stated, "that's what I saw because I was behind him with another motorcycle." Mr. Hernandez heard the Petitioner indicate that he was hurt and saw him walk to the manager, Ricardo Diaz. He also noted that The Petitioner's arm was swollen. He clarified that the Petitioner was wearing short sleeves on April 30, 2012 when he noticed swelling in his arm. Mr. Hernandez testified that if an employee damaged a motorcycle, they would have to pay for its repair out of their pay. (T1, pp. 38-40, 45-46, 51).

On cross-examination, Mr. Hernandez stated that when he testified the Petitioner's left arm failed him on April 30, 2012, he kind of jerked it to the side while moving the bike and then later the arm swelled. (T1, p. 63). He stated that the Petitioner took off a jacket that he was wearing and went to complain to Ricardo Diaz. He stated later when "Mr. Marty" came, I saw him show his arm to Mr. Marty, and Mr. Marty said, "awe that's nothing, just apply some ice". He stated that the employer had ice in a refrigerator at work. (T1, p. 52-54).

Mr. Hernandez denied that the Petitioner ever told him about a left arm injury prior to April 30, 2012, or that his arm was hurting him in March 2012. He clarified that the Petitioner did not drop the motorcycle on April 30, 2012. Even though his arm allegedly failed him, he continued to move that motorcycle into the shop. However, he stated that once it occurred, he did not continue moving any more motorcycles on that day. (T1, p. 55)

Mr. Hernandez offered on cross-examination that he knew the exact date of the second incident was June 23, 2012, it was because he had to "fill out with my own writing testimony". When asked who requested he fill out a sheet of notes, he responded that the Petitioner asked him whether I would do it and then later brought the sheet so he could fill out in his own handwriting. He brought the sheet with him to the Illinois Workers' Compensation Commission for the trial. (T1, pp. 54-55). The written history was retrieved during the trial from Mr. Hernandez's belongings, and it was noted to have been dated July 23, 2015. (T1, p. 56).

Mr. Hernandez admitted that in 2015, the Petitioner called him about testifying in his workers' compensation case. They met with each other in person so that Petitioner could explain what was going on. He stated that his meeting in 2015 lasted for about 30 minutes. Mr. Hernandez testified that he had prepared a written document for the Petitioner and that the Petitioner typed it up and had him sign. The contents of the letter were written in Spanish, and the interpreter, Noel Cortez, interpreted and read the letter into evidence. (T1, pp. 60-63). The letter stated that,

> "On June 23, 2012, the Petitioner was taking out a Gold Wing motorcycle when he screamed and said help me. The bike fell on me. It was falling down to his left side, and he tried to maintain it or hold it but was not able to because of the size and weight of the motorcycle. In that moment, the Petitioner was bent over and complained about severe pain in his stomach and his back. I personally helped him

> straighten up and sit down. There was some time that I saw he was having problems walking. While I worked there, I always knew he had pain in the lower part of his back and around the scrotum area. I witnessed him report the accident to the supervisor, Ricardo Diaz." (T1, pp. 60-63).

Mr. Hernandez admitted that the letter in question was prepared in 2015, over three years after the injuries allegedly occurred. He did not remember whether the Petitioner gave him advice about what to fill out or reminded him of the date that it occurred. (T1, pp 67-68). After the 2015 letter, he would occasionally call the Petitioner to greet each other. He denied seeing the Petitioner outside of his former job at The Zone Honda. (T1, pp. 60-61).

Mr. Hernandez stated that on June 23, 2012, the motorcycle did not fall on top of the Petitioner, but rather to his side. He was standing on the left side of the motorcycle and when the motorcycle started to fall into him, the bike fell to the ground when the Petitioner was not able to sustain it. This happened inside of the shop and later Mr. Hernandez, and another lifted the motorcycle off the ground. (T1, pp. 64-65). On cross-examination, Mr. Hernandez did not remember if there was damage to the motorcycle. He stated that no monies were deducted from his paycheck due to that bike having fallen. He denied ever dropping a motorcycle and having wages deducted. (T1, p. 66).

Mr. Hernandez stopped working at The Zone Honda at the end of 2012 or the beginning of 2013. Mr. Hernandez testified that he worked a total of 2-1/2 years for The Zone Honda and that there were years that he did not work during every month of the year. He testified that Ricardo Diaz was the sales manager and his direct supervisor as well as that of the Petitioner. Ricardo Diaz' boss was Mr. Marty Pavilonis, who was the boss of everyone because he was the owner. (T1, pp. 67-70).

Mr. Francisco Hernandez returned to the Commission for testimony on May 22, 2019 for re-direct. Petitioner's attorney asked what he was doing at the time the Petitioner's left arm failed him on April 30, 2012. He responded that he was two feet away from the Petitioner waiting for him to move, so that Mr. Hernandez could move his motorbike. He had a clear line of sight when the Petitioner's left arm failed. He stated that he and Petitioner were performing the same tasks on June 23, 2012 and that he had a clear line of sight to that incident. (T2, pp. 20-21).

The Petitioner's attorney questioned Mr. Hernandez about the letter he had written in July 2015 at the Petitioner's request. The same exhibit was re-marked as PX21, previously having been marked RX9 for Identification. He claimed that he was not pressured into writing or signing the letter on July 23, 2015. He testified that he wrote the letter because the Petitioner called him to ask if he would be a witness of what happened that day. He testified that he had never met Petitioner's attorney until the morning of the February 21, 2019 hearing. He denied having had any further conversations about the workers' compensation case between February 21, 2019 and May 22, 2019. (T2, pp. 23-25; PX21).

On cross-examination, Mr. Hernandez stated that in 2015, he wrote a letter on a blank piece of paper in his own handwriting and then gave it to Petitioner. Afterward, the Petitioner had the letter typed, and brought it to Mr. Hernandez for signing. He denied meeting with the Petitioner

before the letter was created. He said that the Petitioner called him on one occasion to ask if he would serve as a witness of what happened and that is the only time. After the letter was created, there was another chance to meet or speak with the Petitioner because he had to sign it. He again confirmed that the letter was created three years after the incidents, and long after he last worked for The Zone Honda Kawasaki. (T2, p. 32).

Respondent's Witness: Martin Pavilonis

On March 22, 2022, Martin S. Pavilonis testified to being the owner of The Zone Honda Kawasaki from approximately the early 2000's through 2013. (Transcript 4: Pg. 27) Mr. Pavilonis testified that Petitioner worked for him as a salesman and generally described Petitioner as a hard worker. (Transcript 4: Pg. 32, 38) Mr. Pavilonis identified Ricardo Diaz as the sales manager for Respondent and the direct boss of Petitioner. (Transcript 4: Pg. 38, 39) Mr. Pavilonis also identified Francisco Hernandez as a salesperson employed by the Respondent and present on April 30, 2012, and June 23, 2012. (Transcript 4: Pg. 75, 76, 81)

Regarding how to properly provide notice of a work accident occurring at The Zone Honda Kawasaki, Mr. Pavilonis testified that the correct procedure was to automatically report the incident to the manger and then it would go to the general manager. (Transcript 4: Pg. 92) Mr. Pavilonis could not recall who was employed as his general manger. (Id., Pg. 95) Mr. Pavilonis did agree Petitioner would have provided notice in compliance with store policy if he provided notification of an accident to Ricardo Diaz. (Transcript 4: Pg. 92)

Mr. Pavilonis testified that some of the salesman would be laid off in the winter months, because nobody would be buying motorcycles in Chicago during the winter. He stated that Petitioner was one of the people was regularly laid off in the winter. He stated that the layoff would generally start in October and employees would return any time between February and the end of April, depending on the weather in Chicago. Mr. Pavilonis recalled that the Petitioner would spend one to two months at a time in Mexico during the layoffs. (T4, pp. 40-42, 45).

Mr. Pavilonis stated that the Petitioner traveled to Mexico to work on his farm during the layoff periods. Mr. Pavilonis was aware of this because the Petitioner would tell stories every year and show him pictures of his time in Mexico. The Petitioner told him that he was raising bulls in Mexico and shared photographs depicting his business and the property. Mr. Pavilonis recalled that the Petitioner purchased ATVs from The Zone Honda. At the time they were purchased, Mr. Pavilonis stated that the Petitioner said he purchased them for his farm so that he could move bales of hay and other items around the property.

Petitioner's Rebuttal Testimony

The Petitioner admitted that he had purchased All-Terrain Vehicles from The Zone Honda to take to Mexico for his family. When questioned again about whether his family owned a farm, he stated that his mother had a plot of land that was small, approximately two acres (T3, p. 32, 34). He also admitted that he would visit his family in Mexico during the winter layoff season at The Zone Honda.

He also claimed that he did not remember whether he showed Mr. Pavilonis pictures of his land in Mexico or whether they discussed Mexico, but later admitted he might have had conversations with Mr. Pavilonis that broached a lot of subjects. (T4, pp. 40-42, 107-108, 110-116).

CONCLUSIONS OF LAW

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

Issue C, whether the accident arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds as follows:

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

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

Petitioner's duties as a salesperson with Respondent consisted of keeping the showroom clean as well as moving motorcycles in and out of the showroom. For his 4.30.12 accident, Petitioner was working for Respondent when he hurt his left arm moving a motorcycle, which was witnessed by Francisco Hernandez. For his 6.23.12 accident, Petitioner was working for Respondent when he hurt his left arm, low back and abdominal area trying to keep a motorcycle from falling, requiring the assistance of Jose Garcia and Francisco Hernandez. For his 5.23.13 accident, Petitioner was working for Respondent when he hurt his right ankle slipping as he moped the floor.

All of Petitioner's accidents stem from a risk distinctly associated with his employment as the employee was performing either an act he was instructed to perform by Respondent or, at the very least, an act that Petitioner might reasonably be expected to perform incident to his assigned duties.

The Arbitrator finds that Petitioner has met his burden in proving by a preponderance of the evidence that his accidents on 4.30.12, 6.23.12, and 5.25.13 arose out of and in the course of his employment by Respondent.

Issue E, whether timely notice of the accident was given to Respondent, the Arbitrator finds as follows:

Pursuant to Section 6(c) of the Act, a claimant is required to give notice to his or her employer within 45 days of a work-related accident. 820 ILCS 305/6(c). The failure to give the statutorily required notice is a bar to recovery under the Act. Silica Sand Transport, Inc. v. Industrial Comm'n, 197 Ill. App. 3d 640, 651, 554 N.E.2d 734, 143 Ill. Dec. 799 (1990). Notice to agents of the employer (i.e. supervisors or foremen) can constitute notice to the employer. See McLean Trucking Co. v. Industrial Comm'n, 72 Ill. 2d 350, 354, 381 N.E.2d 245, 21 Ill. Dec. 167 (1978).

The purpose of the notice requirement is to enable the employer to investigate the employee's alleged industrial accident. White v. Illinois Workers' Compensation Comm'n, 374 Ill. App. 3d 907, 911, 873 N.E.2d 388, 313 Ill. Dec. 764 (2007). Giving notice of an injury is insufficient if the employer is not apprised that the injury is work related. Id. Because the legislature has mandated a liberal construction on the issue of notice, if some notice has been given, although inaccurate or defective, then the employer must show that it has been unduly prejudiced. Eileen Farina v. State Farm Mutual Insurance, 2014 Ill. Wrk. Comp. LEXIS 205, *9-10, 14 IWCC 210; See Gano Electric Contracting v. Industrial Comm'n (Moore), 260 Ill. App. 3d 92, 631 N.E.2d 724 (4th Dist. 1994).

Petitioner testified to notifying his manager Ricardo Diaz after each of his accidents. Martin S. Pavilonis, the owner of The Zone Honda Kawasaki, confirmed that it was appropriate for Petitioner to report injuries to Mr. Diaz. Mr. Hernandez also witnessed Petitioner giving Mr. Diaz notice of the accident. A report of injury was made for the 5.25.13 accident.

The Arbitrator finds that Petitioner has met his burden in proving by a preponderance of the evidence that timely notice of the accidents on 4.30.12, 6.23.12, and 5.25.13 was given to Respondent.

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

To obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. A work-related injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. 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).

Regarding Petitioner's 4.30.12 work injury, both Petitioner and Mr. Hernandez testified that an accident occurred. Petitioner stated that while trying to prevent the bike from falling he overexerted his left arm. Mr. Hernandez explained that Petitioner took off his jacket and his arm was swollen. Petitioner went to Dr. Valero on May 16, 2012 and did not report a specific event but rather reported experiencing left elbow pain for the last two week from frequently pushing motorcycles. Petitioner stated that he felt horrible pain to his elbow during his 6.23.12 accident from trying to keep the motorcycle from falling. When Petitioner returned to Dr. Valero on June 28, 2012 (five days after the 6.23.12 accident), he still reported left elbow pain from an accident a couple of months ago involving a falling motorcycle. When Petitioner saw Dr. Iftikhar on July 17, 2012, he reported that he injured his left elbow seven weeks previous, and again two weeks previous while lifting a motorcycle. Dr. Atluri confirmed that the mechanism of injury was consistent with Petitioner's left elbow derangement, radial collateral ligament rupture and lateral epicondylitis. Dr. Atluri recommended work restrictions and surgery.

Based on the record as a whole, the Arbitrator finds that Petitioner has met his burden in proving by a preponderance of the evidence that Petitioner's current condition of ill-being for his left arm is causally related to his 4.30.12 injury.

Regarding Petitioner's 6.23.12 work injury, Petitioner testified that he lost control of motorcycle and injured his left elbow, low back, and abdominal area as he fought to keep the motorcycle from falling. Five days later, Petitioner saw Dr. Valero reporting ongoing left elbow pain for the past two months and abdominal pain for the past 8 days. The Arbitrator does not find the discrepancy between five or eight days to be material but notes that Petitioner did report back pain until 3.11.13 with Dr. Valero at which time he reported low back pain while in Mexico for one month. Dr. Boghossian diagnosed Petitioner with bilateral inguinal hernias more likely than not caused by his work injury of 6.23.12, related his surgery to the work accident and opined that Petitioner did not need additional care or any work restrictions. Dr. Tack opined that Petitioner's low back condition was pre-existing and not causally related.

Based on the record as a whole, the Arbitrator finds that Petitioner has met his burden in proving by a preponderance of the evidence that Petitioner's current condition of ill-being for his bilateral inguinal hernias is causally related to his 6.23.12 injury. The Arbitrator finds that Petitioner's low back and any psychological injuries are not related to the 6.23.12 injury.

Regarding Petitioner's 5.25.13 accident, Petitioner testified that he injured his right foot/ankle while mopping the floor at work. A report of injury was made, and Petitioner reported his twisted ankle to his therapist at MacNeal, to Dr. Canelas on June 5, 2013 and to Dr. Valero on June 17, 2013 where a podiatry referral was made. Dr. Mercado on June 25, 2013 diagnosed Petitioner with an open fracture of the calcaneus, distal sprain of the tibiofibular ligament, and tarsus enthesopathy.

Based on the record as a whole, the Arbitrator finds that Petitioner has met his burden in proving by a preponderance of the evidence that Petitioner's current condition of ill-being for his right foot/ankle is causally related to his 5.25.13 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:

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).

Regarding Petitioner's 4.30.12 work injury, having found Petitioner's left arm/elbow condition to be causally related and relying on the record as a whole, 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, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act, for the outstanding medical services to the left arm/elbow, that was submitted into evidence, from the following providers: Dr. Valero, Riverside Orthopedics, Dr. Iftikhar, MacNeal, Neurologic Care Associates, Dr. Hejna, Orthopedic Associates of Riverside and Dr. Williams.

Regarding Petitioner's 6.23.12 work injury, having found Petitioner's bilateral inguinal hernia condition to be causally related and relying on the record as a whole, the Arbitrator finds Petitioner's treatment related to his bilateral inguinal hernia condition 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, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act, for the outstanding medical services to the bilateral inguinal hernia, that was submitted into evidence, from the following providers: Dr. Valero, MacNeal, and Suburban Surgical Associates, and Dr. Favor.

Regarding Petitioner's 5.25.13 work injury, having found Petitioner's right ankle/foot condition to be causally related and relying on the record as a whole, 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, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act, for the outstanding medical services to the right foot/ankle, that was submitted into evidence, from the following providers: Dr. Valero, Freedom Foot Clinic, MacNeal, Dr. Rizvi, Vanguard Medical, and Dr. Anderson.

For all work injuries, 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:

With regards to Petitioner's 4.30.12 accident, the Arbitrator finds that Petitioner is entitled to prospective medical care for the left elbow/arm. Dr. Hejna concluded Petitioner would benefit

from reconstruction of the ligament tear and Dr. Atluri indicated Dr. Hejna's recommended surgery was a viable option for Petitioner to achieve MMI. Respondent shall approve and pay for the left elbow surgery and necessary post-operative care as prescribed by Dr. Hejna as provided in Section 8(a) and 8.2 of the Act.

With regards to Petitioner's 6.23.12 accident, no further treatment has been recommended for Petitioner's bilateral inguinal hernia and Petitioner has been declared at MMI with respect to said condition.

With regards to Petitioner's 5.25.13 accident, while the Arbitrator has found Petitioner's current condition for the right ankle/foot to be causally related, there is no current and pending order for treatment. Thus, the Arbitrator does not award any prospective medical care for the right ankle/foot at this time.

Issue L, whether Petitioner is entitled to temporary total disability benefits, the Arbitrator finds as follows:

A claimant is temporarily totally disabled from the time an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of his injury will permit. Westin Hotel v. Indus. Comm'n, 372 Ill.App.3d 527, 542 (1st Dist. 2007).

In determining whether a claimant remains entitled to receiving TTD benefits, the primary consideration is whether the claimant's condition has stabilized and whether he 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, he is no longer eligible for TTD benefits. Archer Daniels Midland Co. v. Indus. Comm'n, 138 Ill.2d 107, 118 (1990).

With regards to Petitioner's 4.30.12 accident, while the Arbitrator has found Petitioner's current left elbow/arm condition to be causally related and Petitioner's treatment to be reasonable and necessary, the Arbitrator further finds that Petitioner is entitled to TTD benefits. Petitioner is claiming entitlement to TTD benefits from 1.15.16 – 5.20.19. On January 15, 2016, Dr. Atluri indicated Petitioner should avoid forceful gripping with his left arm and refrain from lifting, pushing, and pulling greater than 2 pounds and further advised Petitioner had yet to reach maximum medical improvement. Petitioner's recommended surgery is still pending. Petitioner was able to work with restrictions with ABM from March 16, 2015 to April 17, 2015 and for El Milagro from May 21, 2019 to January 6, 2020. Based on the above and the record as a whole, the Arbitrator finds Respondent liable for 289 5/7 weeks of TTD benefits (1.15.16 through 5.20.19 and from January 7, 2020 to March 22, 2022) at a weekly rate of $667.15 to be paid directly to Petitioner.

With regards to Petitioner's 6/23/12 accident, as the Arbitrator has found Petitioner's bilateral inguinal hernia to be causally related and Petitioner's treatment to be reasonable and necessary, the Arbitrator further finds that Petitioner is entitled to TTD benefits. Petitioner underwent bilateral inguinal hernia surgery on August 2, 2013 and Dr. Favor released him to work on August 19, 2013. Based on the above and the record as a whole, the Arbitrator finds Respondent liable

for 2 4/7 weeks of TTD benefits (8.2.13 through 8.19.13) at a weekly rate of $646.36 to be paid directly to Petitioner.

With regards to Petitioner's 5/23/13 accident, as the Arbitrator has found Petitioner's right ankle/foot to be causally related and Petitioner's treatment to be reasonable and necessary, the Arbitrator further finds that Petitioner is entitled to TTD benefits. Petitioner was taken off work by Dr. Mercado on June 25, 2013 for two weeks and was returned to work by Dr. Mercado on July 19, 2013. Dr. Rizvi provided an off work note for July 31, 2013. On July 15, 2015, Dr. Mercado gave work restrictions for 8 weeks.

Based on the above and the record as a whole, the Arbitrator finds Respondent liable for 11 5/7 weeks of TTD benefits (6.25.13 – 7.19.13, 7.31.13, and 7.15.15-8.2.15) at a weekly rate of $646.36 to be paid directly to Petitioner.

Issue N, whether Respondent is due any credit, the Arbitrator finds as follows:

With regards to Petitioner's 5/23/13 accident, Respondent has paid TTD benefits in the amount of $1,343.66 for this date of accident.

It is so ordered:

Arbitrator Rachael Sinnen

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	13WC015937
Case Name	Pedro Calderon v. The Zone Honda Kawasaki
Consolidated Cases	13WC011107; 13WC019843;
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0023
Number of Pages of Decision	31
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	David Menchetti
Respondent Attorney	Jason Allain

DATE FILED: 1/19/2024

/s/Maria Portela, Commissioner

Signature

13WC015937
Page 1

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

PEDRO CALDERON,

Petitioner,

vs. NO: 13WC015937

THE ZONE HONDA KAWASAKI,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review under §19(b) having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, notice, causation, temporary total disability, medical expenses, "All reviewable issues" and "Current condition of ill-being," 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).

We correct the spelling of Petitioner's surname to "Calderon" (instead of "Caledron") on the first page of the Decision form sheet. We also correct a scrivener's error on page 20 in the third sentence of the third paragraph by inserting the word "not" between the words "did" and "report."

Regarding prospective medical treatment, we modify the order to reflect that Respondent shall pay for the left elbow surgery and necessary post-operative treatment as recommended by Dr. Williams instead of Dr. Hejna.

On April 4, 2014, Dr. Michael Hejna wrote, Petitioner "does not wish to consider surgical reconstruction of the collateral ligament at this point" and a left elbow injection was performed instead. *Px6, T.1016*. On January 6, 2015, Dr. Hejna performed another injection and wrote he "did not believe that a reconstruction is indicated here. There is a reasonable chance that he may require surgery to treat symptoms of epicondylitis if the symptoms cannot be otherwise controlled." *Id., T.1018*. In other words, Dr. Hejna opined that reconstruction surgery was no longer warranted but surgery to treat the epicondylitis was reasonable. On November 24, 2015, Dr. Hejna wrote that the injection in January gave Petitioner "quite good relief of his symptoms for about 3-4 months." *Id., T.1024*. Another left elbow injection was performed, and Petitioner was to return "if it fails to control his symptoms." *Id*.

Respondent's §12 examiner, Dr. Prasant Atluri, examined Petitioner on January 15, 2016, and testified that, although he did not opine at the time of his initial report about future medical treatment, based on Petitioner's imaging studies and evaluation, he would recommend an examination under anesthesia and, if the elbow was stable, he would perform a lateral epicondylar release. However, if there was instability in the elbow, he would perform an open lateral ulnar collateral ligament repair or reconstruction in addition to the lateral epicondyle release. *Rx13 at 50-51*.

Petitioner did not return to Dr. Hejna and instead saw Dr. Denis Williams on March 28, 2016, on referral from his primary care physician, Dr. Valero. Dr. Williams also diagnosed lateral epicondylitis and recommended "debridement of lateral epicondyle area and fixation of tendon." Dr. Williams wrote, "He'll let us know what he would like to do in the future." *Px19, T.1244*.

Petitioner did not pursue surgical treatment for his left elbow but, at the hearing over three years later, Petitioner testified that he would undergo the "recommended left elbow procedure" *5/22/19 hearing at 140; T.214*. He did not specify to which procedure (and which doctor) he was referring but the procedure that was discussed most immediately preceding that was the one recommended by Dr. Williams. *Id. at 120-21; T.194-95*.

Based on the above, we find that the most recent medical recommendation is the procedure by Dr. Williams. Therefore, we award the left elbow surgery and necessary post-operative treatment as recommended by Dr. Williams.

Despite our finding that Petitioner is entitled to the prospective left elbow surgery, as discussed above, we find that he failed to prove entitlement to temporary total disability (TTD) benefits as of May 10, 2019, when he began his job at El Milagro. We note that Petitioner was not given restrictions regarding his left elbow by his own treating physicians. The Arbitrator based the TTD award on the opinion of Respondent's §12 physician, Dr. Atluri, who examined Petitioner on January 15, 2016, and recommended Petitioner should avoid forceful gripping with his left arm and refrain from lifting, pushing, and pulling greater than 2 pounds. However, Dr.

Atluri testified on July 20, 2018 that, although those restrictions were reasonable at the time of his examination in 2016, he did not know if those restrictions would still be applicable at the time of his deposition. *Rx13 at 49*.

At the hearing on May 22, 2019, Petitioner testified that he began working at El Milagro two weeks prior and works part-time approximately 36 hours in two weeks. *5/22/19 hearing at 132-33; T206*. The El Milagro employment records indicate Petitioner started on May 10, 2019. *Rx15, T.3574-80; RxC, T.4041, 4043, 4046-48.*

Petitioner testified that he was assigned job tasks that he was able to do. *5/22/19 at 133, T.207.* He testified regarding whether his job at El Milagro caused symptoms in his left elbow. On May 22, 2019, Petitioner testified, "I do not have no [sic] pain because they keep rotating me from one job to the other, one to the other. I'm not doing everything at the same time." *5/22/19 at 139, T.213*. At the next hearing, on July 22, 2019, under redirect examination Petitioner testified, "Everything that I do is very simple. But the repetitive movement with my fingers after a while they start to bother me and my arm starts to swell." *7/22/19 at 155, T.375.*

However, we note that Petitioner did not seek any follow up treatment regarding the left elbow, and he continued to work at El Milagro until approximately January 6, 2020, as reflected by his last check date. *Rx15, T.3574*. A letter, dated May 28, 2021, from El Milagro in response to Respondent's subpoena states, "Mr. Calderon is a restaurant seasonal employee; he has not worked most of the year 2020 and the current year 2021 due to the situation with the pandemic." *RxC, T.4039*. Although Petitioner testified in rebuttal, at the hearing on March 22, 2022, he did not testify as to why he left his job at El Milagro nor, more importantly, that it had anything to do with his left elbow condition or complaints.

In summary, at the time Petitioner began his job at El Milagro, he was not pursuing additional left elbow treatment and was not under any valid medical restrictions regarding his left elbow. He worked at El Milagro for almost eight months at a job he was capable of performing and the evidence reflects that he has not worked since January 2020 due to the COVID pandemic as opposed to any left elbow problems. We also find that, although Petitioner only worked part-time at El Milagro, there is no evidence that Petitioner's left elbow condition limited him to part-time employment. To the contrary, it seems likely that Petitioner's decision to work part-time was influenced by the fact that he was collecting Social Security Disability benefits. *5/22/19 at 125-130, T.199-204; Px13, T.1116-21; 7/22/19 at 156-157, T.376-7*.

There is also no evidence that Petitioner sought additional left elbow treatment after his departure from El Milagro or that he is under any currently valid left elbow restrictions from a medical provider. Therefore, we modify the award to find Petitioner is entitled to TTD benefits for 173 weeks from January 15, 2016, the date of Dr. Atluri's opinion regarding Petitioner's restrictions, through May 9, 2019, the day before Petitioner began his job at El Milagro.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $667.15 per week for a period of 173 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the outstanding medical services to the left arm/elbow, that was submitted into evidence, from the following providers: Dr. Valero, Riverside Orthopedics, Dr. Iftikhar, MacNeal, Neurologic Care Associates, Dr. Hejna, Orthopedic Associates of Riverside and Dr. Williams 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 for the left elbow surgery and necessary post-operative care as prescribed by Dr. Williams as provided in Section 8(a) and 8.2 of the Act.

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

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

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

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

January 19, 2024

/s/ *Maria E. Portela*

SE/
O: 11/21/23
49

/s/ *Amylee H. Simonovich*

/s/ *Kathryn A. Doerries*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	13WC015937
Case Name	Pedro Calderon v. The Zone Honda Kawasaki
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	26
Decision Issued By	Rachael Sinnen, Arbitrator

Petitioner Attorney	Eduardo Salgado
Respondent Attorney	Jason Allain

DATE FILED: 7/5/2022

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

/s/ Rachael Sinnen, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Pedro Caledron
Employee/Petitioner

v.

The Zone Honda Kawasaki
Employer/Respondent

Case # **13** WC **15937**

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

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **4.30.12**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**52,037.96**; the average weekly wage was $**1,000.73**.

On the date of accident, Petitioner was **47** years of age, ***married*** with **0** dependent children.

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

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

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

ORDER

Respondent to pay Petitioner directly, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act, for the outstanding medical services to the left arm/elbow, that was submitted into evidence, from the following providers: Dr. Valero, Riverside Orthopedics, Dr. Iftikhar, MacNeal, Neurologic Care Associates, Dr. Hejna, Orthopedic Associates of Riverside and Dr. Williams.

Respondent shall approve and pay for the left elbow surgery and necessary post-operative care as prescribed by Dr. Hejna as provided in Section 8(a) and 8.2 of the Act.

Respondent to pay Petitioner directly for 289 5/7 weeks of TTD benefits (1.15.16 through 5.20.19 and 1.7.20 through 3.22.22) at a weekly rate of $667.15.

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

JULY 5, 2022

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Pedro Calderon	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Case No. 13WC015937
The Zone Honda Kawaski	)	consolidated with
	)	Case No. 13WC011107
	)	Case No. 13WC019843
Respondent.	)	

FINDINGS OF FACT

This matter initially proceeded to hearing on February 21, 2019, in Chicago, Illinois before Arbitrator Tiffany Kay on Petitioner's Request for Hearing pursuant to Sections 19b and 8a of the Illinois Workers Compensation Act ("Act"). The hearing continued on May 22, 2019, and again on July 22, 2019, before Arbitrator Kay. The hearing was finalized on March 22, 2022, before Arbitrator Rachael Sinnen. Issues in dispute include accident, notice, causation, medical bills, temporary total disability ("TTD"), and prospective medical. Arbitrator's Exhibit ("Ax") 5-7.

Petitioner's Medical History

Petitioner was treating with Dr. Valero for depression, elevated cholesterol, and other medical conditions. Medical records from July 2010 note that he had a history of depression and problems with work. (RX A, p. 80). On March 5, 2012, Petitioner presented to Dr. Valero with complaints of pain radiating into the left arm beginning a month ago while he was in Mexico. (RX A, p. 66).

Petitioner's Job Duties

Petitioner testified that he was employed by Respondent as a salesperson in 2012 with job duties consisting of maintaining the showroom clean as well as to move motorcycles in and out of the showroom floor to display. (Transcript 2: Pg. 34) Petitioner indicated that the motorcycles were usually moved outside in the mornings between 10 to 15 minutes prior to opening the store at 10:00 AM. (Transcript 2: Pg. 34, 35) Petitioner also confirmed that he was employed by Respondent as a salesperson in 2013 with duties requiring him to maintain the showroom clean as well as to move motorcycles in and out of the showroom floor to display. (Transcript 2: Pg. 34).

4.30.12 Date of Accident (13WC15937)

On April 30, 2012, Petitioner arrived at The Zone Honda Kawasaki at 9:10 AM to commence his customary opening duties. (Transcript 2: Pg. 42) Once there Mr. Calderon performed a preliminary cleaning of the store before assisting with moving motorcycles outside the store to display. This included moving a 2012 Honda Gold Wing. (Transcript 2: Pg. 43, 44) The Petitioner testified to moving a Honda Gold Wing and losing control of the bike. Petitioner further indicated that while trying to prevent the bike from falling he overexerted his left arm causing injury to his left elbow. (Transcript 2: Pg. 44 – 46) The incident was witnessed by other fellow coworkers who were present at the time of injury including, but not limited to, Francisco Hernandez. (Transcript 2: Pg. 46)

Petitioner stated he notified his manager Ricardo Diaz immediately upon his manager arriving. According to Petitioner, this was approximately ten minutes after the accident occurred. (Transcript 2: Pg. 47) Mr. Calderon described speaking with Mr. Diaz about the incident directly in front of Mr. Pavilonis as well as other coworkers, including Francisco Hernandez. (Id.)

Petitioner's Medical Treatment Post 4.30.12

After the alleged work injury on April 30, 2012, the Petitioner presented to Dr. Elsa Valero on May 16, 2012, after noticing a bump on the upper part of his left elbow. (Transcript 2: Pg. 48-49) Dr. Valero's notes indicate Petitioner was working at a dealership and was seeking treatment after experiencing left elbow pain for the last two week from frequently pushing motorcycles. (PX19, Pg. 249) On exam, he exhibited tenderness and loss of range of motion to the left elbow. He was prescribed Naprosyn and sent for a left elbow X-ray at MacNeal Hospital. The X-ray to the left elbow was negative. (T2, pp. 48-49; RX3, PP 59-61; RX1, pp 34).

This treatment, and all his treatment was placed through Blue Cross / Blue Shield HMO, his wife's group health insurance pursuant to her employment by El Milagro (T2, pp. 61-62, T3, pp. 123-124).

6.23.12 Date of Accident (13WC11107)

Petitioner testified that he continued to work for Respondent including on the morning of June 23, 2012 (Transcript 2: Pg. 50) According to Petitioner he arrived at The Zone Honda Kawasaki at 9:10AM and assisted with moving motorcycles from the showroom outdoors for display. (Transcript 2: Pg. 51) While moving a Honda Gold Wing motorcycle, Petitioner testified that he lost control of the bike and he fought to keep the motorcycle from falling. Unfortunately, Petitioner was unable due to the weight of the motorcycle. (Transcript 2: Pg. 52) At the time Petitioner stated he felt horrible pain to his elbow from trying to keep the motorcycle from falling. (Transcript 2: Pg. 53) In addition Petitioner indicated he felt horrible pain to his abdominal area and pain radiating to his lower back. (Id.) Petitioner indicated he notified his manager Ricardo Diaz as soon as he arrived on June 23, 2012 (Transcript 2: Pg. 53, 54) Mr. Calderon further indicated that Francisco Hernandez was present when he provided notice of the accident to Mr. Diaz. (Transcript 2: Pg. 54)

Petitioner's Medical Treatment Post 6.23.12

After the alleged injury at work on June 23, 2012, the Petitioner did not seek treatment until seeing Dr. Valero on June 28, 2012. He did not report any accident while working on June 23, 2012. Rather, he reported left lateral elbow pain for the past two months after he fell on a motorcycle and used his left arm to pick it up. He also reported abdominal pain for the past eight days, with mild dysuria and pain in the ventral penis. Dr. Valero recommended orthopedic consult for the left elbow and for the abdominal/scrotal pain a scrotal ultrasound, urinalysis, and prostate testing. (T2, p. 56; PX3, pp. 57-59).

The Petitioner next saw Dr. Valero on July 10, 2012. (T2, P. 57; PX3, pp. 54-57). He reported stress after making a mistake on the sale of a motorcycle. He reported that a motorcycle had fallen one day previous causing pain in his right leg. He reported left facial numbness for the previous week. He was referred for a CT scan to the abdomen/pelvis, blood work and was prescribed Xanax for stress. (PX3, pp. 54-57).

The Petitioner saw Dr. Tariq Iftikhar of Riverside Orthopedics on July 17, 2012. He reported that he was right hand dominant, and had injured his left elbow seven weeks previous, and again two weeks previous while lifting a motorcycle. On exam, he was markedly tender over the lateral aspect of his left elbow, at the extensor carpi radialis brevis. He received an injection from Dr. Iftikhar. He was advised that if pain recurred, physical therapy may be ordered, and in extreme cases surgery considered. (T2, pp. 57-59; RX3, pp. 26-28).

On July 19, 2012, the Petitioner had a CT of the abdomen/pelvis at MacNeal. He did not return to Dr. Valero until August 27, 2012 with complaints of ongoing abdominal pain and left elbow pain. He was referred for ultrasound studies to the abdomen and right testicle, which were performed on September 4, 2012. The Petitioner followed up with Dr. Valero on November 5, 2012. He complained of right lower quadrant pain for several months. Dr. Valero referred him to general surgeon to assess bilateral inguinal hernia. (T2, pp 59-60; RX1, 35, 39, 44-45; PX3, pp. 50-54).

The Petitioner did not next see Dr. Valero until March 11, 2013 and he complained of right hip and right lumbar pain for one year, stress, anxiety, and loss of sleep. He reported low back pain while in Mexico, of one month duration, for which he had obtained diclofenac in Mexico. He requested referral to an orthopedic for a repeat left elbow injection. He admitted he had never followed up with general surgery regarding bilateral inguinal hernias. Dr. Valero referred him for a lumbar MRI, to Dr. Iftikhar for his left elbow, and to general surgery for bilateral inguinal hernias. (PX3, pp. 46-50; RX1, p. 47). The lumbar MRI performed at MacNeal on March 18, 2013 disclosed mild degenerative change with mild right facet arthrosis at L4-5 with adjacent soft tissue edema. (T2, p. 60; RX1, pp 46, 49; PX3, pp. 46-50).

On March 20, 2013, the Petitioner saw Dr. Iftikhar for his left elbow. He reported seven months' relief from the cortisone injection in July 2012. He requested and received an injection in the lateral left elbow. He was advised to consider a tennis elbow brace with activity, and to return as needed. (T2, pp. 61-62; RX3, pp.29-30).

On April 12, 2013, the Petitioner saw Dr. Francisco Espinosa regarding low back pain, which he related to activity at work in June 2012 moving a 750-pound motorcycle that began to tip. He reported that as he tried to prevent it from falling, he injured his back. He admitted to a history of having injured in low back eighteen years prior, and the condition lasted six years. Dr. Espinosa found his neurological examination to be normal, and noted he complained of tenderness to the right low back, but not "specifically". Dr. Espinosa stated his main problem was mild facet arthropathy at L4-5 on the right that required no surgery. He offered the Petitioner facet injections. (T2, pp. 62-64; PX8, 11-12).

On April 23, 2013, the Petitioner saw Dr. Kiran Chekka at MacNeal for facet joint injections from L4-S1 due to "arthritis". On May 8, 2013, he reported 85% relief of his low back pain following the facet injections. He was referred for physical therapy at MacNeal. (T2, pp. 65-67, 71; RX1, pp 51, 53-54, 63, 65-67). The Petitioner participated in physical therapy for his low back at MacNeal in May 2013. (T2, p.72; RX1, pp. 73, 89, 75, 82-85).

On May 6, 2013, the Petitioner presented to Dr. Elizabeth Canelas at Pro Salud Medical Center for a psychiatric evaluation. He reported an eighteen-year history of psychiatric issues. He reported stress and feeling "let down" by a problem that had happened at work for Respondent, after he learned in September 2012 that there was no retirement account. He felt betrayed and that money had been stolen from him. He reported that he took a vacation in September 2012 and was then laid off until March 2013. He complained that there was no need for the employer to lie to him and let him believe he had a retirement account. (PX10, p. 8).

On May 8, 2013, Petitioner returned Dr. Chekka right-sided low back pain with radiation into the right lower extremity. (PX2, Pg. 64) Petitioner rated his low back pain to be 10 out of 10 and was diagnosed with lumbosacral facet syndrome, lumbar degenerative disease, low back pain, and myofascial pain. (Id.) Dr. Chekka recommended Petitioner hold off on any further injections but did advise to commence physical therapy. (PX2, Pg. 65)

Petitioner was seen on May 17, 2013, for physical therapy related to complaints of right sided lumbar pain that started from trying to hold a motorcycle from falling. (PX2, Pg. 76) Petitioner indicated that he also felt pain through his right testicle and through his abdominal that developed into hernias. (PX2, Pg. 76) Petitioner further reported that since the incident occurred, he has noticed an onset of urological problems. After speaking with Dr. Valero, Petitioner was told to hold off on physical therapy until his urological symptoms were properly diagnosed by urologist. (PX2, Pg. 76) Petitioner returned to Physical therapy on May 20, 2013, indicating that he was feeling pain 2 out of 10 after his prior injection. (Id., Pg. 79) The next physical therapy appointment occurred on May 23, 2013. At therapy, Petitioner indicated that his low back pain felt better, but that he would still feel pain while pushing motorcycles at work. (PX2, Pg. 79)

5.25.13 Date of Accident (13WC19843)

The Petitioner testified that on May 25, 2013, he turned his heel while at work. As he would every other day, he started sweeping the floors and mop the second floor from the top to the bottom of the steps. The stairs were wet, and he slipped with his foot at the edge of the last step

and fell injuring his feet. (T2, pp. 72-73). He had injured his right foot/ankle. His injury was witnessed by Ricardo Diaz, his manager. (T2, p. 74).

The Petitioner was shown a copy of an Employer's Report of Injury pertaining to the May 25, 2013 right ankle injury. The Petitioner admitted that it was his handwriting and that the signature looked like his but was not sure. He stated that he did not remember filling the report out or signing it. (T3, pp 69-170).

Petitioner's Medical Treatment Post 5.25.13

On May 28, 2013, the Petitioner told his therapists at MacNeal that he had twisted his right ankle at work two days previous. (RX1, p. 84). Petitioner did indicate that he was seen by his primary physician Dr. Elsa Valero on May 30, 2013. (Transcript 2: Pg. 75) Per the treating records, Petitioner was a walk-in patient with complaints of acute right ankle pain. (PX19, Pg. 226) Mr. Calderon was diagnosed with right ankle pain and was recommended an ace wrap and medication. (Id., Pg. 228)

Thereafter Petitioner returned to see Dr. Elizabeth Canelas for ongoing psychiatric care on June 5, 2013. (PX 10, Pg. 4) At this time Petitioner reported to Dr. Canelas hurting his ankle at work and was provided an off work note for the day along with a recommendation for ongoing individual therapy. (Id., Pg. 4, 5) Petitioner also advised Dr. Canelas that he felt the owner of Zone Honda was mistreating him. (PX 10). He stated that he felt more pressure at work and did not feel like he was selling bikes as well. (PX 10).

Petitioner testified that on June 6, 2013, and again on June 10, 2013 he attended physical therapy appointments prior to seeing Dr. Valero on June 17, 2013. (Transcript 2: Pg. 78) At that time a podiatry referral was provided for right ankle joint pain. (PX2, Pg. 96)

On June 19, 2013, Petitioner attended a pain management evaluation with Dr. Kiran Chekka with reports of excellent relief post six weeks from right-sided L4-5 and L5-S1 facet injection. (PX2, Pg. 98) Petitioner reports using a brace provided at physical therapy at work to push motorcycles which has been helping. (Id.) In addition, Petitioner reported having lost his footing going down a set of stairs at work when he twisted his ankle. (Id.) Dr. Checkka diagnosed Petitioner with lumbosacral facet syndrome, lumbar degenerative disc disease, low back pain and myofascial pain. Injections were not recommended given Petitioner's reports of relief with the previous injection, but additional physical therapy was prescribed. (Id., Pg. 99) Petitioner was also recommended to continue to wear his brace at work. (Id.)

At the recommendation of Dr. Valero, Petitioner was seen by Cynthia Mercado, DPM of Freedom Foot Clinic on June 25, 2013. (PX11, Pg. 6) Petitioner reported symptoms of right sided Achilles tendon pain with burning, cracking, crepitations and instability. Dr. Mercado diagnosed Petitioner with an open fracture of the calcaneus, distal sprain of the tibiofibular ligament, and tarsus enthesopathy. (PX11, PG. 7) Petitioner was placed off work for two weeks, provided voltaren gel for inflammation, prescribed an ankle brace, and recommended an injection as well as an MRI. (PX11. Pg. 7, 8)

Petitioner attended his initial physical therapy appointment at MacNeal Hospital on July 8, 2013 for a twisted ankle injury occurring on May 25, 2013. (PX2, Pg. 100) The following day on July 10, 2013, Petitioner underwent a right ankle MRI remarkable for edema like signal around the anterior talofibular and calcaneofibular ligaments suggestive of a sprain. (PX2, Pg. 121, 315)

Petitioner continued to follow up with Dr. Elizabeth Canelas for ongoing psychiatric care on July 10, 2013. (PX10, Pg. 3) During the evaluation Petitioner reported using his back brace to reduce his pain and further indicated that he is taking medication to treat his ankle pain and inflammation. (Id.) On July 10, 2013, Petitioner also reported to Dr. Canelas that the owner wants to move to a new location, and that he was still upset about what the owner did to him. (PX 10). He also stated that he was forgetting the names of clients which was unlike him. (PX 10).

On July 11, 2013, Petitioner returned to MacNeal Hospital for ongoing physical therapy. (PX2. Pg. 102) Petitioner reported pain after being on his feet for long periods of time. (Id.) Petitioner continued with therapy by attending an additional therapy session occurring on July 16, 2013. (PX2, Pg. 102)

The initial consultation for bilateral inguinal hernias with Dr. Robin L. Favor of Suburban Surgical Associates occurred on July 15, 2013. (PX9, Pg. 6) According to the history taken by Dr. Favor, Petitioner sustained bilateral inguinal hernias, while working with a motorcycle that fell on him, approximately one year ago. Dr. Favor noted that when Petitioner tried to lift the motorcycle, he reported feeling a sharp pain in his lower abdomen radiating to both groins. (Id.) Petitioner stated he felt extreme discomfort with a bulge over the first ten days that subsequently abated a little, but symptoms have persisted. (Id.) Mr. Calderon was diagnosed with bilateral inguinal hernia and recommended a laparoscopic repair with mesh that was scheduled for August 2, 2013. (PX9, Pg. 7)

On July 19, 2013, Petitioner followed up with Dr. Elsa Valero regarding ongoing left elbow pain. (PX19, Pg. 133) Petitioner was diagnosed with left elbow lateral epicondylitis along with provided a referral for a urologist. (Id., Pg. 133 – 135)

Petitioner returned to see Dr. Mercado of Freedom Foot Clinics on July 19, 2013 with complaints that his right ankle felt like his bone was moving around. (PX11, Pg. 10) A review of the MRI revealed sinus tarsitis and lateral AFTL and CFL sprain of the right ankle. (Id.) Dr. Mercado recommended Petitioner continue to use his ankle brace, continue taking medications, continue with physical therapy, and advised to return to work full duty. (PX11, Pg. 10 - 13) Petitioner was provided with an injection to the ankle and referred to a rheumatologist for evaluation on account that Petitioner was not responding well to conservative care. (Id., Pg. 15, 16)

On July 19, 2013, July 23, 2013, and again on July 25, 2013 Petitioner continued to attend physical therapy appointments at MacNeal Hospital. (PX2, Pg. 104, 116) Thereafter, Petitioner had his initial rheumatology evaluation with Dr. Syed Rizvi of Vanguard Medical Group on July 31, 2013. Mr. Calderon reported experiencing pain in his right ankle for the last two months after he injured it. (PX19, Pg. 129) Since then pain has been off and on with a range of 4 or 5 out of 10. (Id.) Petitioner was diagnosed with monoarthrits and provided with an off work note for July 31, 2013. (Id.)

At the recommendation of Dr. Elsa Valero, Petitioner was seen by Dr. Iftikhar of Riverside Orthopedics on July 23, 2013, for an evaluation of Petitioner's ongoing left elbow complaints. (PX5, Pg. 9) Mr. Calderon reported relief from the last injection for several months but advised the pain had returned. Per the treating report, it was noted that the constant use of Petitioner's elbows to move motorcycles at work has been contributing to Petitioner's on-going condition. (Id.) Petitioner was recommended to start physical therapy and commence an anti-inflammatory regimen. Dr. Iftikhar further recommended Petitioner wear a tennis elbow brace and to moderate his activities. (Id.) According to Petitioner's testimony, the possibility of surgery was also discussed. (Transcript 2, Pg. 86)

Petitioner underwent bilateral inguinal hernia surgery with mesh on August 2, 2013, with Dr. Robin Favor at MacNeal Hospital. (PX9, Pg. 9, 10)

On August 7, 2013, Petitioner had a follow up psychiatric appointment with Dr. Elizabeth Canelas of Pro Salud Medical Center. Petitioner indicated he was recovering from surgery and felt better since he had not been talking to the owner where he works. (PX10, Pg. 2) Petitioner was again encouraged to obtain individualized therapy. (Id.) Petitioner also advised Dr. Canelas that the owner refused to give him his bonus of $300. (PX 10).

The next rheumatology appointment with Dr. Rizvi occurred on August 14, 2013 at which time Petitioner followed up regarding ongoing ankle problems and joint pain since he sustained a twisting ankle injury. (PX19, Pg. 123) Dr. Rizvi diagnosed Petitioner with sprain of the calcaneofibular ligament and recommended Petitioner continue with physical therapy along with Meloxicam. (Id., Pg. 125)

The next appointment with Dr. Favor occurred August 15, 2013, for the purposes of a post-operative evaluation. Petitioner indicated that he was feeling well after surgery with minimal pain. (PX9, Pg. 11) Dr. Favor specified that Petitioner was status post laparoscopic inguinal hernia repair and was ok to return to normal activity commencing on August 19, 2013. (Ids., Pg. 12, 14)

Petitioner returned to see Dr. Cynthia Mercado of Freedom Foot Clinic on August 16, 2013 with complaints of ongoing popping like sensation in the right ankle. (PX11, Pg. 17) MRI showed mild sprain of the ATFL and the CFL in the right ankle. (Id.) Petitioner was diagnosed with a sprain of the right ankle and recommended to finish his rheumatology appointments. Petitioner was further encouraged to resume physical therapy and wear his ankle brace. (Id.) Petitioner was also provided with a referral for a second opinion regarding ongoing podiatry services. (Id., Pg. 19)

On August 16, 2013 Petitioner continued with physical therapy for his right ankle with MacNeal Hospital. Petitioner had additional physical therapy appointments in August of 2013 occurring on the 19th, 22nd, 23rd, 26th, 28th, and on the 30th. (PX2, Pg. 134 – 141) Petitioner continued to go to physical therapy during September of 2013 attending appointments on the 4th, 6th, 10th, 12th, 17th, 19th 24th, and on the 26th. (Id., Pg. 211 -218). Petitioner was discharged from therapy on September 27, 2013. (Id., Pg. 221)

On August 23, 2013, Petitioner commenced physical therapy for his left elbow at the recommendation of Dr. Iftikhar at MacNeal Hospital. (PX2, Pg. 196) At the therapy evaluation, Petitioner indicated he felt pain rated 5 out of 10 with activity. (Id.) Thereafter, Petitioner had additional physical therapy appointments on August 26th, 28th and 30th of 2013. Petitioner went on to have additional therapy for his left elbow on September 4th, 10th, 12th, 17th, and on the 19th of 2013. (PX2, Pg. 201 - 203, 208)

Petitioner returned to see Dr. Elizabeth Canelas for an additional psychiatric evaluation on August 26, 2013. At this time Petitioner indicated that the Respondent had closed its business. (PX10, Pg. 1) Petitioner further indicated that he was still recovering from surgery and has started therapy for his arm. (Id.)

The following appointment concerning Petitioner's elbow condition occurred with Dr. Elsa Valero on September 30, 2013. Petitioner was instructed to follow up with Dr. Iftikhar regarding possible left elbow surgery given the lack of substantial relief from physical therapy and two injections. (PX19. Pg. 118)

Thereafter, Petitioner followed up with Dr. Valero on November 25, 2013, with recurrent left elbow and lower back pain since his work accident. (PX19, Pg. 209) Petitioner demonstrated limited range of motion to the left elbow. (Id.) Dr. Valero provided Petitioner with a diagnosis of left elbow pain with movement and provided a referral to Dr. Iftikhar for a second orthopedic opinion. In addition, Petitioner was diagnosed with lumbosacral radiculitis. (Id., Pg. 211)

On November 27, 2013, Petitioner was evaluated by Dr. Iftikhar of Riverside Orthopedics with complaints of unresolved left elbow epicondylitis. (PX5, Pg. 17) Petitioner was diagnosed with recurring lateral epicondylitis of the left elbow and possible recent onset of ulnar neuropathy of the left elbow. (Id.) Dr. Iftikhar recommend an MRI of the left elbow, an EMG, an NCV and indicated surgery was an option since conservative care has been exhausted at this time. However, Dr. Iftikhar referred Petitioner for a second opinion given the lack of uniform response from surgical release of the tennis elbow. (Id.)

Mr. Calderon obtained a left elbow MRI on November 30, 2013, from MacNeal Hospital. (PX5, Pg. 21) Per the results Petitioner had moderately large left elbow effusion along with avulsion of the main collateral ligament. (Id.) As for the EMG, it was performed on December 5, 2013, by Neurologic Care Associates and showed no evidence of median, ulnar, or radial mononeuropathy in the left upper extremity. (PX2: Pg. 313 – 314)

Petitioner followed up with Dr. Iftikhar on December 16, 2013. According to Dr. Iftikhar there is no evidence of any neuropathy on the EMG and NCV studies. (PX5, Pg. 23) However, according to the MRI, Dr. Iftikhar indicated it showed an avulsion of the radial collateral ligament as well as epicondylitis. (Id.) This dual pathology, according to Dr. Iftikhar explained the lack of response to conservative care. Due to the complexity of the situation, Petitioner was referred for a second opinion. (Id.)

On December 10, 2013, Petitioner attended an additional pain management appointment with Dr. Kiran Chekka of MacNeal Hospital. (PX2, Pg. 227) According to Dr. Chekka, Petitioner's

symptoms have once again become functionally limiting and are affecting his quality of life. Dr. Chekka noted Petitioner had a gradual regression of his symptoms since the injection on April 23, 2013. (Id.) Petitioner was recommended to repeat a right L4-5 and L5-S1 facet joint injection and to consider a radiofrequency ablation if he does not improve with injections. (PX2, Pg. 227, 228) On February 11, 2014, Petitioner underwent a right L4-5 and L5-S1 facet injection performed by Dr. Chekka. (PX2, Pg. 235)

Acting on the advice of Dr. Iftikhar, Petitioner had an orthopedic evaluation with Dr. Michael J. Hejna of Orthopaedic Associates of Riverside on February 21, 2014. (PX6, Pg. 2 & PX5, Pg. 25) The treating report indicates Petitioner was seen for left elbow complaints subsequent a work accident occurring in 2012. (PX6, Pg. 2) Dr. Hejna also indicated Petitioner suffered from chronic radial collateral ligament tear with significant pain. As for treatment, Dr. Hejna concluded Petitioner would benefit from reconstruction of the ligament tear. (Id.)

Petitioner returned to see Dr. Chekka on March 4, 2014, for ongoing treatment for Petitioner's L4-5 and L5-SI complaints. (PX1, Pg. 2) Petitioner again endorsed that his ongoing functional deficits are a function of a work-related injury when lifting a motorcycle at work. (Id.) In addition, Petitioner indicated that since the last injection, he has been able to function much better. Petitioner was diagnosed with suffering from lumbar facet syndrome, myofascial pain, and low back pain. (PX1, Pg. 3) Dr. Chekka recommended Petitioner be fitted for a lumbosacral orthotic brace to restrict his range of motion and reduce pain and to continue physical therapy. (Id.)

On April 4, 2014, Mr. Calderon returned to Dr. Hejna for a follow consultation regarding Petitioner's ongoing left elbow complaints. According to Dr. Hejna, Petitioner did not want to consider surgical reconstruction of the collateral ligament. (PX6, Pg. 6) Rather, Petitioner requested an injection to keep his symptoms from flaring in the future. At this time, Dr. Hejna provided an injection of Depo-Medrol 40mg with 1cc of Marcaine into Petitioner's left elbow. (Id.)

Petitioner returned to see his primary physician Dr. Elsa Valero on July 15, 2014 with complaints of ongoing right ankle complaints aggravated by activity. (PX3, Pg. 25) Dr. Valero diagnosed Mr. Calderon with right foot / ankle pain and prescribed Petitioner acetaminophen as well as codeine tablets for pain. (Id., Pg. 27)

Petitioner returned to see Dr. Elsa Valero regarding ongoing low back pain on December 19, 2014. (PX3, Pg. 22) According to Dr. Valero's report Petitioner reported having a history of low back pain worsened by a bike accident. Petitioner was diagnosed with displacement of lumbar intervertebral disc with myelopathy and recommended he follow up with pain clinic. (PX3, Pg. 24) In addition, Dr. Valero recommended Petitioner obtain an additional lumbar spine MRI. (Id.) Petitioner was also diagnosed with ongoing left elbow joint pain without relief from therapy. Petitioner was again provided with a referral for orthopedic care. (Id.)

The lumbar MRI recommended by Dr. Valero occurred on December 24, 2014, at MacNeal Hospital. (PX1, Pg. 6) The MRI had remarkable findings at L4-5 as well as L5-S1 that were similar in nature to past lumbar exams.

Thereafter, Petitioner returned to see Dr. Hejna of Orthopaedic Associates of Riverside on January 6, 2015, with ongoing left elbow complaints. (PX6, Pg. 8) According to Dr Hejna, Petitioner aggravated his symptoms while assisting his brother who is a mechanic. (Id.) Dr. Hejna indicated that Petitioner's complaints were from epicondylitis and that reconstruction of the ligament was not warranted (Id.) However, Dr. Hejna advised that Petitioner may require surgery to treat his epicondylitis if his symptoms could not be controlled. Petitioner was provided with an injection of Depo-Medrol and Marcaine to the left elbow. (PX6, Pg. 8)

On March 11, 2015, Petitioner returned to see his primary physician Dr. Elsa Valero with ongoing complaints of lower back pain. Petitioner was diagnosed with displacement of lumbar intervertebral disc without myelopathy and recommended he follow up with the pain clinic. (PX3, Pg. 18 – 21) Petitioner again followed up with Dr. Valero on April 15, 2015 with ongoing complaints of low back pain. (PX3, Pg. 15, 16) Dr. Valero diagnosed Petitioner with a prolapsed lumbar intervertebral disc and referred Petitioner for a neurological consult. (PX3, Pg. 18)

Mr. Calderon was seen for a neurological evaluation for his low back complaints on April 22, 2015, with Dr. Francisco J. Espinosa of Neurological Surgery & Spine Surgery. (PX8, Pg. 13) Petitioner was diagnosed with persistent low back pain with recent MRI imaging showing significant facet arthropathy bilaterally at L5-S1 and on the right at L4-5. (PX8, Pg. 15) Dr. Espinosa again recommended Petitioner obtain facet blocks followed by rhizotomy if successful. (Id.) Dr. Espinosa specified that the facet blocks should be aimed at L4-5 on the right and L5-S1 bilaterally and provided Petitioner a referral for pain management. (Id., Pg. 15, 16) If Petitioner's symptoms persist, Dr. Espinosa stated Petitioner should return to consider having the rhizotomy done openly with surgery. (Id., Pg. 15)

Petitioner was evaluated on June 11, 2015, by Dr. Herbert Engelhard III at the University of Illinois Hospital & Health Systems at the request of Dr. Elsa Valero for right-sided back pain and leg pain. (PX7, Pg. 1) According to Petitioner his symptoms started in June of 2012 and has been treated conservatively with medications, therapy, and injections since. (Id.) However, recently his condition has worsened and has only been able to work part-time. Dr. Engelhard III reviewed Petitioner's MRI imaging and indicated it was remarkable for a herniated disk at L5-S1. (PX7, Pg. 2) Petitioner was diagnosed with a lumbar disk herniation with radiculopathy at L5-S1 and recommended a diskectomy or possible steroid injections (Id.) In addition, Dr. Engelhard III recommended Petitioner obtain a revised lumbar MRI as well as light duty lifting restrictions for work. (Id., Pg. 2)

A repeat lumbar MRI was obtained by Petitioner on June 17, 2015 at MacNeal Hospital. (PX1, Pg. 10) The results were interpreted during Petitioner's follow up appointment with Dr. Engelhard III on July 15, 2015. (PX7, Pg. 6) Dr. Engelhard III indicated that a review of the recent MRI showed signs of mild degenerative changes and some foraminal stenosis without radicular symptoms. (Id.) Petitioner was diagnosed with chronic musculoskeletal pain. According to Dr. Englehard III, although Petitioner does have some stenosis it did not correspond to any radiculopathy. (Id.) Dr. Engelhard III recommended Petitioner follow up with his primary physician as well as trigger point injections or facet injections, but not a rhizotomy. (Id., Pg. 7)

The following evaluation with Dr. Valero did not occur until July 2, 2015. (PX3, Pg. 12) At that time Petitioner made complaints of ongoing right foot pain with mild relief from the last injection administered by Dr. Mercado. (Id.) Petitioner was diagnosed with right foot and ankle pain and was prescribed oxycodone for pain relief.

Thereafter, Petitioner returned to Dr. Mercado of Freedom Foot Clinic on July 15, 2015 with ongoing complaints of right ankle instability secondary to a right ankle sprain in 2013. (PX11, Pg. 20) According to Dr. Mercado, these kinds of injuries lead to instability of the ankle. Surgery was discussed along with additional conservative measures such as the use of bracing and a tens unit. (Id.) Petitioner was diagnosed with a sprain of the distal tibiofibular ligament of the right ankle, tibialis tendinitis, as well as ankle and tarsus enthesopathy. (Id., Pg. 21) Dr. Mercado recommended Petitioner return to work with light duty restrictions for eight weeks and obtain a second opinion with Dr. Nick Anderson to further evaluate a lateral ankle stabilization procedure. (Id., Pg. 22, 23)

Petitioner returned to see Dr. Michael J. Hejna on November 24, 2015, with complaints of ongoing left elbow lateral epicondylitis pain with ligament tear. (PX6, Pg. 11) The prior injection in January provided relief of symptoms for approximately 3 to 4 months. (Id.) Dr. Hejna diagnosed Petitioner with left elbow epicondylitis and provided an injection of Depo-Medrol and Marcaine. (Id.) Petitioner was instructed to return should this injection fail to control his symptoms.

Petitioner testified that he was sent to four independent medical evaluations, including an appointment with Dr. George B. Holmes Jr. of Midwest Orthopaedics at Rush. (Transcript 2: Pg. 117, 118) Petitioner testified that his evaluation with Dr. Holmes Jr. occurred on January 20, 2016. (Transcript 2: Pg. 118)

On March 11, 2016, Petitioner returned to see his primary physician Dr. Elsa Valero with ongoing complaints of left elbow pain. Dr. Valero diagnosed Petitioner with left elbow and again provided Petitioner with an orthopedic referral. (PX3, Pg. 8) Petitioner was treated by Dr. Dennis A. Williams for an orthopedic evaluation of the left elbow at the request of Dr. Valero on March 28, 2016. (PX19, Pg. 39) Per Dr. Williams, Petitioner arrived with complaints of ongoing left elbow pain since lifting a motorcycle in 2012. Pain was rated to be a 6 out of 10 during the evaluation. Petitioner was diagnosed with left elbow lateral epicondylitis. (PX19, Pg. 41) Dr. Williams did not recommend additional injection to Petitioner's elbow but did recommend a debridement of the lateral epicondylar area and fixation of the tendon. (Id. Pg. 41)

Petitioner returned to see Dr. Valero on June 27, 2016 and complained of right heel and back pain. Dr. Valero diagnosed Petitioner with displacement of lumbar intervertebral disc without myelopathy and advised to follow up with the pain clinic. (PX19, Pg. 33) Petitioner followed up again with Dr. Valero on November 3, 2016, at which point he was diagnosed with abdominal pain. (PX19, Pg. 28) Thereafter, Petitioner was seen by Dr. Valero on April 6, 2017. (Id., Pg. 22) Dr. Valero provided Petitioner with a diagnosis of ongoing abdominal pain with lumbosacral radiculopathy. (Id., Pg. 23)

On August 15, 2017, Petitioner returned to see Dr. Valero with complaints that included low back pain. (PX19, Pg. 16) Dr. Valero provided Petitioner with a diagnosis of displacement of lumbar intervertebral disc without myelopathy and lumbosacral radiculopathy. (Id., Pg. 17)

Petitioner was seen by Dr. Elsa Valero on April 24, 2018 for a right foot Xray. According to the results Petitioner had mild degenerative joint disease of the first MTP joint without fracture. (PX20, Pg. 55 – 59)

On November 14, 2018 Petitioner was again evaluated by Dr. Cynthia Mercado of Freedom Foot Clinic. At this time Petitioner was diagnosed with peroneal tendinitis, pain in the right leg, sprain of unspecified ligament of the right ankle and lesion of plantar nerve. (PX20, Pg. 62) Dr. Mercado provided Petitioner with a recommendation of physical therapy with a focus on deep message / kneading of the right foot to break up cicatrix scar tissue from nerve entrapment. (Id.)

On November 26, 2018 Petitioner was seen at MacNeal Hospital for an initial physical therapy. (PX20, Pg. 66, 68) Thereafter, Petitioner had an additional session on November 30, 2018 and on December 4th, 6th, 7th, 11th 13th, 14th, 18th, 20th, and the 24th of 2018. (Id., Pg. 76, 78 - 87) Petitioner continued with his prescribed therapy appointments by attending a final session on January 2, 2019. (PX20, Pg. 90)

Thereafter, Petitioner was seen by Dr. Nicolas Anderson of MacNeal Hospital on February 28, 2019. Dr. Anderson diagnosed Petitioner with a stress fracture of the right foot, instability of the right ankle, and a right ankle ligament strain. (PX20, Pg. 106) Petitioner was seen for a right foot MRI and of the right lower extremity on March 1, 2019. (Id., Pg. 110, 111) The right ankle MRI confirmed the following impressions: third metatarsal shaft bone marrow edema with signs of stress injury; second metatarsal shaft bone marrow edema with sings of possible stress injury; and intermetatarsal trace edema. (Id., Pg. 110)

The next appointment with Dr. Valero occurred on December 11, 2019 with Loyola Medicine. (PX25, Pg. 160) Petitioner had general complaints of right wrist pain and congestion and was diagnosed with lumbar radiculitis and right wrist pain. (Id., Pg. 166)

On April 28, 2020, Petitioner was again seen by Dr. Valero with ongoing complaints of back pain via a telephonic office visit. (PX25, Pg. 184 – 191) According to Dr. Valero's notes Petitioner was diagnosed with lumbar radiculitis and prescribed 325mg oxycodone tablets for pain relief. (Id., Pg. 190) Petitioner returned to Dr. Valero on August 5, 2020, for a medication refill appointment and was diagnosed with lumbar radiculitis. (Id., Pg. 195 - 200) In addition, Petitioner was provided with a new prescription for 325mg oxycodone tablets. (Id., Pg. 200)

Thereafter, Petitioner returned to Dr. Valero on September 29, 2020, with ongoing complaints of low back and right-hand pain. (PX25, Pg. 207) According to Dr. Valero, Petitioner was suffering from chronic low back pain thar radiated into the right leg. (Id., Pg. 208) Dr. Valero provided Petitioner with a diagnosis for spinal stenosis of the lumbar region without neurogenic claudication and spinal stenosis of the lumbosacral region. (Ids., Pg. 211) Petitioner was provided with a referral for a lumbar MRI and recommended to follow up with Orthopaedics Associates of Riverside. (Id., Pg. 211 & 212)

Petitioner presented to Loyola Medicine for a lumbar MRI on September 30, 2020. (PX25, Pg. 226) The findings were suggestive of multilevel lumbar spondylosis most evident at L5-S1 that has progressed since June 17, 2015. (Id.)

On July 23, 2021, Petitioner returned to Loyola Medicine for a follow up appointment with ongoing low back pain. Petitioner was diagnosed with spinal stenosis of the lumbar region without neurogenic claudication and chronic right foot pain (PX23, Pg. 7) According the provider, Petitioner reported suffering a work injury in 2012 to his low back when he was carrying a heavy item and hurt his low back. (PX23, Pg. 9) In addition the reports indicates that since the accident the Petitioner has gone onto disability and is currently working 16 hours a week. (Id.) A recommendation was provided for skilled physical therapy to address Petitioner's functional limitations. (Id., Pg. 15) Therapy commenced on September 1, 2021, and continued through October 22, 2021 with Loyola Medicine. (Id., Pg. 21 -173)

Section 12 examiner: Dr. Prasant Atluri

Petitioner was evaluated on January 15, 2016 by Dr. Prasant Atluri of Hand to Shoulder Associates. On physical examination Dr. Atluri noted Petitioner had tenderness over the lateral epicondyle and the ECRB tendon origin. A review of the November 30, 2013 left elbow MRI showed signs of damage to the lateral ulnar collateral ligament. Dr. Atluri diagnosed Petitioner with left elbow derangement, radial collateral ligament rupture, and left elbow lateral epicondylitis. (RX13, Transcript Pg. 30) According to Dr. Atluri, the mechanism of injury reported by Petitioner was plausible for causing or contributing to his left elbow condition. Specifically, Dr. Atluri argued Petitioner's identified mechanism of injury represented a classic mechanism for inuring the lateral elbow. Meaning at the time of injury Petitioner's elbow was in an at-risk position, which includes a semi extended position of the elbow with forearms pronated so that the palms are facing downward and arms away from the body, subject to a sudden unexpected load. (RX13, Pg. 33) Given the evidence presented Dr. Atluri concluded Petitioner suffered an acute elbow injury in 2012 that did not resolve. (RX13, Pg. 34) As for whether additional care was needed, Dr. Atluri suggested Petitioner had yet reached MMI as of the date of his evaluation on January 15, 2016. (RX13, PG. 34, 35)

Regarding Petitioner's ability to work, Dr. Atluri indicated Petitioner should avoid forceful gripping with his left arm and refrain from lifting, pushing, and pulling greater than 2 pounds and further advised Petitioner had yet to reach maximum medical improvement. With regards to Petitioner's care, Dr. Atluri indicated that overall Petitioner's treatment had been reasonable, and that Dr. Hejna's recommended surgery was a viable option for Petitioner to achieve MMI. (RX13, Pg. 47, 48) As for the kind of surgery to be performed, Dr. Atluri indicated it would depend on the stability of joint. If the elbow was stable, then a lateral epicondylar release would be appropriate. However, if the joint was unstable then an open lateral ulnar collateral ligament repair or reconstruction would be appropriate along with the tennis elbow release. (RX13, Pg. 50, 51)

Section 12 examiner: Dr. Stanford Tack

The Petitioner underwent an independent medical evaluation by Dr. Stanford Tack for his back on January 29, 2016. The Petitioner testified that Dr. Tack spent about 30 minutes with him for the independent medical evaluation. He did not remember whether Dr. Tack spoke with him about prior workers' compensation cases. (T2, p. 118-119). Dr. Tack testified via an evidence deposition on May 16, 2018. (RX12). He stated that the Petitioner provided a history of having lost control of a motorcycle on June 23, 2012 causing left elbow pain, and abdominal pain. He reported losing no time from work until a hernia surgery (August 2, 2013). He reported a consultation with Dr. Francisco Espinosa, and referral for injections. He reported having had multiple MRI studies. He admitted having had low back pain twenty years previous. (RX12, pp. 8-10). Dr. Tack reviewed MRI imaging from March 18, 2013, December 23, 2014 and June 17, 2015. He stated that all the MRIs indicated degenerative changes with slight progression. (RX12, pp. 10-11). Dr. Tack stated that the Petitioner's lumbar condition and treatment was unrelated to the events of June 23, 2012. More specifically he testified that on June 28, 2012, he did not complain of his low back. On July 10, 2012, he complained of his right leg after an incident the day prior, but no low back pain. On August 27, 2012 he complained of pain in his rib cage, but no low back pain. On November 5, 2012 he complained of right lower quadrant pain and was diagnosed with an inguinal hernia. On March 11, 2013, he complained of low back pain for the past month. Dr. Tack concluded that the Petitioner's low back condition was unrelated to the events on June 23, 2012. He assessed no work restrictions or surgical intervention was necessary. (RX12, pp. 13-16).

Section 12 examiner: Dr. Stephen Boghossian

Thereafter, Petitioner was evaluated by Dr. Stephen P. Boghossian on February 8, 2016, for the purpose of an independent medical evaluation. According to Dr. Boghossian, Petitioner reported a work accident in June of 2012 while trying to move a heavy motorcycle and lost control. (PX15, Pg. 8) Upon trying to keep the motorcycle from falling, Petitioner reported feeling pain in his lower abdomen that radiated to his back. (PX15, Pg. 8) Dr. Boghossian diagnosed Petitioner with bilateral inguinal hernias more likely than not caused by his work injury. With respect to ongoing care, Petitioner will not require further care and will not need restrictions. However, the need for surgery was related to his employment accident with Respondent in June of 2012. (Id.)

Petitioner's Witness: Francisco Hernandez

The first witness presented by the Petitioner was Mr. Francisco Hernandez, a co-worker at The Zone Honda Kawasaki. He worked as a salesperson with the Petitioner on April 30, 2012 and June 23, 2012. (T1, pp. 28-29).

Mr. Hernandez stated that The Zone Honda Kawasaki sold motorcycles, both new and used. He stated that the motorcycle involved in both incidents was "top of the line, the biggest motorcycle that Honda has". Mr. Hernandez testified had the Gold Wing weighed between 900 and 933 lbs. Mr. Hernandez testified to Petitioner's Exhibit #18, a photograph of a Honda Gold Wing motorcycle and was also shown Petitioner's Exhibit #17, a printout of the Honda Gold Wing

specifications for 2012 identifying the weight of said motorcycle to be between 904 lbs. and 933 lbs. (T1, pp. 29, 31-32, 34-35).

Mr. Hernandez testified that on April 30, 2012, he witnessed Petitioner move motorcycles into a display at The Zone Honda Kawasaki. He explained that the employees had to take motorcycles outside, and Petitioner grabbed the Gold Wing, his left arm/hand failed him. He stated, "that's what I saw because I was behind him with another motorcycle." Mr. Hernandez heard the Petitioner indicate that he was hurt and saw him walk to the manager, Ricardo Diaz. He also noted that The Petitioner's arm was swollen. He clarified that the Petitioner was wearing short sleeves on April 30, 2012 when he noticed swelling in his arm. Mr. Hernandez testified that if an employee damaged a motorcycle, they would have to pay for its repair out of their pay. (T1, pp. 38-40, 45-46, 51).

On cross-examination, Mr. Hernandez stated that when he testified the Petitioner's left arm failed him on April 30, 2012, he kind of jerked it to the side while moving the bike and then later the arm swelled. (T1, p. 63). He stated that the Petitioner took off a jacket that he was wearing and went to complain to Ricardo Diaz. He stated later when "Mr. Marty" came, I saw him show his arm to Mr. Marty, and Mr. Marty said, "awe that's nothing, just apply some ice". He stated that the employer had ice in a refrigerator at work. (T1, p. 52-54).

Mr. Hernandez denied that the Petitioner ever told him about a left arm injury prior to April 30, 2012, or that his arm was hurting him in March 2012. He clarified that the Petitioner did not drop the motorcycle on April 30, 2012. Even though his arm allegedly failed him, he continued to move that motorcycle into the shop. However, he stated that once it occurred, he did not continue moving any more motorcycles on that day. (T1, p. 55)

Mr. Hernandez offered on cross-examination that he knew the exact date of the second incident was June 23, 2012, it was because he had to "fill out with my own writing testimony". When asked who requested he fill out a sheet of notes, he responded that the Petitioner asked him whether I would do it and then later brought the sheet so he could fill out in his own handwriting. He brought the sheet with him to the Illinois Workers' Compensation Commission for the trial. (T1, pp. 54-55). The written history was retrieved during the trial from Mr. Hernandez's belongings, and it was noted to have been dated July 23, 2015. (T1, p. 56).

Mr. Hernandez admitted that in 2015, the Petitioner called him about testifying in his workers' compensation case. They met with each other in person so that Petitioner could explain what was going on. He stated that his meeting in 2015 lasted for about 30 minutes. Mr. Hernandez testified that he had prepared a written document for the Petitioner and that the Petitioner typed it up and had him sign. The contents of the letter were written in Spanish, and the interpreter, Noel Cortez, interpreted and read the letter into evidence. (T1, pp. 60-63). The letter stated that,

> "On June 23, 2012, the Petitioner was taking out a Gold Wing motorcycle when he screamed and said help me. The bike fell on me. It was falling down to his left side, and he tried to maintain it or hold it but was not able to because of the size and weight of the motorcycle. In that moment, the Petitioner was bent over and complained about severe pain in his stomach and his back. I personally helped him

> straighten up and sit down. There was some time that I saw he was having problems walking. While I worked there, I always knew he had pain in the lower part of his back and around the scrotum area. I witnessed him report the accident to the supervisor, Ricardo Diaz." (T1, pp. 60-63).

Mr. Hernandez admitted that the letter in question was prepared in 2015, over three years after the injuries allegedly occurred. He did not remember whether the Petitioner gave him advice about what to fill out or reminded him of the date that it occurred. (T1, pp 67-68). After the 2015 letter, he would occasionally call the Petitioner to greet each other. He denied seeing the Petitioner outside of his former job at The Zone Honda. (T1, pp. 60-61).

Mr. Hernandez stated that on June 23, 2012, the motorcycle did not fall on top of the Petitioner, but rather to his side. He was standing on the left side of the motorcycle and when the motorcycle started to fall into him, the bike fell to the ground when the Petitioner was not able to sustain it. This happened inside of the shop and later Mr. Hernandez, and another lifted the motorcycle off the ground. (T1, pp. 64-65). On cross-examination, Mr. Hernandez did not remember if there was damage to the motorcycle. He stated that no monies were deducted from his paycheck due to that bike having fallen. He denied ever dropping a motorcycle and having wages deducted. (T1, p. 66).

Mr. Hernandez stopped working at The Zone Honda at the end of 2012 or the beginning of 2013. Mr. Hernandez testified that he worked a total of 2-1/2 years for The Zone Honda and that there were years that he did not work during every month of the year. He testified that Ricardo Diaz was the sales manager and his direct supervisor as well as that of the Petitioner. Ricardo Diaz' boss was Mr. Marty Pavilonis, who was the boss of everyone because he was the owner. (T1, pp. 67-70).

Mr. Francisco Hernandez returned to the Commission for testimony on May 22, 2019 for re-direct. Petitioner's attorney asked what he was doing at the time the Petitioner's left arm failed him on April 30, 2012. He responded that he was two feet away from the Petitioner waiting for him to move, so that Mr. Hernandez could move his motorbike. He had a clear line of sight when the Petitioner's left arm failed. He stated that he and Petitioner were performing the same tasks on June 23, 2012 and that he had a clear line of sight to that incident. (T2, pp. 20-21).

The Petitioner's attorney questioned Mr. Hernandez about the letter he had written in July 2015 at the Petitioner's request. The same exhibit was re-marked as PX21, previously having been marked RX9 for Identification. He claimed that he was not pressured into writing or signing the letter on July 23, 2015. He testified that he wrote the letter because the Petitioner called him to ask if he would be a witness of what happened that day. He testified that he had never met Petitioner's attorney until the morning of the February 21, 2019 hearing. He denied having had any further conversations about the workers' compensation case between February 21, 2019 and May 22, 2019. (T2, pp. 23-25; PX21).

On cross-examination, Mr. Hernandez stated that in 2015, he wrote a letter on a blank piece of paper in his own handwriting and then gave it to Petitioner. Afterward, the Petitioner had the letter typed, and brought it to Mr. Hernandez for signing. He denied meeting with the Petitioner

before the letter was created. He said that the Petitioner called him on one occasion to ask if he would serve as a witness of what happened and that is the only time. After the letter was created, there was another chance to meet or speak with the Petitioner because he had to sign it. He again confirmed that the letter was created three years after the incidents, and long after he last worked for The Zone Honda Kawasaki. (T2, p. 32).

Respondent's Witness: Martin Pavilonis

On March 22, 2022, Martin S. Pavilonis testified to being the owner of The Zone Honda Kawasaki from approximately the early 2000's through 2013. (Transcript 4: Pg. 27) Mr. Pavilonis testified that Petitioner worked for him as a salesman and generally described Petitioner as a hard worker. (Transcript 4: Pg. 32, 38) Mr. Pavilonis identified Ricardo Diaz as the sales manager for Respondent and the direct boss of Petitioner. (Transcript 4: Pg. 38, 39) Mr. Pavilonis also identified Francisco Hernandez as a salesperson employed by the Respondent and present on April 30, 2012, and June 23, 2012. (Transcript 4: Pg. 75, 76, 81)

Regarding how to properly provide notice of a work accident occurring at The Zone Honda Kawasaki, Mr. Pavilonis testified that the correct procedure was to automatically report the incident to the manger and then it would go to the general manager. (Transcript 4: Pg. 92) Mr. Pavilonis could not recall who was employed as his general manger. (Id., Pg. 95) Mr. Pavilonis did agree Petitioner would have provided notice in compliance with store policy if he provided notification of an accident to Ricardo Diaz. (Transcript 4: Pg. 92)

Mr. Pavilonis testified that some of the salesman would be laid off in the winter months, because nobody would be buying motorcycles in Chicago during the winter. He stated that Petitioner was one of the people was regularly laid off in the winter. He stated that the layoff would generally start in October and employees would return any time between February and the end of April, depending on the weather in Chicago. Mr. Pavilonis recalled that the Petitioner would spend one to two months at a time in Mexico during the layoffs. (T4, pp. 40-42, 45).

Mr. Pavilonis stated that the Petitioner traveled to Mexico to work on his farm during the layoff periods. Mr. Pavilonis was aware of this because the Petitioner would tell stories every year and show him pictures of his time in Mexico. The Petitioner told him that he was raising bulls in Mexico and shared photographs depicting his business and the property. Mr. Pavilonis recalled that the Petitioner purchased ATVs from The Zone Honda. At the time they were purchased, Mr. Pavilonis stated that the Petitioner said he purchased them for his farm so that he could move bales of hay and other items around the property.

Petitioner's Rebuttal Testimony

The Petitioner admitted that he had purchased All-Terrain Vehicles from The Zone Honda to take to Mexico for his family. When questioned again about whether his family owned a farm, he stated that his mother had a plot of land that was small, approximately two acres (T3, p. 32, 34). He also admitted that he would visit his family in Mexico during the winter layoff season at The Zone Honda.

He also claimed that he did not remember whether he showed Mr. Pavilonis pictures of his land in Mexico or whether they discussed Mexico, but later admitted he might have had conversations with Mr. Pavilonis that broached a lot of subjects. (T4, pp. 40-42, 107-108, 110-116).

CONCLUSIONS OF LAW

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

Issue C, whether the accident arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds as follows:

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

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

Petitioner's duties as a salesperson with Respondent consisted of keeping the showroom clean as well as moving motorcycles in and out of the showroom. For his 4.30.12 accident, Petitioner was working for Respondent when he hurt his left arm moving a motorcycle, which was witnessed by Francisco Hernandez. For his 6.23.12 accident, Petitioner was working for Respondent when he hurt his left arm, low back and abdominal area trying to keep a motorcycle from falling, requiring the assistance of Jose Garcia and Francisco Hernandez. For his 5.23.13 accident, Petitioner was working for Respondent when he hurt his right ankle slipping as he moped the floor.

All of Petitioner's accidents stem from a risk distinctly associated with his employment as the employee was performing either an act he was instructed to perform by Respondent or, at the very least, an act that Petitioner might reasonably be expected to perform incident to his assigned duties.

The Arbitrator finds that Petitioner has met his burden in proving by a preponderance of the evidence that his accidents on 4.30.12, 6.23.12, and 5.25.13 arose out of and in the course of his employment by Respondent.

Issue E, whether timely notice of the accident was given to Respondent, the Arbitrator finds as follows:

Pursuant to Section 6(c) of the Act, a claimant is required to give notice to his or her employer within 45 days of a work-related accident. 820 ILCS 305/6(c). The failure to give the statutorily required notice is a bar to recovery under the Act. Silica Sand Transport, Inc. v. Industrial Comm'n, 197 Ill. App. 3d 640, 651, 554 N.E.2d 734, 143 Ill. Dec. 799 (1990). Notice to agents of the employer (i.e. supervisors or foremen) can constitute notice to the employer. See McLean Trucking Co. v. Industrial Comm'n, 72 Ill. 2d 350, 354, 381 N.E.2d 245, 21 Ill. Dec. 167 (1978).

The purpose of the notice requirement is to enable the employer to investigate the employee's alleged industrial accident. White v. Illinois Workers' Compensation Comm'n, 374 Ill. App. 3d 907, 911, 873 N.E.2d 388, 313 Ill. Dec. 764 (2007). Giving notice of an injury is insufficient if the employer is not apprised that the injury is work related. Id. Because the legislature has mandated a liberal construction on the issue of notice, if some notice has been given, although inaccurate or defective, then the employer must show that it has been unduly prejudiced. Eileen Farina v. State Farm Mutual Insurance, 2014 Ill. Wrk. Comp. LEXIS 205, *9-10, 14 IWCC 210; See Gano Electric Contracting v. Industrial Comm'n (Moore), 260 Ill. App. 3d 92, 631 N.E.2d 724 (4th Dist. 1994).

Petitioner testified to notifying his manager Ricardo Diaz after each of his accidents. Martin S. Pavilonis, the owner of The Zone Honda Kawasaki, confirmed that it was appropriate for Petitioner to report injuries to Mr. Diaz. Mr. Hernandez also witnessed Petitioner giving Mr. Diaz notice of the accident. A report of injury was made for the 5.25.13 accident.

The Arbitrator finds that Petitioner has met his burden in proving by a preponderance of the evidence that timely notice of the accidents on 4.30.12, 6.23.12, and 5.25.13 was given to Respondent.

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

To obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. A work-related injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. 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).

Regarding Petitioner's 4.30.12 work injury, both Petitioner and Mr. Hernandez testified that an accident occurred. Petitioner stated that while trying to prevent the bike from falling he overexerted his left arm. Mr. Hernandez explained that Petitioner took off his jacket and his arm was swollen. Petitioner went to Dr. Valero on May 16, 2012 and did not report a specific event but rather reported experiencing left elbow pain for the last two week from frequently pushing motorcycles. Petitioner stated that he felt horrible pain to his elbow during his 6.23.12 accident from trying to keep the motorcycle from falling. When Petitioner returned to Dr. Valero on June 28, 2012 (five days after the 6.23.12 accident), he still reported left elbow pain from an accident a couple of months ago involving a falling motorcycle. When Petitioner saw Dr. Iftikhar on July 17, 2012, he reported that he injured his left elbow seven weeks previous, and again two weeks previous while lifting a motorcycle. Dr. Atluri confirmed that the mechanism of injury was consistent with Petitioner's left elbow derangement, radial collateral ligament rupture and lateral epicondylitis. Dr. Atluri recommended work restrictions and surgery.

Based on the record as a whole, the Arbitrator finds that Petitioner has met his burden in proving by a preponderance of the evidence that Petitioner's current condition of ill-being for his left arm is causally related to his 4.30.12 injury.

Regarding Petitioner's 6.23.12 work injury, Petitioner testified that he lost control of motorcycle and injured his left elbow, low back, and abdominal area as he fought to keep the motorcycle from falling. Five days later, Petitioner saw Dr. Valero reporting ongoing left elbow pain for the past two months and abdominal pain for the past 8 days. The Arbitrator does not find the discrepancy between five or eight days to be material but notes that Petitioner did report back pain until 3.11.13 with Dr. Valero at which time he reported low back pain while in Mexico for one month. Dr. Boghossian diagnosed Petitioner with bilateral inguinal hernias more likely than not caused by his work injury of 6.23.12, related his surgery to the work accident and opined that Petitioner did not need additional care or any work restrictions. Dr. Tack opined that Petitioner's low back condition was pre-existing and not causally related.

Based on the record as a whole, the Arbitrator finds that Petitioner has met his burden in proving by a preponderance of the evidence that Petitioner's current condition of ill-being for his bilateral inguinal hernias is causally related to his 6.23.12 injury. The Arbitrator finds that Petitioner's low back and any psychological injuries are not related to the 6.23.12 injury.

Regarding Petitioner's 5.25.13 accident, Petitioner testified that he injured his right foot/ankle while mopping the floor at work. A report of injury was made, and Petitioner reported his twisted ankle to his therapist at MacNeal, to Dr. Canelas on June 5, 2013 and to Dr. Valero on June 17, 2013 where a podiatry referral was made. Dr. Mercado on June 25, 2013 diagnosed Petitioner with an open fracture of the calcaneus, distal sprain of the tibiofibular ligament, and tarsus enthesopathy.

Based on the record as a whole, the Arbitrator finds that Petitioner has met his burden in proving by a preponderance of the evidence that Petitioner's current condition of ill-being for his right foot/ankle is causally related to his 5.25.13 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:

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).

Regarding Petitioner's 4.30.12 work injury, having found Petitioner's left arm/elbow condition to be causally related and relying on the record as a whole, 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, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act, for the outstanding medical services to the left arm/elbow, that was submitted into evidence, from the following providers: Dr. Valero, Riverside Orthopedics, Dr. Iftikhar, MacNeal, Neurologic Care Associates, Dr. Hejna, Orthopedic Associates of Riverside and Dr. Williams.

Regarding Petitioner's 6.23.12 work injury, having found Petitioner's bilateral inguinal hernia condition to be causally related and relying on the record as a whole, the Arbitrator finds Petitioner's treatment related to his bilateral inguinal hernia condition 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, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act, for the outstanding medical services to the bilateral inguinal hernia, that was submitted into evidence, from the following providers: Dr. Valero, MacNeal, and Suburban Surgical Associates, and Dr. Favor.

Regarding Petitioner's 5.25.13 work injury, having found Petitioner's right ankle/foot condition to be causally related and relying on the record as a whole, 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, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act, for the outstanding medical services to the right foot/ankle, that was submitted into evidence, from the following providers: Dr. Valero, Freedom Foot Clinic, MacNeal, Dr. Rizvi, Vanguard Medical, and Dr. Anderson.

For all work injuries, 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:

With regards to Petitioner's 4.30.12 accident, the Arbitrator finds that Petitioner is entitled to prospective medical care for the left elbow/arm. Dr. Hejna concluded Petitioner would benefit

from reconstruction of the ligament tear and Dr. Atluri indicated Dr. Hejna's recommended surgery was a viable option for Petitioner to achieve MMI. Respondent shall approve and pay for the left elbow surgery and necessary post-operative care as prescribed by Dr. Hejna as provided in Section 8(a) and 8.2 of the Act.

With regards to Petitioner's 6.23.12 accident, no further treatment has been recommended for Petitioner's bilateral inguinal hernia and Petitioner has been declared at MMI with respect to said condition.

With regards to Petitioner's 5.25.13 accident, while the Arbitrator has found Petitioner's current condition for the right ankle/foot to be causally related, there is no current and pending order for treatment. Thus, the Arbitrator does not award any prospective medical care for the right ankle/foot at this time.

Issue L, whether Petitioner is entitled to temporary total disability benefits, the Arbitrator finds as follows:

A claimant is temporarily totally disabled from the time an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of his injury will permit. Westin Hotel v. Indus. Comm'n, 372 Ill.App.3d 527, 542 (1st Dist. 2007).

In determining whether a claimant remains entitled to receiving TTD benefits, the primary consideration is whether the claimant's condition has stabilized and whether he 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, he is no longer eligible for TTD benefits. Archer Daniels Midland Co. v. Indus. Comm'n, 138 Ill.2d 107, 118 (1990).

With regards to Petitioner's 4.30.12 accident, while the Arbitrator has found Petitioner's current left elbow/arm condition to be causally related and Petitioner's treatment to be reasonable and necessary, the Arbitrator further finds that Petitioner is entitled to TTD benefits. Petitioner is claiming entitlement to TTD benefits from 1.15.16 – 5.20.19. On January 15, 2016, Dr. Atluri indicated Petitioner should avoid forceful gripping with his left arm and refrain from lifting, pushing, and pulling greater than 2 pounds and further advised Petitioner had yet to reach maximum medical improvement. Petitioner's recommended surgery is still pending. Petitioner was able to work with restrictions with ABM from March 16, 2015 to April 17, 2015 and for El Milagro from May 21, 2019 to January 6, 2020. Based on the above and the record as a whole, the Arbitrator finds Respondent liable for 289 5/7 weeks of TTD benefits (1.15.16 through 5.20.19 and from January 7, 2020 to March 22, 2022) at a weekly rate of $667.15 to be paid directly to Petitioner.

With regards to Petitioner's 6/23/12 accident, as the Arbitrator has found Petitioner's bilateral inguinal hernia to be causally related and Petitioner's treatment to be reasonable and necessary, the Arbitrator further finds that Petitioner is entitled to TTD benefits. Petitioner underwent bilateral inguinal hernia surgery on August 2, 2013 and Dr. Favor released him to work on August 19, 2013. Based on the above and the record as a whole, the Arbitrator finds Respondent liable

for 2 4/7 weeks of TTD benefits (8.2.13 through 8.19.13) at a weekly rate of $646.36 to be paid directly to Petitioner.

With regards to Petitioner's 5/23/13 accident, as the Arbitrator has found Petitioner's right ankle/foot to be causally related and Petitioner's treatment to be reasonable and necessary, the Arbitrator further finds that Petitioner is entitled to TTD benefits. Petitioner was taken off work by Dr. Mercado on June 25, 2013 for two weeks and was returned to work by Dr. Mercado on July 19, 2013. Dr. Rizvi provided an off work note for July 31, 2013. On July 15, 2015, Dr. Mercado gave work restrictions for 8 weeks.

Based on the above and the record as a whole, the Arbitrator finds Respondent liable for 11 5/7 weeks of TTD benefits (6.25.13 – 7.19.13, 7.31.13, and 7.15.15-8.2.15) at a weekly rate of $646.36 to be paid directly to Petitioner.

Issue N, whether Respondent is due any credit, the Arbitrator finds as follows:

With regards to Petitioner's 5/23/13 accident, Respondent has paid TTD benefits in the amount of $1,343.66 for this date of accident.

It is so ordered:

Arbitrator Rachael Sinnen

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	13WC019843
Case Name	Pedro Calderon v. The Zone Honda Kawasaki
Consolidated Cases	13WC011107; 13WC015937;
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0024
Number of Pages of Decision	31
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	David Menchetti
Respondent Attorney	Micaela Cassidy

DATE FILED: 1/19/2024

/s/Maria Portela, Commissioner

Signature

13WC019843
Page 1

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

PEDRO CALDERON,

Petitioner,

vs. NO: 13WC019843

THE ZONE HONDA KAWASAKI,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review under §19(b) having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, notice, causation, temporary total disability, medical expenses and "Any and all issues raised by the Transcript/Exhibits at Arbitration," 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).

We correct the spelling of Petitioner's surname to "Calderon" (instead of "Caledron") on the first page of the Decision form sheet. We also correct a scrivener's error on page 20 in the third sentence of the third paragraph by inserting the word "not" between the words "did" and "report."

On the issue of causation, we find that Petitioner's right ankle condition was only causally related to his May 25, 2013 work injury through September 8, 2015. We initially point out that the diagnosis of "open fracture of the calcaneus" in Dr. Mercado's June 25, 2013 record is most likely in error because the x-ray on May 30, 2013 showed "no obvious fracture." As such, it does not seem possible for Petitioner to have had an "open" fracture when he visited Dr. Mercado less than a month later on June 25, 2013. This diagnosis being a clerical error is also supported by the July 8, 2013 physical therapy evaluation that listed the diagnosis as a "[right] ankle anterior tibiofibular

[syndesmosis] inflammation, talus bruising" and the July 10, 2013 MRI that only showed "mild sprain of the anterior talofibular and calcaneofibular ligaments." We hereby strike the references on pages 5 and 20 to the diagnosis of "open fracture of the calcaneus" because this seems to be based on a clerical error in Dr. Mercado's June 25, 2013 record and it is contradicted by the other medical evidence.

The September 26, 2013 physical therapy discharge note indicates Petitioner was "doing fine" with "no pain except for" inversion and he had 5/5 ankle strength with no functional limitations. *Px2, T.780, 790*. Petitioner did not return for ankle treatment until almost two years later when he saw Dr. Valero on July 2, 2015 with complaints of "right foot pain x 2mths." *Px2, T.822*. We note that it is unclear what may have occurred two months prior to this visit. Dr. Valero diagnosed "foot pain- right foot/ankle sprain/oa on MRI" and prescribed oxycodone. *Id., T.825*. On July 9, 2015, she referred Petitioner to Dr. Mercado again. *Px19, T.1267.* On July 15, 2015, Petitioner saw Dr. Mercado who wrote:

> The patient feels his ankle is unstable of the right ankle which in 2013 had a mild sprain via MRI. I did explain to the patient that these kinds of sprains do lead to instability of the ankle just like a knee which has been injured. We did review…lateral ankle stabilization or to use ankle brace which can be picked up [over-the-counter] as well as a tens unit.

Px11, T.1104. Dr. Mercado referred Petitioner to Dr. Nick Anderson for a second opinion about possible right lateral ankle stabilization surgery and Petitioner was given a light duty note for eight weeks. *Id.., T.1105*. Dr. Mercado's note would seem to be a reasonable causation opinion relating Petitioner's "instability" to his original work injury. However, Petitioner did not see Dr. Anderson immediately.

Instead, Petitioner returned to Dr. Valero on June 27, 2016 complaining of right heel pain and low back pain for a few months but no diagnosis or recommendations were made regarding the right foot. There is then a gap in treatment until April 24, 2018 when a right foot x-ray was performed and only showed mild degenerative joint disease of the first metatarsal phalangeal (MTP) joint. This had apparently been ordered by Dr. Valero but there are no associated detailed notes that would normally include Subjective findings, Objective findings, an Assessment and a Plan (a/k/a "SOAP" note).

On November 14, 2018, there are again no SOAP notes, but Dr. Mercado ordered "Physical therapy: deep massage /kneading of the right foot to break up cicatrix scar tissue from nerve entrapment and right lateral ankle." Petitioner began physical therapy on November 26, 2018 and the mechanism of injury was listed as "trauma rolled ankle in 2013" but "worsening in the recent few months." Petitioner was discharged on January 2, 2019 with continued pain of 4 to 4.5/10 and complaints that "walking aggravates it."

On February 28, 2019, again without any detailed SOAP notes, Dr. Nicolas Anderson, DPM ordered an MRI and included the diagnoses of:

> STRESS FRACTURE, RIGHT FOOT, INITIAL ENCOUNTER FOR FRACTURE
> OTHER INSTABILITY, RIGHT ANKLE

SPRAIN OF OTHER LIGAMENT OF RIGHT ANKLE

Px20, T.1634. We question whether this indicates that Petitioner sustained a new stress fracture in his right foot, since this was an "initial encounter for fracture" even though it had been three and a half years since Dr. Mercado had referred Petitioner to Dr. Anderson. We find that, without detailed SOAP notes, it is impossible to determine what may have caused Petitioner's current condition.

On March 1, 2019, Petitioner underwent an MRI of the right foot and another one of the right ankle. The right foot MRI revealed:

IMPRESSION:
1. Third metatarsal shaft faint bone marrow edema, nonspecific, equivocal for stress injury
2. Second metatarsal shaft faint bone marrow edema, nonspecific, equivocal for stress injury
3. Intermetatarsal trace edema, nonspecific for injury or inflammation, no gross ligamentous tear

The MRI of the right ankle showed "no acute finding." *Px20, T.1639.*

Based on the preceding and our review of the evidence, we find Petitioner has failed to prove that his current right ankle/foot condition is causally related to his original ankle sprain in 2012. There is no current medical causation opinion in evidence and the most recent MRI of the *ankle* showed no acute finding. The *foot* MRI did show some metatarsal bone marrow edema but there is no persuasive medical opinion, to a reasonable degree of medical certainty, to explain how that would be causally related to an ankle sprain seven years earlier. As discussed above, there do not appear to be any detailed SOAP notes relating to Petitioner's right ankle in evidence after Dr. Mercado's July 15, 2015 visit.

Therefore, we modify the Arbitrator's decision regarding causation and find that Petitioner reached maximum medical improvement from his work injury as of September 8, 2015, which is eight weeks after the July 15, 2015 visit with Dr. Mercado when Petitioner was given eight weeks of light duty restrictions. After that visit, there was an almost 3-year gap in treatment at which time the right foot x-ray showed only mild degenerative joint disease of the first MTP joint.

Based on the above, we find Petitioner is only entitled to medical expenses and temporary total disability (TTD) through September 8, 2015. Although the Arbitrator correctly awarded 11-5/7 weeks of TTD, we correct clerical errors in the Order section and also on page 23, which indicated that TTD ended on August 2, 2015. To clarify, we award Petitioner TTD for June 25, 2013 through July 19, 2013, for July 31, 2013, and for July 15, 2015 through September 8, 2015, representing a period of 11-5/7 weeks.

Finally, we correct a clerical error in the calculation of the TTD benefit rate. The parties stipulated on the Request for Hearing form that Petitioner's average weekly wage applicable to this accident was $1,007.49. *ArbX7, T.552*. The Arbitrator's Decision accurately reflects this average

weekly wage but there is a clerical error in the calculation of the TTD benefit rate. The correct rate is $671.66 ($1,007.49 x 2/3). We hereby modify the TTD benefit rate in the Order section and on page 23 accordingly.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $671.66 per week for a period of 11-5/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall receive a credit of $1,343.66 for temporary total disability benefits already paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the outstanding medical services to the right foot/ankle only through September 8, 2015, that were submitted into evidence from the following providers: Dr. Valero, Freedom Foot Clinic, MacNeal Hospital, Dr. Rizvi, Vanguard Medical, and Dr. Anderson under §8(a) of the Act subject to the fee schedule in §8.2 of the Act.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $10,000.00. 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.

January 19, 2024

/s/ *Maria E. Portela*

SE/
O: 11/21/23
49

/s/ *Amylee H. Simonovich*

/s/ *Kathryn A. Doerries*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	13WC019843
Case Name	Pedro Calderon v. The Zone Honda Kawasaki
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	26
Decision Issued By	Rachael Sinnen, Arbitrator

Petitioner Attorney	Eduardo Salgado
Respondent Attorney	Micaela Cassidy

DATE FILED: 7/5/2022

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

/s/ Rachael Sinnen, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Pedro Caledron
Employee/Petitioner

v.

The Zone Honda Kawasaki
Employer/Respondent

Case # **13** WC **19843**

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

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **5.25.13**, 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 $**29,217.21**; the average weekly wage was $**1007.49**.

On the date of accident, Petitioner was **48** 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 $**1,343.66** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**1343.66**.

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

ORDER

Respondent to pay Petitioner directly, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act, for the outstanding medical services to the right foot/ankle, that was submitted into evidence, from the following providers: Dr. Valero, Freedom Foot Clinic, MacNeal, Dr. Rizvi, Vanguard Medical, and Dr. Anderson.

Respondent to pay Petitioner directly for 11 5/7 weeks of TTD benefits (6.25.13 – 7.19.13, 7.31.13, and 7.15.15-8.2.15) at a weekly rate of $646.36.

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.

_____ **JULY 5, 2022**

Signature of Arbitrator

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Pedro Calderon	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Case No. 13WC015937
The Zone Honda Kawaski	)	consolidated with
	)	Case No. 13WC011107
	)	Case No. 13WC019843
Respondent.	)	

FINDINGS OF FACT

This matter initially proceeded to hearing on February 21, 2019, in Chicago, Illinois before Arbitrator Tiffany Kay on Petitioner's Request for Hearing pursuant to Sections 19b and 8a of the Illinois Workers Compensation Act ("Act"). The hearing continued on May 22, 2019, and again on July 22, 2019, before Arbitrator Kay. The hearing was finalized on March 22, 2022, before Arbitrator Rachael Sinnen. Issues in dispute include accident, notice, causation, medical bills, temporary total disability ("TTD"), and prospective medical. Arbitrator's Exhibit ("Ax") 5-7.

Petitioner's Medical History

Petitioner was treating with Dr. Valero for depression, elevated cholesterol, and other medical conditions. Medical records from July 2010 note that he had a history of depression and problems with work. (RX A, p. 80). On March 5, 2012, Petitioner presented to Dr. Valero with complaints of pain radiating into the left arm beginning a month ago while he was in Mexico. (RX A, p. 66).

Petitioner's Job Duties

Petitioner testified that he was employed by Respondent as a salesperson in 2012 with job duties consisting of maintaining the showroom clean as well as to move motorcycles in and out of the showroom floor to display. (Transcript 2: Pg. 34) Petitioner indicated that the motorcycles were usually moved outside in the mornings between 10 to 15 minutes prior to opening the store at 10:00 AM. (Transcript 2: Pg. 34, 35) Petitioner also confirmed that he was employed by Respondent as a salesperson in 2013 with duties requiring him to maintain the showroom clean as well as to move motorcycles in and out of the showroom floor to display. (Transcript 2: Pg. 34).

4.30.12 Date of Accident (13WC15937)

On April 30, 2012, Petitioner arrived at The Zone Honda Kawasaki at 9:10 AM to commence his customary opening duties. (Transcript 2: Pg. 42) Once there Mr. Calderon performed a preliminary cleaning of the store before assisting with moving motorcycles outside the store to display. This included moving a 2012 Honda Gold Wing. (Transcript 2: Pg. 43, 44) The Petitioner testified to moving a Honda Gold Wing and losing control of the bike. Petitioner further indicated that while trying to prevent the bike from falling he overexerted his left arm causing injury to his left elbow. (Transcript 2: Pg. 44 – 46) The incident was witnessed by other fellow coworkers who were present at the time of injury including, but not limited to, Francisco Hernandez. (Transcript 2: Pg. 46)

Petitioner stated he notified his manager Ricardo Diaz immediately upon his manager arriving. According to Petitioner, this was approximately ten minutes after the accident occurred. (Transcript 2: Pg. 47) Mr. Calderon described speaking with Mr. Diaz about the incident directly in front of Mr. Pavilonis as well as other coworkers, including Francisco Hernandez. (Id.)

Petitioner's Medical Treatment Post 4.30.12

After the alleged work injury on April 30, 2012, the Petitioner presented to Dr. Elsa Valero on May 16, 2012, after noticing a bump on the upper part of his left elbow. (Transcript 2: Pg. 48-49) Dr. Valero's notes indicate Petitioner was working at a dealership and was seeking treatment after experiencing left elbow pain for the last two week from frequently pushing motorcycles. (PX19, Pg. 249) On exam, he exhibited tenderness and loss of range of motion to the left elbow. He was prescribed Naprosyn and sent for a left elbow X-ray at MacNeal Hospital. The X-ray to the left elbow was negative. (T2, pp. 48-49; RX3, PP 59-61; RX1, pp 34).

This treatment, and all his treatment was placed through Blue Cross / Blue Shield HMO, his wife's group health insurance pursuant to her employment by El Milagro (T2, pp. 61-62, T3, pp. 123-124).

6.23.12 Date of Accident (13WC11107)

Petitioner testified that he continued to work for Respondent including on the morning of June 23, 2012 (Transcript 2: Pg. 50) According to Petitioner he arrived at The Zone Honda Kawasaki at 9:10AM and assisted with moving motorcycles from the showroom outdoors for display. (Transcript 2: Pg. 51) While moving a Honda Gold Wing motorcycle, Petitioner testified that he lost control of the bike and he fought to keep the motorcycle from falling. Unfortunately, Petitioner was unable due to the weight of the motorcycle. (Transcript 2: Pg. 52) At the time Petitioner stated he felt horrible pain to his elbow from trying to keep the motorcycle from falling. (Transcript 2: Pg. 53) In addition Petitioner indicated he felt horrible pain to his abdominal area and pain radiating to his lower back. (Id.) Petitioner indicated he notified his manager Ricardo Diaz as soon as he arrived on June 23, 2012 (Transcript 2: Pg. 53, 54) Mr. Calderon further indicated that Francisco Hernandez was present when he provided notice of the accident to Mr. Diaz. (Transcript 2: Pg. 54)

Petitioner's Medical Treatment Post 6.23.12

After the alleged injury at work on June 23, 2012, the Petitioner did not seek treatment until seeing Dr. Valero on June 28, 2012. He did not report any accident while working on June 23, 2012. Rather, he reported left lateral elbow pain for the past two months after he fell on a motorcycle and used his left arm to pick it up. He also reported abdominal pain for the past eight days, with mild dysuria and pain in the ventral penis. Dr. Valero recommended orthopedic consult for the left elbow and for the abdominal/scrotal pain a scrotal ultrasound, urinalysis, and prostate testing. (T2, p. 56; PX3, pp. 57-59).

The Petitioner next saw Dr. Valero on July 10, 2012. (T2, P. 57; PX3, pp. 54-57). He reported stress after making a mistake on the sale of a motorcycle. He reported that a motorcycle had fallen one day previous causing pain in his right leg. He reported left facial numbness for the previous week. He was referred for a CT scan to the abdomen/pelvis, blood work and was prescribed Xanax for stress. (PX3, pp. 54-57).

The Petitioner saw Dr. Tariq Iftikhar of Riverside Orthopedics on July 17, 2012. He reported that he was right hand dominant, and had injured his left elbow seven weeks previous, and again two weeks previous while lifting a motorcycle. On exam, he was markedly tender over the lateral aspect of his left elbow, at the extensor carpi radialis brevis. He received an injection from Dr. Iftikhar. He was advised that if pain recurred, physical therapy may be ordered, and in extreme cases surgery considered. (T2, pp. 57-59; RX3, pp. 26-28).

On July 19, 2012, the Petitioner had a CT of the abdomen/pelvis at MacNeal. He did not return to Dr. Valero until August 27, 2012 with complaints of ongoing abdominal pain and left elbow pain. He was referred for ultrasound studies to the abdomen and right testicle, which were performed on September 4, 2012. The Petitioner followed up with Dr. Valero on November 5, 2012. He complained of right lower quadrant pain for several months. Dr. Valero referred him to general surgeon to assess bilateral inguinal hernia. (T2, pp 59-60; RX1, 35, 39, 44-45; PX3, pp. 50-54).

The Petitioner did not next see Dr. Valero until March 11, 2013 and he complained of right hip and right lumbar pain for one year, stress, anxiety, and loss of sleep. He reported low back pain while in Mexico, of one month duration, for which he had obtained diclofenac in Mexico. He requested referral to an orthopedic for a repeat left elbow injection. He admitted he had never followed up with general surgery regarding bilateral inguinal hernias. Dr. Valero referred him for a lumbar MRI, to Dr. Iftikhar for his left elbow, and to general surgery for bilateral inguinal hernias. (PX3, pp. 46-50; RX1, p. 47). The lumbar MRI performed at MacNeal on March 18, 2013 disclosed mild degenerative change with mild right facet arthrosis at L4-5 with adjacent soft tissue edema. (T2, p. 60; RX1, pp 46, 49; PX3, pp. 46-50).

On March 20, 2013, the Petitioner saw Dr. Iftikhar for his left elbow. He reported seven months' relief from the cortisone injection in July 2012. He requested and received an injection in the lateral left elbow. He was advised to consider a tennis elbow brace with activity, and to return as needed. (T2, pp. 61-62; RX3, pp.29-30).

On April 12, 2013, the Petitioner saw Dr. Francisco Espinosa regarding low back pain, which he related to activity at work in June 2012 moving a 750-pound motorcycle that began to tip. He reported that as he tried to prevent it from falling, he injured his back. He admitted to a history of having injured in low back eighteen years prior, and the condition lasted six years. Dr. Espinosa found his neurological examination to be normal, and noted he complained of tenderness to the right low back, but not "specifically". Dr. Espinosa stated his main problem was mild facet arthropathy at L4-5 on the right that required no surgery. He offered the Petitioner facet injections. (T2, pp. 62-64; PX8, 11-12).

On April 23, 2013, the Petitioner saw Dr. Kiran Chekka at MacNeal for facet joint injections from L4-S1 due to "arthritis". On May 8, 2013, he reported 85% relief of his low back pain following the facet injections. He was referred for physical therapy at MacNeal. (T2, pp. 65-67, 71; RX1, pp 51, 53-54, 63, 65-67). The Petitioner participated in physical therapy for his low back at MacNeal in May 2013. (T2, p.72; RX1, pp. 73, 89, 75, 82-85).

On May 6, 2013, the Petitioner presented to Dr. Elizabeth Canelas at Pro Salud Medical Center for a psychiatric evaluation. He reported an eighteen-year history of psychiatric issues. He reported stress and feeling "let down" by a problem that had happened at work for Respondent, after he learned in September 2012 that there was no retirement account. He felt betrayed and that money had been stolen from him. He reported that he took a vacation in September 2012 and was then laid off until March 2013. He complained that there was no need for the employer to lie to him and let him believe he had a retirement account. (PX10, p. 8).

On May 8, 2013, Petitioner returned Dr. Chekka right-sided low back pain with radiation into the right lower extremity. (PX2, Pg. 64) Petitioner rated his low back pain to be 10 out of 10 and was diagnosed with lumbosacral facet syndrome, lumbar degenerative disease, low back pain, and myofascial pain. (Id.) Dr. Chekka recommended Petitioner hold off on any further injections but did advise to commence physical therapy. (PX2, Pg. 65)

Petitioner was seen on May 17, 2013, for physical therapy related to complaints of right sided lumbar pain that started from trying to hold a motorcycle from falling. (PX2, Pg. 76) Petitioner indicated that he also felt pain through his right testicle and through his abdominal that developed into hernias. (PX2, Pg. 76) Petitioner further reported that since the incident occurred, he has noticed an onset of urological problems. After speaking with Dr. Valero, Petitioner was told to hold off on physical therapy until his urological symptoms were properly diagnosed by urologist. (PX2, Pg. 76) Petitioner returned to Physical therapy on May 20, 2013, indicating that he was feeling pain 2 out of 10 after his prior injection. (Id., Pg. 79) The next physical therapy appointment occurred on May 23, 2013. At therapy, Petitioner indicated that his low back pain felt better, but that he would still feel pain while pushing motorcycles at work. (PX2, Pg. 79)

5.25.13 Date of Accident (13WC19843)

The Petitioner testified that on May 25, 2013, he turned his heel while at work. As he would every other day, he started sweeping the floors and mop the second floor from the top to the bottom of the steps. The stairs were wet, and he slipped with his foot at the edge of the last step

and fell injuring his feet. (T2, pp. 72-73). He had injured his right foot/ankle. His injury was witnessed by Ricardo Diaz, his manager. (T2, p. 74).

The Petitioner was shown a copy of an Employer's Report of Injury pertaining to the May 25, 2013 right ankle injury. The Petitioner admitted that it was his handwriting and that the signature looked like his but was not sure. He stated that he did not remember filling the report out or signing it. (T3, pp 69-170).

Petitioner's Medical Treatment Post 5.25.13

On May 28, 2013, the Petitioner told his therapists at MacNeal that he had twisted his right ankle at work two days previous. (RX1, p. 84). Petitioner did indicate that he was seen by his primary physician Dr. Elsa Valero on May 30, 2013. (Transcript 2: Pg. 75) Per the treating records, Petitioner was a walk-in patient with complaints of acute right ankle pain. (PX19, Pg. 226) Mr. Calderon was diagnosed with right ankle pain and was recommended an ace wrap and medication. (Id., Pg. 228)

Thereafter Petitioner returned to see Dr. Elizabeth Canelas for ongoing psychiatric care on June 5, 2013. (PX 10, Pg. 4) At this time Petitioner reported to Dr. Canelas hurting his ankle at work and was provided an off work note for the day along with a recommendation for ongoing individual therapy. (Id., Pg. 4, 5) Petitioner also advised Dr. Canelas that he felt the owner of Zone Honda was mistreating him. (PX 10). He stated that he felt more pressure at work and did not feel like he was selling bikes as well. (PX 10).

Petitioner testified that on June 6, 2013, and again on June 10, 2013 he attended physical therapy appointments prior to seeing Dr. Valero on June 17, 2013. (Transcript 2: Pg. 78) At that time a podiatry referral was provided for right ankle joint pain. (PX2, Pg. 96)

On June 19, 2013, Petitioner attended a pain management evaluation with Dr. Kiran Chekka with reports of excellent relief post six weeks from right-sided L4-5 and L5-S1 facet injection. (PX2, Pg. 98) Petitioner reports using a brace provided at physical therapy at work to push motorcycles which has been helping. (Id.) In addition, Petitioner reported having lost his footing going down a set of stairs at work when he twisted his ankle. (Id.) Dr. Checkka diagnosed Petitioner with lumbosacral facet syndrome, lumbar degenerative disc disease, low back pain and myofascial pain. Injections were not recommended given Petitioner's reports of relief with the previous injection, but additional physical therapy was prescribed. (Id., Pg. 99) Petitioner was also recommended to continue to wear his brace at work. (Id.)

At the recommendation of Dr. Valero, Petitioner was seen by Cynthia Mercado, DPM of Freedom Foot Clinic on June 25, 2013. (PX11, Pg. 6) Petitioner reported symptoms of right sided Achilles tendon pain with burning, cracking, crepitations and instability. Dr. Mercado diagnosed Petitioner with an open fracture of the calcaneus, distal sprain of the tibiofibular ligament, and tarsus enthesopathy. (PX11, PG. 7) Petitioner was placed off work for two weeks, provided voltaren gel for inflammation, prescribed an ankle brace, and recommended an injection as well as an MRI. (PX11. Pg. 7, 8)

Petitioner attended his initial physical therapy appointment at MacNeal Hospital on July 8, 2013 for a twisted ankle injury occurring on May 25, 2013. (PX2, Pg. 100) The following day on July 10, 2013, Petitioner underwent a right ankle MRI remarkable for edema like signal around the anterior talofibular and calcaneofibular ligaments suggestive of a sprain. (PX2, Pg. 121, 315)

Petitioner continued to follow up with Dr. Elizabeth Canelas for ongoing psychiatric care on July 10, 2013. (PX10, Pg. 3) During the evaluation Petitioner reported using his back brace to reduce his pain and further indicated that he is taking medication to treat his ankle pain and inflammation. (Id.) On July 10, 2013, Petitioner also reported to Dr. Canelas that the owner wants to move to a new location, and that he was still upset about what the owner did to him. (PX 10). He also stated that he was forgetting the names of clients which was unlike him. (PX 10).

On July 11, 2013, Petitioner returned to MacNeal Hospital for ongoing physical therapy. (PX2. Pg. 102) Petitioner reported pain after being on his feet for long periods of time. (Id.) Petitioner continued with therapy by attending an additional therapy session occurring on July 16, 2013. (PX2, Pg. 102)

The initial consultation for bilateral inguinal hernias with Dr. Robin L. Favor of Suburban Surgical Associates occurred on July 15, 2013. (PX9, Pg. 6) According to the history taken by Dr. Favor, Petitioner sustained bilateral inguinal hernias, while working with a motorcycle that fell on him, approximately one year ago. Dr. Favor noted that when Petitioner tried to lift the motorcycle, he reported feeling a sharp pain in his lower abdomen radiating to both groins. (Id.) Petitioner stated he felt extreme discomfort with a bulge over the first ten days that subsequently abated a little, but symptoms have persisted. (Id.) Mr. Calderon was diagnosed with bilateral inguinal hernia and recommended a laparoscopic repair with mesh that was scheduled for August 2, 2013. (PX9, Pg. 7)

On July 19, 2013, Petitioner followed up with Dr. Elsa Valero regarding ongoing left elbow pain. (PX19, Pg. 133) Petitioner was diagnosed with left elbow lateral epicondylitis along with provided a referral for a urologist. (Id., Pg. 133 – 135)

Petitioner returned to see Dr. Mercado of Freedom Foot Clinics on July 19, 2013 with complaints that his right ankle felt like his bone was moving around. (PX11, Pg. 10) A review of the MRI revealed sinus tarsitis and lateral AFTL and CFL sprain of the right ankle. (Id.) Dr. Mercado recommended Petitioner continue to use his ankle brace, continue taking medications, continue with physical therapy, and advised to return to work full duty. (PX11, Pg. 10 - 13) Petitioner was provided with an injection to the ankle and referred to a rheumatologist for evaluation on account that Petitioner was not responding well to conservative care. (Id., Pg. 15, 16)

On July 19, 2013, July 23, 2013, and again on July 25, 2013 Petitioner continued to attend physical therapy appointments at MacNeal Hospital. (PX2, Pg. 104, 116) Thereafter, Petitioner had his initial rheumatology evaluation with Dr. Syed Rizvi of Vanguard Medical Group on July 31, 2013. Mr. Calderon reported experiencing pain in his right ankle for the last two months after he injured it. (PX19, Pg. 129) Since then pain has been off and on with a range of 4 or 5 out of 10. (Id.) Petitioner was diagnosed with monoarthrits and provided with an off work note for July 31, 2013. (Id.)

At the recommendation of Dr. Elsa Valero, Petitioner was seen by Dr. Iftikhar of Riverside Orthopedics on July 23, 2013, for an evaluation of Petitioner's ongoing left elbow complaints. (PX5, Pg. 9) Mr. Calderon reported relief from the last injection for several months but advised the pain had returned. Per the treating report, it was noted that the constant use of Petitioner's elbows to move motorcycles at work has been contributing to Petitioner's on-going condition. (Id.) Petitioner was recommended to start physical therapy and commence an anti-inflammatory regimen. Dr. Iftikhar further recommended Petitioner wear a tennis elbow brace and to moderate his activities. (Id.) According to Petitioner's testimony, the possibility of surgery was also discussed. (Transcript 2, Pg. 86)

Petitioner underwent bilateral inguinal hernia surgery with mesh on August 2, 2013, with Dr. Robin Favor at MacNeal Hospital. (PX9, Pg. 9, 10)

On August 7, 2013, Petitioner had a follow up psychiatric appointment with Dr. Elizabeth Canelas of Pro Salud Medical Center. Petitioner indicated he was recovering from surgery and felt better since he had not been talking to the owner where he works. (PX10, Pg. 2) Petitioner was again encouraged to obtain individualized therapy. (Id.) Petitioner also advised Dr. Canelas that the owner refused to give him his bonus of $300. (PX 10).

The next rheumatology appointment with Dr. Rizvi occurred on August 14, 2013 at which time Petitioner followed up regarding ongoing ankle problems and joint pain since he sustained a twisting ankle injury. (PX19, Pg. 123) Dr. Rizvi diagnosed Petitioner with sprain of the calcaneofibular ligament and recommended Petitioner continue with physical therapy along with Meloxicam. (Id., Pg. 125)

The next appointment with Dr. Favor occurred August 15, 2013, for the purposes of a post-operative evaluation. Petitioner indicated that he was feeling well after surgery with minimal pain. (PX9, Pg. 11) Dr. Favor specified that Petitioner was status post laparoscopic inguinal hernia repair and was ok to return to normal activity commencing on August 19, 2013. (Ids., Pg. 12, 14)

Petitioner returned to see Dr. Cynthia Mercado of Freedom Foot Clinic on August 16, 2013 with complaints of ongoing popping like sensation in the right ankle. (PX11, Pg. 17) MRI showed mild sprain of the ATFL and the CFL in the right ankle. (Id.) Petitioner was diagnosed with a sprain of the right ankle and recommended to finish his rheumatology appointments. Petitioner was further encouraged to resume physical therapy and wear his ankle brace. (Id.) Petitioner was also provided with a referral for a second opinion regarding ongoing podiatry services. (Id., Pg. 19)

On August 16, 2013 Petitioner continued with physical therapy for his right ankle with MacNeal Hospital. Petitioner had additional physical therapy appointments in August of 2013 occurring on the 19th, 22nd, 23rd, 26th, 28th, and on the 30th. (PX2, Pg. 134 – 141) Petitioner continued to go to physical therapy during September of 2013 attending appointments on the 4th, 6th, 10th, 12th, 17th, 19th 24th, and on the 26th. (Id., Pg. 211 -218). Petitioner was discharged from therapy on September 27, 2013. (Id., Pg. 221)

On August 23, 2013, Petitioner commenced physical therapy for his left elbow at the recommendation of Dr. Iftikhar at MacNeal Hospital. (PX2, Pg. 196) At the therapy evaluation, Petitioner indicated he felt pain rated 5 out of 10 with activity. (Id.) Thereafter, Petitioner had additional physical therapy appointments on August 26th, 28th and 30th of 2013. Petitioner went on to have additional therapy for his left elbow on September 4th, 10th, 12th, 17th, and on the 19th of 2013. (PX2, Pg. 201 - 203, 208)

Petitioner returned to see Dr. Elizabeth Canelas for an additional psychiatric evaluation on August 26, 2013. At this time Petitioner indicated that the Respondent had closed its business. (PX10, Pg. 1) Petitioner further indicated that he was still recovering from surgery and has started therapy for his arm. (Id.)

The following appointment concerning Petitioner's elbow condition occurred with Dr. Elsa Valero on September 30, 2013. Petitioner was instructed to follow up with Dr. Iftikhar regarding possible left elbow surgery given the lack of substantial relief from physical therapy and two injections. (PX19. Pg. 118)

Thereafter, Petitioner followed up with Dr. Valero on November 25, 2013, with recurrent left elbow and lower back pain since his work accident. (PX19, Pg. 209) Petitioner demonstrated limited range of motion to the left elbow. (Id.) Dr. Valero provided Petitioner with a diagnosis of left elbow pain with movement and provided a referral to Dr. Iftikhar for a second orthopedic opinion. In addition, Petitioner was diagnosed with lumbosacral radiculitis. (Id., Pg. 211)

On November 27, 2013, Petitioner was evaluated by Dr. Iftikhar of Riverside Orthopedics with complaints of unresolved left elbow epicondylitis. (PX5, Pg. 17) Petitioner was diagnosed with recurring lateral epicondylitis of the left elbow and possible recent onset of ulnar neuropathy of the left elbow. (Id.) Dr. Iftikhar recommend an MRI of the left elbow, an EMG, an NCV and indicated surgery was an option since conservative care has been exhausted at this time. However, Dr. Iftikhar referred Petitioner for a second opinion given the lack of uniform response from surgical release of the tennis elbow. (Id.)

Mr. Calderon obtained a left elbow MRI on November 30, 2013, from MacNeal Hospital. (PX5, Pg. 21) Per the results Petitioner had moderately large left elbow effusion along with avulsion of the main collateral ligament. (Id.) As for the EMG, it was performed on December 5, 2013, by Neurologic Care Associates and showed no evidence of median, ulnar, or radial mononeuropathy in the left upper extremity. (PX2: Pg. 313 – 314)

Petitioner followed up with Dr. Iftikhar on December 16, 2013. According to Dr. Iftikhar there is no evidence of any neuropathy on the EMG and NCV studies. (PX5, Pg. 23) However, according to the MRI, Dr. Iftikhar indicated it showed an avulsion of the radial collateral ligament as well as epicondylitis. (Id.) This dual pathology, according to Dr. Iftikhar explained the lack of response to conservative care. Due to the complexity of the situation, Petitioner was referred for a second opinion. (Id.)

On December 10, 2013, Petitioner attended an additional pain management appointment with Dr. Kiran Chekka of MacNeal Hospital. (PX2, Pg. 227) According to Dr. Chekka, Petitioner's

symptoms have once again become functionally limiting and are affecting his quality of life. Dr. Chekka noted Petitioner had a gradual regression of his symptoms since the injection on April 23, 2013. (Id.) Petitioner was recommended to repeat a right L4-5 and L5-S1 facet joint injection and to consider a radiofrequency ablation if he does not improve with injections. (PX2, Pg. 227, 228) On February 11, 2014, Petitioner underwent a right L4-5 and L5-S1 facet injection performed by Dr. Chekka. (PX2, Pg. 235)

Acting on the advice of Dr. Iftikhar, Petitioner had an orthopedic evaluation with Dr. Michael J. Hejna of Orthopaedic Associates of Riverside on February 21, 2014. (PX6, Pg. 2 & PX5, Pg. 25) The treating report indicates Petitioner was seen for left elbow complaints subsequent a work accident occurring in 2012. (PX6, Pg. 2) Dr. Hejna also indicated Petitioner suffered from chronic radial collateral ligament tear with significant pain. As for treatment, Dr. Hejna concluded Petitioner would benefit from reconstruction of the ligament tear. (Id.)

Petitioner returned to see Dr. Chekka on March 4, 2014, for ongoing treatment for Petitioner's L4-5 and L5-SI complaints. (PX1, Pg. 2) Petitioner again endorsed that his ongoing functional deficits are a function of a work-related injury when lifting a motorcycle at work. (Id.) In addition, Petitioner indicated that since the last injection, he has been able to function much better. Petitioner was diagnosed with suffering from lumbar facet syndrome, myofascial pain, and low back pain. (PX1, Pg. 3) Dr. Chekka recommended Petitioner be fitted for a lumbosacral orthotic brace to restrict his range of motion and reduce pain and to continue physical therapy. (Id.)

On April 4, 2014, Mr. Calderon returned to Dr. Hejna for a follow consultation regarding Petitioner's ongoing left elbow complaints. According to Dr. Hejna, Petitioner did not want to consider surgical reconstruction of the collateral ligament. (PX6, Pg. 6) Rather, Petitioner requested an injection to keep his symptoms from flaring in the future. At this time, Dr. Hejna provided an injection of Depo-Medrol 40mg with 1cc of Marcaine into Petitioner's left elbow. (Id.)

Petitioner returned to see his primary physician Dr. Elsa Valero on July 15, 2014 with complaints of ongoing right ankle complaints aggravated by activity. (PX3, Pg. 25) Dr. Valero diagnosed Mr. Calderon with right foot / ankle pain and prescribed Petitioner acetaminophen as well as codeine tablets for pain. (Id., Pg. 27)

Petitioner returned to see Dr. Elsa Valero regarding ongoing low back pain on December 19, 2014. (PX3, Pg. 22) According to Dr. Valero's report Petitioner reported having a history of low back pain worsened by a bike accident. Petitioner was diagnosed with displacement of lumbar intervertebral disc with myelopathy and recommended he follow up with pain clinic. (PX3, Pg. 24) In addition, Dr. Valero recommended Petitioner obtain an additional lumbar spine MRI. (Id.) Petitioner was also diagnosed with ongoing left elbow joint pain without relief from therapy. Petitioner was again provided with a referral for orthopedic care. (Id.)

The lumbar MRI recommended by Dr. Valero occurred on December 24, 2014, at MacNeal Hospital. (PX1, Pg. 6) The MRI had remarkable findings at L4-5 as well as L5-S1 that were similar in nature to past lumbar exams.

Thereafter, Petitioner returned to see Dr. Hejna of Orthopaedic Associates of Riverside on January 6, 2015, with ongoing left elbow complaints. (PX6, Pg. 8) According to Dr Hejna, Petitioner aggravated his symptoms while assisting his brother who is a mechanic. (Id.) Dr. Hejna indicated that Petitioner's complaints were from epicondylitis and that reconstruction of the ligament was not warranted (Id.) However, Dr. Hejna advised that Petitioner may require surgery to treat his epicondylitis if his symptoms could not be controlled. Petitioner was provided with an injection of Depo-Medrol and Marcaine to the left elbow. (PX6, Pg. 8)

On March 11, 2015, Petitioner returned to see his primary physician Dr. Elsa Valero with ongoing complaints of lower back pain. Petitioner was diagnosed with displacement of lumbar intervertebral disc without myelopathy and recommended he follow up with the pain clinic. (PX3, Pg. 18 – 21) Petitioner again followed up with Dr. Valero on April 15, 2015 with ongoing complaints of low back pain. (PX3, Pg. 15, 16) Dr. Valero diagnosed Petitioner with a prolapsed lumbar intervertebral disc and referred Petitioner for a neurological consult. (PX3, Pg. 18)

Mr. Calderon was seen for a neurological evaluation for his low back complaints on April 22, 2015, with Dr. Francisco J. Espinosa of Neurological Surgery & Spine Surgery. (PX8, Pg. 13) Petitioner was diagnosed with persistent low back pain with recent MRI imaging showing significant facet arthropathy bilaterally at L5-S1 and on the right at L4-5. (PX8, Pg. 15) Dr. Espinosa again recommended Petitioner obtain facet blocks followed by rhizotomy if successful. (Id.) Dr. Espinosa specified that the facet blocks should be aimed at L4-5 on the right and L5-S1 bilaterally and provided Petitioner a referral for pain management. (Id., Pg. 15, 16) If Petitioner's symptoms persist, Dr. Espinosa stated Petitioner should return to consider having the rhizotomy done openly with surgery. (Id., Pg. 15)

Petitioner was evaluated on June 11, 2015, by Dr. Herbert Engelhard III at the University of Illinois Hospital & Health Systems at the request of Dr. Elsa Valero for right-sided back pain and leg pain. (PX7, Pg. 1) According to Petitioner his symptoms started in June of 2012 and has been treated conservatively with medications, therapy, and injections since. (Id.) However, recently his condition has worsened and has only been able to work part-time. Dr. Engelhard III reviewed Petitioner's MRI imaging and indicated it was remarkable for a herniated disk at L5-S1. (PX7, Pg. 2) Petitioner was diagnosed with a lumbar disk herniation with radiculopathy at L5-S1 and recommended a diskectomy or possible steroid injections (Id.) In addition, Dr. Engelhard III recommended Petitioner obtain a revised lumbar MRI as well as light duty lifting restrictions for work. (Id., Pg. 2)

A repeat lumbar MRI was obtained by Petitioner on June 17, 2015 at MacNeal Hospital. (PX1, Pg. 10) The results were interpreted during Petitioner's follow up appointment with Dr. Engelhard III on July 15, 2015. (PX7, Pg. 6) Dr. Engelhard III indicated that a review of the recent MRI showed signs of mild degenerative changes and some foraminal stenosis without radicular symptoms. (Id.) Petitioner was diagnosed with chronic musculoskeletal pain. According to Dr. Englehard III, although Petitioner does have some stenosis it did not correspond to any radiculopathy. (Id.) Dr. Engelhard III recommended Petitioner follow up with his primary physician as well as trigger point injections or facet injections, but not a rhizotomy. (Id., Pg. 7)

The following evaluation with Dr. Valero did not occur until July 2, 2015. (PX3, Pg. 12) At that time Petitioner made complaints of ongoing right foot pain with mild relief from the last injection administered by Dr. Mercado. (Id.) Petitioner was diagnosed with right foot and ankle pain and was prescribed oxycodone for pain relief.

Thereafter, Petitioner returned to Dr. Mercado of Freedom Foot Clinic on July 15, 2015 with ongoing complaints of right ankle instability secondary to a right ankle sprain in 2013. (PX11, Pg. 20) According to Dr. Mercado, these kinds of injuries lead to instability of the ankle. Surgery was discussed along with additional conservative measures such as the use of bracing and a tens unit. (Id.) Petitioner was diagnosed with a sprain of the distal tibiofibular ligament of the right ankle, tibialis tendinitis, as well as ankle and tarsus enthesopathy. (Id., Pg. 21) Dr. Mercado recommended Petitioner return to work with light duty restrictions for eight weeks and obtain a second opinion with Dr. Nick Anderson to further evaluate a lateral ankle stabilization procedure. (Id., Pg. 22, 23)

Petitioner returned to see Dr. Michael J. Hejna on November 24, 2015, with complaints of ongoing left elbow lateral epicondylitis pain with ligament tear. (PX6, Pg. 11) The prior injection in January provided relief of symptoms for approximately 3 to 4 months. (Id.) Dr. Hejna diagnosed Petitioner with left elbow epicondylitis and provided an injection of Depo-Medrol and Marcaine. (Id.) Petitioner was instructed to return should this injection fail to control his symptoms.

Petitioner testified that he was sent to four independent medical evaluations, including an appointment with Dr. George B. Holmes Jr. of Midwest Orthopaedics at Rush. (Transcript 2: Pg. 117, 118) Petitioner testified that his evaluation with Dr. Holmes Jr. occurred on January 20, 2016. (Transcript 2: Pg. 118)

On March 11, 2016, Petitioner returned to see his primary physician Dr. Elsa Valero with ongoing complaints of left elbow pain. Dr. Valero diagnosed Petitioner with left elbow and again provided Petitioner with an orthopedic referral. (PX3, Pg. 8) Petitioner was treated by Dr. Dennis A. Williams for an orthopedic evaluation of the left elbow at the request of Dr. Valero on March 28, 2016. (PX19, Pg. 39) Per Dr. Williams, Petitioner arrived with complaints of ongoing left elbow pain since lifting a motorcycle in 2012. Pain was rated to be a 6 out of 10 during the evaluation. Petitioner was diagnosed with left elbow lateral epicondylitis. (PX19, Pg. 41) Dr. Williams did not recommend additional injection to Petitioner's elbow but did recommend a debridement of the lateral epicondylar area and fixation of the tendon. (Id. Pg. 41)

Petitioner returned to see Dr. Valero on June 27, 2016 and complained of right heel and back pain. Dr. Valero diagnosed Petitioner with displacement of lumbar intervertebral disc without myelopathy and advised to follow up with the pain clinic. (PX19, Pg. 33) Petitioner followed up again with Dr. Valero on November 3, 2016, at which point he was diagnosed with abdominal pain. (PX19, Pg. 28) Thereafter, Petitioner was seen by Dr. Valero on April 6, 2017. (Id., Pg. 22) Dr. Valero provided Petitioner with a diagnosis of ongoing abdominal pain with lumbosacral radiculopathy. (Id., Pg. 23)

On August 15, 2017, Petitioner returned to see Dr. Valero with complaints that included low back pain. (PX19, Pg. 16) Dr. Valero provided Petitioner with a diagnosis of displacement of lumbar intervertebral disc without myelopathy and lumbosacral radiculopathy. (Id., Pg. 17)

Petitioner was seen by Dr. Elsa Valero on April 24, 2018 for a right foot Xray. According to the results Petitioner had mild degenerative joint disease of the first MTP joint without fracture. (PX20, Pg. 55 – 59)

On November 14, 2018 Petitioner was again evaluated by Dr. Cynthia Mercado of Freedom Foot Clinic. At this time Petitioner was diagnosed with peroneal tendinitis, pain in the right leg, sprain of unspecified ligament of the right ankle and lesion of plantar nerve. (PX20, Pg. 62) Dr. Mercado provided Petitioner with a recommendation of physical therapy with a focus on deep message / kneading of the right foot to break up cicatrix scar tissue from nerve entrapment. (Id.)

On November 26, 2018 Petitioner was seen at MacNeal Hospital for an initial physical therapy. (PX20, Pg. 66, 68) Thereafter, Petitioner had an additional session on November 30, 2018 and on December 4th, 6th, 7th, 11th 13th, 14th, 18th, 20th, and the 24th of 2018. (Id., Pg. 76, 78 - 87) Petitioner continued with his prescribed therapy appointments by attending a final session on January 2, 2019. (PX20, Pg. 90)

Thereafter, Petitioner was seen by Dr. Nicolas Anderson of MacNeal Hospital on February 28, 2019. Dr. Anderson diagnosed Petitioner with a stress fracture of the right foot, instability of the right ankle, and a right ankle ligament strain. (PX20, Pg. 106) Petitioner was seen for a right foot MRI and of the right lower extremity on March 1, 2019. (Id., Pg. 110, 111) The right ankle MRI confirmed the following impressions: third metatarsal shaft bone marrow edema with signs of stress injury; second metatarsal shaft bone marrow edema with sings of possible stress injury; and intermetatarsal trace edema. (Id., Pg. 110)

The next appointment with Dr. Valero occurred on December 11, 2019 with Loyola Medicine. (PX25, Pg. 160) Petitioner had general complaints of right wrist pain and congestion and was diagnosed with lumbar radiculitis and right wrist pain. (Id., Pg. 166)

On April 28, 2020, Petitioner was again seen by Dr. Valero with ongoing complaints of back pain via a telephonic office visit. (PX25, Pg. 184 – 191) According to Dr. Valero's notes Petitioner was diagnosed with lumbar radiculitis and prescribed 325mg oxycodone tablets for pain relief. (Id., Pg. 190) Petitioner returned to Dr. Valero on August 5, 2020, for a medication refill appointment and was diagnosed with lumbar radiculitis. (Id., Pg. 195 - 200) In addition, Petitioner was provided with a new prescription for 325mg oxycodone tablets. (Id., Pg. 200)

Thereafter, Petitioner returned to Dr. Valero on September 29, 2020, with ongoing complaints of low back and right-hand pain. (PX25, Pg. 207) According to Dr. Valero, Petitioner was suffering from chronic low back pain thar radiated into the right leg. (Id., Pg. 208) Dr. Valero provided Petitioner with a diagnosis for spinal stenosis of the lumbar region without neurogenic claudication and spinal stenosis of the lumbosacral region. (Ids., Pg. 211) Petitioner was provided with a referral for a lumbar MRI and recommended to follow up with Orthopaedics Associates of Riverside. (Id., Pg. 211 & 212)

Petitioner presented to Loyola Medicine for a lumbar MRI on September 30, 2020. (PX25, Pg. 226) The findings were suggestive of multilevel lumbar spondylosis most evident at L5-S1 that has progressed since June 17, 2015. (Id.)

On July 23, 2021, Petitioner returned to Loyola Medicine for a follow up appointment with ongoing low back pain. Petitioner was diagnosed with spinal stenosis of the lumbar region without neurogenic claudication and chronic right foot pain (PX23, Pg. 7) According the provider, Petitioner reported suffering a work injury in 2012 to his low back when he was carrying a heavy item and hurt his low back. (PX23, Pg. 9) In addition the reports indicates that since the accident the Petitioner has gone onto disability and is currently working 16 hours a week. (Id.) A recommendation was provided for skilled physical therapy to address Petitioner's functional limitations. (Id., Pg. 15) Therapy commenced on September 1, 2021, and continued through October 22, 2021 with Loyola Medicine. (Id., Pg. 21 -173)

Section 12 examiner: Dr. Prasant Atluri

Petitioner was evaluated on January 15, 2016 by Dr. Prasant Atluri of Hand to Shoulder Associates. On physical examination Dr. Atluri noted Petitioner had tenderness over the lateral epicondyle and the ECRB tendon origin. A review of the November 30, 2013 left elbow MRI showed signs of damage to the lateral ulnar collateral ligament. Dr. Atluri diagnosed Petitioner with left elbow derangement, radial collateral ligament rupture, and left elbow lateral epicondylitis. (RX13, Transcript Pg. 30) According to Dr. Atluri, the mechanism of injury reported by Petitioner was plausible for causing or contributing to his left elbow condition. Specifically, Dr. Atluri argued Petitioner's identified mechanism of injury represented a classic mechanism for inuring the lateral elbow. Meaning at the time of injury Petitioner's elbow was in an at-risk position, which includes a semi extended position of the elbow with forearms pronated so that the palms are facing downward and arms away from the body, subject to a sudden unexpected load. (RX13, Pg. 33) Given the evidence presented Dr. Atluri concluded Petitioner suffered an acute elbow injury in 2012 that did not resolve. (RX13, Pg. 34) As for whether additional care was needed, Dr. Atluri suggested Petitioner had yet reached MMI as of the date of his evaluation on January 15, 2016. (RX13, PG. 34, 35)

Regarding Petitioner's ability to work, Dr. Atluri indicated Petitioner should avoid forceful gripping with his left arm and refrain from lifting, pushing, and pulling greater than 2 pounds and further advised Petitioner had yet to reach maximum medical improvement. With regards to Petitioner's care, Dr. Atluri indicated that overall Petitioner's treatment had been reasonable, and that Dr. Hejna's recommended surgery was a viable option for Petitioner to achieve MMI. (RX13, Pg. 47, 48) As for the kind of surgery to be performed, Dr. Atluri indicated it would depend on the stability of joint. If the elbow was stable, then a lateral epicondylar release would be appropriate. However, if the joint was unstable then an open lateral ulnar collateral ligament repair or reconstruction would be appropriate along with the tennis elbow release. (RX13, Pg. 50, 51)

Section 12 examiner: Dr. Stanford Tack

The Petitioner underwent an independent medical evaluation by Dr. Stanford Tack for his back on January 29, 2016. The Petitioner testified that Dr. Tack spent about 30 minutes with him for the independent medical evaluation. He did not remember whether Dr. Tack spoke with him about prior workers' compensation cases. (T2, p. 118-119). Dr. Tack testified via an evidence deposition on May 16, 2018. (RX12). He stated that the Petitioner provided a history of having lost control of a motorcycle on June 23, 2012 causing left elbow pain, and abdominal pain. He reported losing no time from work until a hernia surgery (August 2, 2013). He reported a consultation with Dr. Francisco Espinosa, and referral for injections. He reported having had multiple MRI studies. He admitted having had low back pain twenty years previous. (RX12, pp. 8-10). Dr. Tack reviewed MRI imaging from March 18, 2013, December 23, 2014 and June 17, 2015. He stated that all the MRIs indicated degenerative changes with slight progression. (RX12, pp. 10-11). Dr. Tack stated that the Petitioner's lumbar condition and treatment was unrelated to the events of June 23, 2012. More specifically he testified that on June 28, 2012, he did not complain of his low back. On July 10, 2012, he complained of his right leg after an incident the day prior, but no low back pain. On August 27, 2012 he complained of pain in his rib cage, but no low back pain. On November 5, 2012 he complained of right lower quadrant pain and was diagnosed with an inguinal hernia. On March 11, 2013, he complained of low back pain for the past month. Dr. Tack concluded that the Petitioner's low back condition was unrelated to the events on June 23, 2012. He assessed no work restrictions or surgical intervention was necessary. (RX12, pp. 13-16).

Section 12 examiner: Dr. Stephen Boghossian

Thereafter, Petitioner was evaluated by Dr. Stephen P. Boghossian on February 8, 2016, for the purpose of an independent medical evaluation. According to Dr. Boghossian, Petitioner reported a work accident in June of 2012 while trying to move a heavy motorcycle and lost control. (PX15, Pg. 8) Upon trying to keep the motorcycle from falling, Petitioner reported feeling pain in his lower abdomen that radiated to his back. (PX15, Pg. 8) Dr. Boghossian diagnosed Petitioner with bilateral inguinal hernias more likely than not caused by his work injury. With respect to ongoing care, Petitioner will not require further care and will not need restrictions. However, the need for surgery was related to his employment accident with Respondent in June of 2012. (Id.)

Petitioner's Witness: Francisco Hernandez

The first witness presented by the Petitioner was Mr. Francisco Hernandez, a co-worker at The Zone Honda Kawasaki. He worked as a salesperson with the Petitioner on April 30, 2012 and June 23, 2012. (T1, pp. 28-29).

Mr. Hernandez stated that The Zone Honda Kawasaki sold motorcycles, both new and used. He stated that the motorcycle involved in both incidents was "top of the line, the biggest motorcycle that Honda has". Mr. Hernandez testified had the Gold Wing weighed between 900 and 933 lbs. Mr. Hernandez testified to Petitioner's Exhibit #18, a photograph of a Honda Gold Wing motorcycle and was also shown Petitioner's Exhibit #17, a printout of the Honda Gold Wing

specifications for 2012 identifying the weight of said motorcycle to be between 904 lbs. and 933 lbs. (T1, pp. 29, 31-32, 34-35).

Mr. Hernandez testified that on April 30, 2012, he witnessed Petitioner move motorcycles into a display at The Zone Honda Kawasaki. He explained that the employees had to take motorcycles outside, and Petitioner grabbed the Gold Wing, his left arm/hand failed him. He stated, "that's what I saw because I was behind him with another motorcycle." Mr. Hernandez heard the Petitioner indicate that he was hurt and saw him walk to the manager, Ricardo Diaz. He also noted that The Petitioner's arm was swollen. He clarified that the Petitioner was wearing short sleeves on April 30, 2012 when he noticed swelling in his arm. Mr. Hernandez testified that if an employee damaged a motorcycle, they would have to pay for its repair out of their pay. (T1, pp. 38-40, 45-46, 51).

On cross-examination, Mr. Hernandez stated that when he testified the Petitioner's left arm failed him on April 30, 2012, he kind of jerked it to the side while moving the bike and then later the arm swelled. (T1, p. 63). He stated that the Petitioner took off a jacket that he was wearing and went to complain to Ricardo Diaz. He stated later when "Mr. Marty" came, I saw him show his arm to Mr. Marty, and Mr. Marty said, "awe that's nothing, just apply some ice". He stated that the employer had ice in a refrigerator at work. (T1, p. 52-54).

Mr. Hernandez denied that the Petitioner ever told him about a left arm injury prior to April 30, 2012, or that his arm was hurting him in March 2012. He clarified that the Petitioner did not drop the motorcycle on April 30, 2012. Even though his arm allegedly failed him, he continued to move that motorcycle into the shop. However, he stated that once it occurred, he did not continue moving any more motorcycles on that day. (T1, p. 55)

Mr. Hernandez offered on cross-examination that he knew the exact date of the second incident was June 23, 2012, it was because he had to "fill out with my own writing testimony". When asked who requested he fill out a sheet of notes, he responded that the Petitioner asked him whether I would do it and then later brought the sheet so he could fill out in his own handwriting. He brought the sheet with him to the Illinois Workers' Compensation Commission for the trial. (T1, pp. 54-55). The written history was retrieved during the trial from Mr. Hernandez's belongings, and it was noted to have been dated July 23, 2015. (T1, p. 56).

Mr. Hernandez admitted that in 2015, the Petitioner called him about testifying in his workers' compensation case. They met with each other in person so that Petitioner could explain what was going on. He stated that his meeting in 2015 lasted for about 30 minutes. Mr. Hernandez testified that he had prepared a written document for the Petitioner and that the Petitioner typed it up and had him sign. The contents of the letter were written in Spanish, and the interpreter, Noel Cortez, interpreted and read the letter into evidence. (T1, pp. 60-63). The letter stated that,

> "On June 23, 2012, the Petitioner was taking out a Gold Wing motorcycle when he screamed and said help me. The bike fell on me. It was falling down to his left side, and he tried to maintain it or hold it but was not able to because of the size and weight of the motorcycle. In that moment, the Petitioner was bent over and complained about severe pain in his stomach and his back. I personally helped him

> straighten up and sit down. There was some time that I saw he was having problems walking. While I worked there, I always knew he had pain in the lower part of his back and around the scrotum area. I witnessed him report the accident to the supervisor, Ricardo Diaz." (T1, pp. 60-63).

Mr. Hernandez admitted that the letter in question was prepared in 2015, over three years after the injuries allegedly occurred. He did not remember whether the Petitioner gave him advice about what to fill out or reminded him of the date that it occurred. (T1, pp 67-68). After the 2015 letter, he would occasionally call the Petitioner to greet each other. He denied seeing the Petitioner outside of his former job at The Zone Honda. (T1, pp. 60-61).

Mr. Hernandez stated that on June 23, 2012, the motorcycle did not fall on top of the Petitioner, but rather to his side. He was standing on the left side of the motorcycle and when the motorcycle started to fall into him, the bike fell to the ground when the Petitioner was not able to sustain it. This happened inside of the shop and later Mr. Hernandez, and another lifted the motorcycle off the ground. (T1, pp. 64-65). On cross-examination, Mr. Hernandez did not remember if there was damage to the motorcycle. He stated that no monies were deducted from his paycheck due to that bike having fallen. He denied ever dropping a motorcycle and having wages deducted. (T1, p. 66).

Mr. Hernandez stopped working at The Zone Honda at the end of 2012 or the beginning of 2013. Mr. Hernandez testified that he worked a total of 2-1/2 years for The Zone Honda and that there were years that he did not work during every month of the year. He testified that Ricardo Diaz was the sales manager and his direct supervisor as well as that of the Petitioner. Ricardo Diaz' boss was Mr. Marty Pavilonis, who was the boss of everyone because he was the owner. (T1, pp. 67-70).

Mr. Francisco Hernandez returned to the Commission for testimony on May 22, 2019 for re-direct. Petitioner's attorney asked what he was doing at the time the Petitioner's left arm failed him on April 30, 2012. He responded that he was two feet away from the Petitioner waiting for him to move, so that Mr. Hernandez could move his motorbike. He had a clear line of sight when the Petitioner's left arm failed. He stated that he and Petitioner were performing the same tasks on June 23, 2012 and that he had a clear line of sight to that incident. (T2, pp. 20-21).

The Petitioner's attorney questioned Mr. Hernandez about the letter he had written in July 2015 at the Petitioner's request. The same exhibit was re-marked as PX21, previously having been marked RX9 for Identification. He claimed that he was not pressured into writing or signing the letter on July 23, 2015. He testified that he wrote the letter because the Petitioner called him to ask if he would be a witness of what happened that day. He testified that he had never met Petitioner's attorney until the morning of the February 21, 2019 hearing. He denied having had any further conversations about the workers' compensation case between February 21, 2019 and May 22, 2019. (T2, pp. 23-25; PX21).

On cross-examination, Mr. Hernandez stated that in 2015, he wrote a letter on a blank piece of paper in his own handwriting and then gave it to Petitioner. Afterward, the Petitioner had the letter typed, and brought it to Mr. Hernandez for signing. He denied meeting with the Petitioner

before the letter was created. He said that the Petitioner called him on one occasion to ask if he would serve as a witness of what happened and that is the only time. After the letter was created, there was another chance to meet or speak with the Petitioner because he had to sign it. He again confirmed that the letter was created three years after the incidents, and long after he last worked for The Zone Honda Kawasaki. (T2, p. 32).

Respondent's Witness: Martin Pavilonis

On March 22, 2022, Martin S. Pavilonis testified to being the owner of The Zone Honda Kawasaki from approximately the early 2000's through 2013. (Transcript 4: Pg. 27) Mr. Pavilonis testified that Petitioner worked for him as a salesman and generally described Petitioner as a hard worker. (Transcript 4: Pg. 32, 38) Mr. Pavilonis identified Ricardo Diaz as the sales manager for Respondent and the direct boss of Petitioner. (Transcript 4: Pg. 38, 39) Mr. Pavilonis also identified Francisco Hernandez as a salesperson employed by the Respondent and present on April 30, 2012, and June 23, 2012. (Transcript 4: Pg. 75, 76, 81)

Regarding how to properly provide notice of a work accident occurring at The Zone Honda Kawasaki, Mr. Pavilonis testified that the correct procedure was to automatically report the incident to the manger and then it would go to the general manager. (Transcript 4: Pg. 92) Mr. Pavilonis could not recall who was employed as his general manger. (Id., Pg. 95) Mr. Pavilonis did agree Petitioner would have provided notice in compliance with store policy if he provided notification of an accident to Ricardo Diaz. (Transcript 4: Pg. 92)

Mr. Pavilonis testified that some of the salesman would be laid off in the winter months, because nobody would be buying motorcycles in Chicago during the winter. He stated that Petitioner was one of the people was regularly laid off in the winter. He stated that the layoff would generally start in October and employees would return any time between February and the end of April, depending on the weather in Chicago. Mr. Pavilonis recalled that the Petitioner would spend one to two months at a time in Mexico during the layoffs. (T4, pp. 40-42, 45).

Mr. Pavilonis stated that the Petitioner traveled to Mexico to work on his farm during the layoff periods. Mr. Pavilonis was aware of this because the Petitioner would tell stories every year and show him pictures of his time in Mexico. The Petitioner told him that he was raising bulls in Mexico and shared photographs depicting his business and the property. Mr. Pavilonis recalled that the Petitioner purchased ATVs from The Zone Honda. At the time they were purchased, Mr. Pavilonis stated that the Petitioner said he purchased them for his farm so that he could move bales of hay and other items around the property.

Petitioner's Rebuttal Testimony

The Petitioner admitted that he had purchased All-Terrain Vehicles from The Zone Honda to take to Mexico for his family. When questioned again about whether his family owned a farm, he stated that his mother had a plot of land that was small, approximately two acres (T3, p. 32, 34). He also admitted that he would visit his family in Mexico during the winter layoff season at The Zone Honda.

He also claimed that he did not remember whether he showed Mr. Pavilonis pictures of his land in Mexico or whether they discussed Mexico, but later admitted he might have had conversations with Mr. Pavilonis that broached a lot of subjects. (T4, pp. 40-42, 107-108, 110-116).

CONCLUSIONS OF LAW

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

Issue C, whether the accident arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds as follows:

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

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

Petitioner's duties as a salesperson with Respondent consisted of keeping the showroom clean as well as moving motorcycles in and out of the showroom. For his 4.30.12 accident, Petitioner was working for Respondent when he hurt his left arm moving a motorcycle, which was witnessed by Francisco Hernandez. For his 6.23.12 accident, Petitioner was working for Respondent when he hurt his left arm, low back and abdominal area trying to keep a motorcycle from falling, requiring the assistance of Jose Garcia and Francisco Hernandez. For his 5.23.13 accident, Petitioner was working for Respondent when he hurt his right ankle slipping as he moped the floor.

All of Petitioner's accidents stem from a risk distinctly associated with his employment as the employee was performing either an act he was instructed to perform by Respondent or, at the very least, an act that Petitioner might reasonably be expected to perform incident to his assigned duties.

The Arbitrator finds that Petitioner has met his burden in proving by a preponderance of the evidence that his accidents on 4.30.12, 6.23.12, and 5.25.13 arose out of and in the course of his employment by Respondent.

Issue E, whether timely notice of the accident was given to Respondent, the Arbitrator finds as follows:

Pursuant to Section 6(c) of the Act, a claimant is required to give notice to his or her employer within 45 days of a work-related accident. 820 ILCS 305/6(c). The failure to give the statutorily required notice is a bar to recovery under the Act. Silica Sand Transport, Inc. v. Industrial Comm'n, 197 Ill. App. 3d 640, 651, 554 N.E.2d 734, 143 Ill. Dec. 799 (1990). Notice to agents of the employer (i.e. supervisors or foremen) can constitute notice to the employer. See McLean Trucking Co. v. Industrial Comm'n, 72 Ill. 2d 350, 354, 381 N.E.2d 245, 21 Ill. Dec. 167 (1978).

The purpose of the notice requirement is to enable the employer to investigate the employee's alleged industrial accident. White v. Illinois Workers' Compensation Comm'n, 374 Ill. App. 3d 907, 911, 873 N.E.2d 388, 313 Ill. Dec. 764 (2007). Giving notice of an injury is insufficient if the employer is not apprised that the injury is work related. Id. Because the legislature has mandated a liberal construction on the issue of notice, if some notice has been given, although inaccurate or defective, then the employer must show that it has been unduly prejudiced. Eileen Farina v. State Farm Mutual Insurance, 2014 Ill. Wrk. Comp. LEXIS 205, *9-10, 14 IWCC 210; See Gano Electric Contracting v. Industrial Comm'n (Moore), 260 Ill. App. 3d 92, 631 N.E.2d 724 (4th Dist. 1994).

Petitioner testified to notifying his manager Ricardo Diaz after each of his accidents. Martin S. Pavilonis, the owner of The Zone Honda Kawasaki, confirmed that it was appropriate for Petitioner to report injuries to Mr. Diaz. Mr. Hernandez also witnessed Petitioner giving Mr. Diaz notice of the accident. A report of injury was made for the 5.25.13 accident.

The Arbitrator finds that Petitioner has met his burden in proving by a preponderance of the evidence that timely notice of the accidents on 4.30.12, 6.23.12, and 5.25.13 was given to Respondent.

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

To obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. A work-related injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. 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).

Regarding Petitioner's 4.30.12 work injury, both Petitioner and Mr. Hernandez testified that an accident occurred. Petitioner stated that while trying to prevent the bike from falling he overexerted his left arm. Mr. Hernandez explained that Petitioner took off his jacket and his arm was swollen. Petitioner went to Dr. Valero on May 16, 2012 and did not report a specific event but rather reported experiencing left elbow pain for the last two week from frequently pushing motorcycles. Petitioner stated that he felt horrible pain to his elbow during his 6.23.12 accident from trying to keep the motorcycle from falling. When Petitioner returned to Dr. Valero on June 28, 2012 (five days after the 6.23.12 accident), he still reported left elbow pain from an accident a couple of months ago involving a falling motorcycle. When Petitioner saw Dr. Iftikhar on July 17, 2012, he reported that he injured his left elbow seven weeks previous, and again two weeks previous while lifting a motorcycle. Dr. Atluri confirmed that the mechanism of injury was consistent with Petitioner's left elbow derangement, radial collateral ligament rupture and lateral epicondylitis. Dr. Atluri recommended work restrictions and surgery.

Based on the record as a whole, the Arbitrator finds that Petitioner has met his burden in proving by a preponderance of the evidence that Petitioner's current condition of ill-being for his left arm is causally related to his 4.30.12 injury.

Regarding Petitioner's 6.23.12 work injury, Petitioner testified that he lost control of motorcycle and injured his left elbow, low back, and abdominal area as he fought to keep the motorcycle from falling. Five days later, Petitioner saw Dr. Valero reporting ongoing left elbow pain for the past two months and abdominal pain for the past 8 days. The Arbitrator does not find the discrepancy between five or eight days to be material but notes that Petitioner did report back pain until 3.11.13 with Dr. Valero at which time he reported low back pain while in Mexico for one month. Dr. Boghossian diagnosed Petitioner with bilateral inguinal hernias more likely than not caused by his work injury of 6.23.12, related his surgery to the work accident and opined that Petitioner did not need additional care or any work restrictions. Dr. Tack opined that Petitioner's low back condition was pre-existing and not causally related.

Based on the record as a whole, the Arbitrator finds that Petitioner has met his burden in proving by a preponderance of the evidence that Petitioner's current condition of ill-being for his bilateral inguinal hernias is causally related to his 6.23.12 injury. The Arbitrator finds that Petitioner's low back and any psychological injuries are not related to the 6.23.12 injury.

Regarding Petitioner's 5.25.13 accident, Petitioner testified that he injured his right foot/ankle while mopping the floor at work. A report of injury was made, and Petitioner reported his twisted ankle to his therapist at MacNeal, to Dr. Canelas on June 5, 2013 and to Dr. Valero on June 17, 2013 where a podiatry referral was made. Dr. Mercado on June 25, 2013 diagnosed Petitioner with an open fracture of the calcaneus, distal sprain of the tibiofibular ligament, and tarsus enthesopathy.

Based on the record as a whole, the Arbitrator finds that Petitioner has met his burden in proving by a preponderance of the evidence that Petitioner's current condition of ill-being for his right foot/ankle is causally related to his 5.25.13 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:

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).

Regarding Petitioner's 4.30.12 work injury, having found Petitioner's left arm/elbow condition to be causally related and relying on the record as a whole, 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, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act, for the outstanding medical services to the left arm/elbow, that was submitted into evidence, from the following providers: Dr. Valero, Riverside Orthopedics, Dr. Iftikhar, MacNeal, Neurologic Care Associates, Dr. Hejna, Orthopedic Associates of Riverside and Dr. Williams.

Regarding Petitioner's 6.23.12 work injury, having found Petitioner's bilateral inguinal hernia condition to be causally related and relying on the record as a whole, the Arbitrator finds Petitioner's treatment related to his bilateral inguinal hernia condition 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, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act, for the outstanding medical services to the bilateral inguinal hernia, that was submitted into evidence, from the following providers: Dr. Valero, MacNeal, and Suburban Surgical Associates, and Dr. Favor.

Regarding Petitioner's 5.25.13 work injury, having found Petitioner's right ankle/foot condition to be causally related and relying on the record as a whole, 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, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act, for the outstanding medical services to the right foot/ankle, that was submitted into evidence, from the following providers: Dr. Valero, Freedom Foot Clinic, MacNeal, Dr. Rizvi, Vanguard Medical, and Dr. Anderson.

For all work injuries, 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:

With regards to Petitioner's 4.30.12 accident, the Arbitrator finds that Petitioner is entitled to prospective medical care for the left elbow/arm. Dr. Hejna concluded Petitioner would benefit

from reconstruction of the ligament tear and Dr. Atluri indicated Dr. Hejna's recommended surgery was a viable option for Petitioner to achieve MMI. Respondent shall approve and pay for the left elbow surgery and necessary post-operative care as prescribed by Dr. Hejna as provided in Section 8(a) and 8.2 of the Act.

With regards to Petitioner's 6.23.12 accident, no further treatment has been recommended for Petitioner's bilateral inguinal hernia and Petitioner has been declared at MMI with respect to said condition.

With regards to Petitioner's 5.25.13 accident, while the Arbitrator has found Petitioner's current condition for the right ankle/foot to be causally related, there is no current and pending order for treatment. Thus, the Arbitrator does not award any prospective medical care for the right ankle/foot at this time.

Issue L, whether Petitioner is entitled to temporary total disability benefits, the Arbitrator finds as follows:

A claimant is temporarily totally disabled from the time an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of his injury will permit. Westin Hotel v. Indus. Comm'n, 372 Ill.App.3d 527, 542 (1st Dist. 2007).

In determining whether a claimant remains entitled to receiving TTD benefits, the primary consideration is whether the claimant's condition has stabilized and whether he 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, he is no longer eligible for TTD benefits. Archer Daniels Midland Co. v. Indus. Comm'n, 138 Ill.2d 107, 118 (1990).

With regards to Petitioner's 4.30.12 accident, while the Arbitrator has found Petitioner's current left elbow/arm condition to be causally related and Petitioner's treatment to be reasonable and necessary, the Arbitrator further finds that Petitioner is entitled to TTD benefits. Petitioner is claiming entitlement to TTD benefits from 1.15.16 – 5.20.19. On January 15, 2016, Dr. Atluri indicated Petitioner should avoid forceful gripping with his left arm and refrain from lifting, pushing, and pulling greater than 2 pounds and further advised Petitioner had yet to reach maximum medical improvement. Petitioner's recommended surgery is still pending. Petitioner was able to work with restrictions with ABM from March 16, 2015 to April 17, 2015 and for El Milagro from May 21, 2019 to January 6, 2020. Based on the above and the record as a whole, the Arbitrator finds Respondent liable for 289 5/7 weeks of TTD benefits (1.15.16 through 5.20.19 and from January 7, 2020 to March 22, 2022) at a weekly rate of $667.15 to be paid directly to Petitioner.

With regards to Petitioner's 6/23/12 accident, as the Arbitrator has found Petitioner's bilateral inguinal hernia to be causally related and Petitioner's treatment to be reasonable and necessary, the Arbitrator further finds that Petitioner is entitled to TTD benefits. Petitioner underwent bilateral inguinal hernia surgery on August 2, 2013 and Dr. Favor released him to work on August 19, 2013. Based on the above and the record as a whole, the Arbitrator finds Respondent liable

for 2 4/7 weeks of TTD benefits (8.2.13 through 8.19.13) at a weekly rate of $646.36 to be paid directly to Petitioner.

With regards to Petitioner's 5/23/13 accident, as the Arbitrator has found Petitioner's right ankle/foot to be causally related and Petitioner's treatment to be reasonable and necessary, the Arbitrator further finds that Petitioner is entitled to TTD benefits. Petitioner was taken off work by Dr. Mercado on June 25, 2013 for two weeks and was returned to work by Dr. Mercado on July 19, 2013. Dr. Rizvi provided an off work note for July 31, 2013. On July 15, 2015, Dr. Mercado gave work restrictions for 8 weeks.

Based on the above and the record as a whole, the Arbitrator finds Respondent liable for 11 5/7 weeks of TTD benefits (6.25.13 – 7.19.13, 7.31.13, and 7.15.15-8.2.15) at a weekly rate of $646.36 to be paid directly to Petitioner.

Issue N, whether Respondent is due any credit, the Arbitrator finds as follows:

With regards to Petitioner's 5/23/13 accident, Respondent has paid TTD benefits in the amount of $1,343.66 for this date of accident.

It is so ordered:

Arbitrator Rachael Sinnen

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC028551
Case Name	Marcia Ramirez v. State of Illinois - Pontiac Correctional Center
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0025
Number of Pages of Decision	16
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Alexis Ferracuti
Respondent Attorney	Thomas Owen

DATE FILED: 1/19/2024

/s/Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF LASALLE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MARCIA RAMIREZ,

Petitioner,

vs. NO: 18 WC 28551

STATE OF ILLINOIS,
PONTIAC CORRECTIONAL CENTER,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed August 25, 2022, is hereby affirmed and adopted.

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

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

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

January 19, 2024

O: 1-11-24
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	18WC028551
Case Name	Marcia Ramirez v. State of Illinois - Pontiac Correctional Center
Consolidated Cases	
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Paul Cellini, Arbitrator

Petitioner Attorney	Alexis Ferracuti
Respondent Attorney	Thomas Owen

DATE FILED: 8/25/2022

/s/ Paul Cellini, Arbitrator
Signature

INTEREST RATE WEEK OF AUGUST 23, 2022 3.11%

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

August 25, 2022

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation Commission

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

MARCIA RAMIREZ
Employee/Petitioner

v.

STATE OF ILLINOIS / PONTIAC CORRECTIONAL CENTER
Employer/Respondent

Case # **18** WC **028551**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Cellini**, Arbitrator of the Commission, in the city of **Ottawa**, on **April 28, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **January 8, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**97,800.04**; the average weekly wage was $**1,880.77**.

On the date of accident, Petitioner was **58** years of age, ***single*** with **0** dependent children.

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

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

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

Respondent is entitled to a credit of $**1,763.38** under Section 8(j) of the Act.

ORDER

The Arbitrator finds that the preponderance of the evidence supports that Petitioner sustained accidental injury arising out of and in the course of her employment on a repetitive basis with a manifestation date of January 8, 2018.

The Arbitrator finds that the Petitioner's bilateral carpal tunnel syndrome condition was caused or aggravated by her work duties and manifested on January 8, 2018.

The Arbitrator finds that the Petitioner provided timely notice of her work related injury to Respondent.

Respondent shall pay reasonable and necessary medical expenses contained in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit of $1,763.38 for medical expenses that have been paid by Respondent prior to hearing pursuant to Section 8(j), as well as credit for any medical expenses that have been paid prior to hearing through the workers' compensation carrier, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

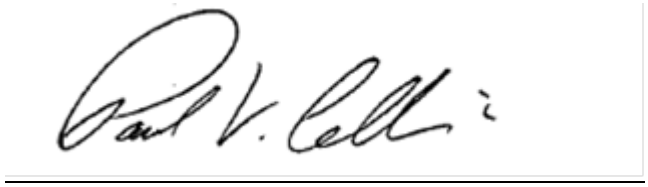
Respondent shall pay Petitioner permanent partial disability benefits of $790.64 per week, the maximum allowable statutory rate, for 23.75 weeks, because the injuries sustained caused the loss of use of 12.5% of the right hand, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $790.64 per week, the maximum allowable statutory rate, for 16.15 weeks, because the injuries sustained caused the loss of use of 8.5% of the left hand, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner compensation that has accrued from **January 8, 2018** through **April 28, 2022**, and shall pay the remainder of the award, if any, in weekly payments.

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

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



Signature of Arbitrator **August 25, 2022**

STATEMENT OF FACTS

Petitioner began working for the Illinois Department of Corrections in November 1993. She has held a number of job titles in her time there, including office associate, human resources representative, office assistant, office coordinator, personnel representative, and public service administrator. Many of the job titles she held required her to be able to do shorthand, and she testified that all of her positions throughout her employment with Respondent have involved similar duties - as she would move up, "you would get more" to do. She has also worked in a number of Respondent's facilities in these positions, including Stateville, Dwight and Pontiac. Most recently she worked at the Pontiac facility from 2013 to 2018, working as an AA3, which she testified is essentially the same job she worked as public service administrator/bureau of operations/technology coordinator/industry superintendent. This most recent AA3 job involved typing, filing, dictation for labor and warden meetings, and signing offender documents. She testified she addressed thousands of documents per week. She would have to write some out longhand and then type them up. There were thousands of checks produced weekly that she would have to sign off on. She would do researching, correspondence for the warden, act as a media liaison, take meeting minutes and act as a Labor relations coordinator. She also took care of contract issues for various employee groups, as well as employee discipline. The warden at Pontiac since 2013 is Terri Kennedy.

Petitioner testified that between 2013 to 2018 she would be physically typing at her computer about 80% of the day, while working 10 to 14 hours per day, 5 days a week, between 40 and 65 hours per week. At Pontiac, she worked at a standard "L" shaped desk with a keyboard and 2 monitors. She was not aware of any ergonomic safety studies done at that time. As to the job descriptions that were entered into evidence (Px2), Petitioner testified she did not work as a "clerk 3", which requires a 6 week officer training program. She testified that the rest of the descriptions were accurate. She testified that a normal day as an AA3 involves "tons" of paperwork, and that she would be on the computer all the time, including email and research. Things got more and more computerized over her time working for Respondent. She would transcribe meeting minutes, compile labor

relations packets and sign hundreds of checks each day. Every morning she would have to review all incident documents from the day before, as well as work on filing and contracts.

Petitioner testified she first developed pain in her hands in 2013 at Pontiac. As time went by, especially working at the desk with her hand at a 45 degree angle with the mouse and keyboard all day, the symptoms would worsen. It progressed in severity until she was unable to sit and do her work for longer time periods and she felt she needed to do something. She is right handed, and the pain was primarily right-sided, but she would get a lesser degree of tingling and tiredness in the left hand as well.

Petitioner testified she explained the situation to the warden as well as to Respondent's human resources person, and that "absolutely they knew exactly what was going on." Petitioner agreed that it was possible the incident summary report was reported to the Warden on 1/8/18, but Petitioner testified she had casual conversations about her carpal tunnel with the warden prior to 1/8/18, including that it was achy and progressing. She was waiting to try to deal with it after she retired on 9/1/18. She testified that she just could no longer work the number of hours that she would have needed to continue working. Petitioner acknowledged that no one mandated her to work those hours, but as a salaried employee, she worked the hours needed to get her work done.

Petitioner's symptoms included bilateral numbness and tingling in the hands and fingers and the pain would radiate to the elbow, again right greater than left. She was dropping things with the right hand, and it felt constantly swollen and heavy. Aching and numbness would awaken her during sleep.

Petitioner testified she had sought treatment for her hands prior to 2018. She was working at Dwight and went to see her primary provider, who told her she likely had carpal tunnel syndrome (CTS) and recommended she see a surgeon. She filed a workers' compensation claim at that time and got a case number, but ultimately was notified the paperwork was lost. This was redone but never got anything back, "something about a flood." She testified the Respondent's workers' compensation administrator changed over to Tristar which then restarted everything. While she had the same type of symptoms at Dwight, they weren't as bad as they were when she finally reported the condition at Pontiac. She testified she was not sure if her hand symptoms were due to the hands, her neck or something else. The symptoms had not prevented her from doing her job. Petitioner indicated that with the hours she worked, she had no time to do any type of hand-intensive activities in her free time.

At OAK Orthopedics on 11/19/18, Petitioner agreed she reported a 10 year history of symptoms, worse with her work duties, which she testified she described to OAK. She testified she reported that she sought treatment because her symptoms had become much worse. She testified she had become somewhat used to the numbness and tingling, but she became more concerned when she developed gripping issues and wrist drop, which slowed down her ability to work. She still was typing for 80% of her day, and she indicated it was possible she was spending even more time working because the symptoms were slowing her down.

The 11/19/18 report from OAK notes complaints of bilateral hand pain with a history of pain and numbness to both hands for over six years, including a bilateral EMG study 6 years prior which revealed the presence of CTS. Petitioner reported she was seeking treatment due to increasing symptoms. She reported numbness, tingling, buckling, instability, and radiation to dorsal/hand thumb. Petitioner was assessed with bilateral CTS, surgical intervention was discussed, and an EMG/NCV study was ordered. (Px3).

The 12/7/18 EMG/NCV reflected moderate CTS on the right and mild CTS on the left. Petitioner returned to OAK on 12/10/18 and underwent a corticosteroid injection to her right wrist which yielded minimal improvements. On 1/7/19, Petitioner was found to have thenar atrophy and decreased strength. She elected to undergo a carpal tunnel release to her right wrist. (Px3).

Petitioner testified that this was the first time surgery had been recommended to her. She testified that as she continued to work, the condition would just keep getting exacerbated with a constant aching and an inability to make her hand do what she wanted it to do. While she testified the injection did provide some improvement, it was short lived, and her symptoms would continue to be exacerbated.

On 2/4/19, Dr. Choy performed a mini-open right carpal tunnel release. On 2/14/19, Petitioner's surgical incision was found to be well-healed with minimal swelling. On 3/19/19, Petitioner was found to be markedly improved from her preoperative status, but still had some incisional discomfort. (Px3).

While she had been released to return to work on 2/19/19, Petitioner testified she had already retired at that time.

On 3/11/19, Petitioner presented at Hinsdale Orthopedics for a second opinion, reporting a repetitive injury. Petitioner testified that she discussed her job duties with Dr. Urbanosky. She was assessed with right CTS, post-surgery, and left CTS. Petitioner was allowed to continue regular work duties as of 3/12/19 and was to consider intervention for left wrist when needed. (Px5).

On 4/16/19, Petitioner returned to OAK Orthopedics with complaints of some tenderness and scar tissue pain to the right palm. She was placed on a Medrol dose pack and referred to physical therapy. On 5/13/19, Petitioner was found to have improved nicely and did not have any of her preoperative paresthesia. She still had some mild tenderness, but it had decreased markedly. Petitioner was instructed to continue with a home exercise program on her own and follow up when necessary. (Px3). Petitioner testified that she returned to OAK in May 2019 because they left her a message indicating she was supposed to have a follow up, and they discussed her ongoing symptoms when she went back.

Petitioner testified she had ongoing symptoms at the base of her right palm at the incision area in April 2019, with two sensitive lumps/scar tissue. Symptoms would increase with pressure on the hand. Given the ongoing pain and pressure feeling, she was concerned the surgery ended up leaving her the same or worse than she was prior to surgery.

From 4/22/19 to 5/9/19, Petitioner participated in nine sessions of physical therapy. At discharge, Petitioner was found to have made objective improvements with range of motion, strength, and flexibility, as well as improvements with sensation and weight bearing. She continued to present with impairments involving range of motion, soft tissue mobility, strength, pain, and weight bearing. Although Petitioner reported limitations with some activities, she also reported that the limitations had improved very much, and she was able to perform her activities with less difficulty. (Px9).

On 7/31/19, Petitioner returned to Dr. Urbanosky with bilateral wrist pain, right greater than left, and pain with pressure on the right wrist. Petitioner was diagnosed with bilateral CTS "due to repetitive work activities over 25 year desk duty job." She underwent a left CTS injection, which provided 75% pain relief. Dr. Urbanosky opined that Petitioner would likely require carpal tunnel release surgery on the left when the right was completely healed if symptoms persisted or returned. (Px5). Petitioner testified she had improvement at this point with numbness and tingling but she was still dropping things and having issues with scar tissue. She did indicate she had about 75% relief with the left-sided injection, which was a big difference versus what she had experienced with the right-sided injection.

On 10/7/19, Petitioner described her pain as being a 0 out of 10 on a 10 point scale and she was found to have reached MMI with regard to the bilateral wrist conditions. (Px5).

On 1/8/20, Petitioner was examined by Dr. Cohen at the request of Respondent. Petitioner informed Dr. Cohen that she developed bilateral hand symptoms over a period of years. Dr. Cohen diagnosed the Petitioner with right greater than left bilateral CTS that had been treated surgically on the right side. The doctor opined that there was no basis to link Petitioner's condition to her job activities as a public service administrator. He noted that CTS is idiopathic in the vast majority of cases and is seen in association with certain medical conditions and being a middle-aged female. "Although there was some controversy in the past, it is currently clear, utilizing evidence-based medicine, that carpal tunnel syndrome is neither caused nor precipitated by data entry or clerical work activities. This is not supported on any anatomic of scientific basis." (Rx2).

On 5/11/20, Dr. Urbanosky issued a narrative opining that Petitioner's left hand CTS was at least in part related to her job activities, based upon the Petitioner's work history and physical examination. Dr. Urbanosky also opined that her right carpal tunnel syndrome was at least in part related to Petitioner's job activities as a public service administrator for 25 years. She reviewed Dr. Cohen's report and did not agree with his conclusion that the CTS was neither caused nor precipitated by Petitioner's job duties. Dr. Urbanosky stated that there are other contributing factors to the development of CTS, which in Petitioner's cases included her "extensive and busy work hours with constant use of her hands on the keyboard, writing, and minimal, if any, break time." She opined that Petitioner's right hand median neuritis symptoms post the carpal tunnel release should likely have resolved. Dr. Urbanosky opined that Petitioner's left CTS is controlled but not resolved, and that if Petitioner's symptoms warrant further treatment, she would be a candidate for a repeat corticosteroid injection or left carpal tunnel release surgery. (Px7).

Dr. Urbanosky's deposition was obtained on 12/3/20. Her impression was that the vast majority of Petitioner's day was spent on the phone and having to write letters and take dictation. Her understanding was Petitioner spent 90% of her work time on the computer. On cross, Dr. Urbanosky testified she only discussed the frequency and duration of Petitioner's typing with the Petitioner to a general extent, that she was not aware of the force that Petitioner exerted while typing nor her method of typing. She was not aware of the frequency and duration that Petitioner transcribed notes. (Px7).

Dr. Cohen was deposed on 11/1/21. Dr. Cohen used the term "long-standing carpal tunnel syndrome" and understood Petitioner's symptoms to have started many years ago. He explained that typing or data entry may lead to a manifestation of symptoms, but it does not mean that the activity is causing or changing the natural history of the condition. Dr. Cohen testified that current population-based studies show that there is no direct association between CTS and data entry activities and there is no cause and effect relationship. Dr. Cohen testified that CTS can be seen in association with occupational activities that involve forceful and repetitive grasping and squeezing against resistance, but not with respect to clerical work, computer work, and data entry. (Rx4).

Petitioner testified that her most significant activity was typing and writing her signature repeatedly. She did not perform shorthand on a daily basis, but it also was problematic. Anything involving fine motor activity would cause her problems. She testified that Dr. Urbanosky felt that her right hand was as good as it would get.

Petitioner testified that she was continuing to work for Respondent on a contract bases after she retired on 9/1/18, essentially in the same position, but she was able to work only roughly 3 days per week, which helped alleviate her symptoms. She testified that the contract position was suggested to her by Respondent because they were not able to hire quickly enough, so the warden requested to hire her by contract. This process started prior to her retirement. She testified the warden knew there was a lot of work to do, and she would take what she could get out of Petitioner even if less hours. Petitioner continued working on a contract basis until 3/1/19.

She continues to have tingling in the tips of her fingers, but no real pain unless she tries to do too much, like cutting grass, as it puts pressure on the palm of her hand for more than a minute, which triggers symptoms of numbness and tingling, and pain in her thumb. She gets periodic ache in the right wrist and thumb. She has ongoing difficulty with opening jars and fine pinching with the fingers, such as taking the foil top off of a yogurt container. She doesn't use a computer because she becomes symptomatic when she has her wrist at a 45 degree angle.

Petitioner testified that her left CTS is not resolved but is controlled. She still has numbness and tingling and some awakening at night, and it feels swollen and tight in her fingers. She wears a brace on the left to sleep. She doesn't notice much problem with pinch grip on the left side and can hold items without dropping them in her left hand. She takes Tylenol almost daily and has not really sought any treatment since December 2019.

P testified she described her job to Dr. Urbanosky the same way she did in her testimony, including her work hours. She is not a diabetic and has no other known nerve conditions. In total, she was only off work for about 2 weeks before returning to work n the contract basis. She testified that Dr. Cohen spent about 10 minutes with her and, while he did examine her, he did not ask about her for a job description or about her job duties. She did not know if he had information about her job duties or desk set-up, just that he did not get such information from her. Dr. Urbanosky spent significantly more time with her. and Petitioner provided her with information about her job duties as well as her desk set up, noting that Px2 is similar to what she provided her. This includes both things pulled from a website and her own additions.

Petitioner testified that she filled her prescriptions at a CVS in Braidwood, which was paid for by herself, and that he bills were submitted through her group health coverage, possibly Aetna or Cigna, which paid for the treatment. Px1 – Petitioner identifies a bill in Px1 where she is seeking reimbursement of her out of pocket medical payments.

On cross-examination, Petitioner testified she has worked as an AA3 since 2013. She agreed she had pain prior to this in other positions she has worked for Respondent, first noticing it while working at Dwight, which preceded her start working at Pontiac. At Dwight, she agreed it was progressive, but again testified she could not pinpoint an exact date and time when the injury occurred, but that it rather was "a buildup over time." She believed 2012 was when she first discussed her symptoms with her doctor, and he advised her to see a surgeon. At that time, she testified she didn't know if it was related to her job, as when she saw her primary provider at that time and completed workers' compensation paperwork, she never got any info other than a claim number. It was when she could no longer handle the symptoms that she filed a workers' compensation claim. Once she was moved to Pontiac, Petitioner testified that her job became much more administrative at Pontiac while it was more supervisory at Dwight and involved less typing. Other than a lunch break, during which Petitioner indicated she ate at her desk and continued to work at Pontiac, there were no other required breaks. While she agreed she had duties at Pontiac which did not involve typing or writing, Petitioner testified that even when using the telephone, she very often would be using the computer at the same time. Other activities would also be performed in conjunction with computer typing. At meetings, she would take notes or perform stenography. She would perform all office activities, including preparation of spreadsheets and power points. For such activities, she would gather information and compile it. Petitioner agreed she has undergone no treatment since December 2019 and that she hasn't really improved since then. She also agreed her retirement was voluntary, and that she receives a pension, and that she was still treating when she retired.

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, THE ARBITRATOR FINDS AS FOLLOWS:

In order to prove an "accidental injury" pursuant to the Illinois Workers' Compensation Act, the Petitioner needs to show that some act or phase of the employment was a causative factor of the resulting injury. *Fierke v. Industrial Commission, 309 Ill.App.3d 1037*. An injury can be considered "accidental" within the Act, though it develops gradually over time without requiring complete dysfunction, if it is caused by the performance of the Petitioner's job. Id. A Petitioner seeking benefits for a gradual injury, such as this Petitioner's bilateral carpal tunnel syndrome, must meet the same standard of proof as a Petitioner who alleges a single, definable accident, and must prove a precise, identifiable date when accidental injury manifested itself. *Williams v. Industrial Commission*, 244 Ill.App.3d 204. The manifestation date in a case where the employee is seeking benefits for a gradual injury is the date on which both the fact of the injury itself and the causal relationship of the same injury to the Petitioner's employment would have become plainly apparent to a reasonable person. *Id*. The test of when a gradual injury from a repetitive trauma manifested itself is an objective one determined from the facts and circumstances of each case.

In a case similar to the one at bar, *Sheils v. Illinois Workers' Compensation Commission*, 2015 IL (1st) 132843WC-U, the employee had spent 40 years working as a graphic designer. Each workday, she spent eight hours on the computer doing keyboarding and using the mouse; her work was dependent on continuous hand movements, requiring utilization of the fine motor skills, with prolonged grasping and precise manipulation of the mouse, as well as constant keyboard strokes. She began to experience difficulties with her hands as early as 2001 but was able to continue performing her job duties without medical complications, lost working time, or the need to be reassigned to different work until approximately eight years later in 2009. In that case, the claimant testified that prior to 2009, though she experienced symptoms, she was able to perform her job duties and did not know whether her condition would degenerate to a point where it would impact her ability to do her job. As in this case, the Petitioner in *Sheils* continued to work until the breakdown of her physical structure. The Act itself was intended to compensate workers who have been injured as a result of their employment. The Appellate Court found in that case the Act was intended specifically to compensate workers who have been injured as a result of their employment, and to deny an employee benefits for a work- related injury that is not the result of a sudden mishap or completely disabling injury penalizes the employee who faithfully performed her job duties until such time as it caused significant breakdown and damage to her own bodily structure.

In this case, though the Petitioner admitted she had previously filed a workers compensation claim in 2012 for bilateral carpal tunnel, she testified that she did not have a formally filed claim and did not receive any compensation in 2012 when she originally attempted to file a workers compensation injury report with the State of Illinois. According to her unrebutted testimony, the Petitioner continued, after that time, to perform her regular job duties at both Dixon and Pontiac Correctional Centers, performing similar administrative assistant work at Pontiac with more administrative duties which included an increase in repetitive typing, writing, and filing at the Pontiac position. The Petitioner testified that she worked significantly more hours at Pontiac than at Dixon between 2013 and 2018 while working in her position as an Administrative Assistant III for the warden there. In fact, the Petitioner worked 10-12 hours per day at Pontiac, and while she may have additionally answered calls or used a calculator, those tasks were performed concurrently while she typed. The Petitioner estimated she spent approximately 80% of her day typing at the Pontiac. Again, Respondent offered no evidence to rebut or contradict the Petitioner's testimony as to the amount of time she spent typing in her job, or the job position information provided to Dr. Urbanosky by the Petitioner. No evidence was presented which contradicted the Petitioner's testimony as to her increased work hours at Pontiac, which she testified occurred

because as her condition worsened, she was unable to get her regular work done in an eight hour workday. The Petitioner specifically testified that the pain did not resolve but instead worsened over time between 2012 and 2018, and in 2018 the condition had worsened to the point that she sought treatment for her symptoms of bilateral hand numbness, weakness, dropping of objects, and pain after working the 10 to 12 hour days. At that point she was advised to be evaluated by a surgeon.

The Petitioner, upon reasonable belief that the condition was related to her work activities and that she could no longer perform her job duties as required by the Respondent, reported her hand condition to her Warden on 1/8/18, and asked for medical treatment to assess the same. The Petitioner specifically testified she reported the condition when she became unable to perform many of her normal job tasks.

The Petitioner's regular job duties, per her testimony, included multiple hand-intensive daily tasks, including dictation, typing, research, compiling reports or spreadsheets on the computer, performing interviews, and taking the dictation from those interviews, taking phone calls, and typing letters or signing checks for the Warden. The Petitioner testified that while her job duties were diverse, the majority of her day involved keyboarding or handwriting. She testified that 80% of her day was spent typing on average while working in her position as Administrative Assistant III even if she was performing other tasks while typing like answering the phone. It is clear to the Arbitrator from the Petitioner's testimony and the job description given to Dr. Urbanosky that the Petitioner's job duties were sufficiently repetitive in nature with regard to hand motion.

The greater weight of the evidence indicates that Petitioner's symptoms did not affect her job performance or her ability to complete her job tasks until leading into 2018, and that it was not until 1/8/18 that the Petitioner could no longer actively perform her job tasks and sought treatment. At that time, the Petitioner immediately reported this as a work-related injury despite not having a physician's statement causally relating the injury to her work duties at that time because she suspected it may be caused or aggravated by her increased hours and added job duties at Pontiac Correctional Center. The Petitioner should not be penalized for working diligently through her pain until such as time as it affected her ability to perform her job and required medical treatment. The manifest weight of the evidence in this claim shows that the manifestation date of 1/8/18 is an appropriate manifestation date based on it being the date that the Petitioner could no longer perform her regular job duties and required medical treatment for her condition.

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

The Petitioner credibly testified that on 1/8/18 she reported her carpal tunnel condition to Warden Kennedy. The Petitioner additionally testified that the Warden had a larger conversation with the Petitioner about her need for treatment and ongoing ability to perform her job tasks at that time. It was Petitioner's understanding that she would have to do less because of her pain and that Warden Kennedy told her she would take what she could get from the Petitioner at that time as it was difficult to hire someone to fill Petitioner's position. The Petitioner testimony in this regard was unrebutted at hearing. The Petitioner testified that she submitted a written incident report confirming that she had reported the incident appropriately at that time to Warden Kennedy. As no evidence was presented to dispute the Petitioner's testimony, the Arbitrator finds that appropriate notice was given of the work accident on 1/8/18.

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

In workers' compensation claims involving a pre-existing condition such as in this claim, recovery depends on the employee's ability to establish 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 be causally connected to the work-related injury. Bolingbrook Police Department v. Illinois Workers' Compensation Commission, 2015 IL App (3d) 130869WC.

The Arbitrator finds that the Petitioner's bilateral carpal tunnel conditions were either caused or aggravated by her repetitive work duties over time as an administrator. The Petitioner testified extensively to the many various duties she performed for Respondent, almost all of which involved handwriting or keyboarding in some fashion, The Arbitrator also takes significant interest in the hours and days the Petitioner indicated she worked, sometimes up to 65 hours per week. While the Respondent may question this, no evidence was presented which would rebut the Petitioner's testimony. Her testimony regarding her discussions with Warden Kennedy in January 2018 indicate that she was a valuable asset to the Respondent, and it appears to the Arbitrator that this was because she handled so many administrative duties.

Petitioner worked for the Respondent for twenty-five years prior to the date of accident, holding a variety of positions, but all positions which she testified were similarly administrative in nature. The Petitioner stated that while she initially noticed hand pain in the last year of her employment at the Dwight facility in 2012. When Dwight closed, she moved to the Pontiac facility in 2013, where she indicated that she spent 80% of her day filing, handwriting, and/or keyboarding. The Petitioner specifically testified that this job was fully administrative in nature and required much more work than her previous positions, testifying she often worked 10 to 12-hour days in this position for five days a week because it was the time which was required to finish all her job tasks. Again, this testimony was unrebutted.

Dr. Urbanosky testified that she had discussed Petitioner's job duties with her and reviewed her job description with her on multiple occasions and opined that the Petitioner's bilateral carpal tunnel was caused by her employment and was directly related to and made worse by her daily repetitive work activities at Pontiac. Dr. Urbanosky was aware of Petitioner's work schedule. She testified in detail how each of Petitioner's job tasks impacted her CTS condition. She indicated that repetitive force or exertion while typing, if the desk were not ergonomically set up and she was typing for 80-90% of her day, could worsen her carpal tunnel condition in both hands. She also stated that stapling, filing, dictation, and even holding a phone while typing could cause increased difficulties with carpal tunnel bilaterally if Petitioner was doing those job tasks 10-12 hours per day for five days each week over the course of the last 5-6 years. Dr. Urbanosky opined that without other contributing health conditions, and given the demands of Petitioner's employment, it was extremely likely that her employment contributed to and was a causative factor of her bilateral CTS.

Section 12 examiner Dr. Cohen disagreed, opining that Petitioner, as a middle-aged woman, developed the CTS condition idiopathically based solely on her age and gender rather than any causative factor at work. He testified that current studies do not support a causal relationship between such clerical tasks and the development of CTS. However, it appears to the Arbitrator that Dr. Cohen did not have the same level of understanding of the Petitioner's job duties as Dr. Urbanosky, as he really did not discuss this with Petitioner in detail and relied on a job description from Respondent that may not have provided detail as to the Petitioner's job duties as an AA3. Nor was Dr. Cohen aware of the hours the Petitioner was working at Pontiac Correctional.

The Arbitrator finds the opinions of Dr. Urbanosky to be more persuasive than those of Dr. Cohen in this case. The Arbitrator believes that Dr. Urbanosky provided more informed and reasonable opinions. It should again be noted for the record that the work duties need not be the only cause of a condition to be compensable under the Act, but rather only need be a causative factor. The Arbitrator also notes, as discussed in the "accident" section above, that the case law is clear that a claimant should not be punished for continuing to work with ongoing symptoms until they reach the point of breakdown where they are unable to continue working their job duties.

The Arbitrator finds that the Petitioner has shown, by the preponderance of the evidence, that her bilateral carpal tunnel conditions are causally related to the 1/8/18 accident.

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

Petitioner's Exhibit 1 is a compilation of medical expenses and bills related to the Petitioner's bilateral carpal tunnel injuries and subsequent treatment. Based upon the finding of causation and the medical findings of Dr. Urbanosky, the Arbitrator finds that Petitioner shall be entitled to an award of these expenses as being related to reasonable and necessary causally related treatment. As such, the Arbitrator finds that Petitioner is entitled to the medical expenses contained in Petitioner's Exhibit 1, and that Respondent is entitled to credit pursuant to Section 8(j) of the Act for the expenses paid by the group health carrier, so long as Respondent holds Petitioner harmless from any claims by the providers of the medical services for which Respondent is receiving said credit. This award also includes the documented out-of-pocket expenses paid by Petitioner related to this claim. This award is subject to Sections 8 and 8.2 of the Act and the Respondent is not liable for any expenses in excess of the Fee Schedule contained in Section 8.2 of the Act.

The Petitioner is also entitled to reimbursement for her out of pocket expenses that are shown via the evidence presented in this case, which would include prescription medication and any co-pays paid via her group health coverage.

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

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

(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 (AMA) "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.

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

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

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that neither party has presented an AMA permanent partial impairment rating or report into evidence. Therefore, this factor carries no weight in the permanency determination.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as an Administrative Assistant III as of the manifestation date. She initially retired, which she testified was as a result of her needing medical treatment for her wrists/hands and difficulty performing her daily job activities. Petitioner then however continued to work on a contractual basis, working less hours, for the Respondent after the 2018 injury and retirement until 2019 when she fully retired. There is no medical opinion indicating she was unable to continue working her regular work duties. The Arbitrator gives this factor medium weight

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 58 years old at the time of the accident. Neither party has submitted evidence which would tend to indicate the impact of the Petitioner's age on her permanent condition. She is in the upper range of her work life, but has already retired from her employment with Respondent, which began in 1993. This factor carries minimal weight in the permanency determination.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that the Petitioner credibly testified that she retired from her job with Respondent earlier than she normally would have planned due to her wrist/hand conditions. However, there also is no medical evidence which supports that she was restricted from returning to her job with Respondent. This factor carries medium weight in the permanency determination.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes the Petitioner was diagnosed with bilateral carpal tunnel syndrome and underwent release surgery on the right. She was recommended for a left carpal tunnel release, but she had not undergone this treatment as of the hearing date and has indicated that she does not plan to have such surgery. Petitioner did receive injections to both wrists. The records of Petitioner's last visit with Dr. Urbanosky show that the Petitioner had ongoing complaints of weakness with grip, numbness, and continued tingling in both of her hands with slight improvement on the left as well as continuing disability with activities of daily living including difficulty with grip strength and fine pinch grip. She was not provided with any work restrictions the Arbitrator is aware of and her retirement was ultimately voluntary after working on a more part time basis via contract work into 2019. She has not sought treatment since 2019. This factor carries significant weight in the permanency determination.

Based on the above factors, the record taken as a whole and a review of prior Commission awards with similar injuries and similar outcomes, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of the loss of use of 12.5% of the right hand and 8.5% of the left hand pursuant to §8(e) of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC018188
Case Name	Amanda Pozniak (Individually and as Guardian of Dependent Children Addison Pozniak and Ashley Lawton, and as Ind. Adm. of the Estate of Charles Lawton, Deceased) v. Pactiv Corporation.
Consolidated Cases	16WC018189;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0026
Number of Pages of Decision	22
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Kurt Niermann
Respondent Attorney	Matthew Rokusek

DATE FILED: 1/19/2024

/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

AMANDA POZNIAK, individually
And as guardian of dependent children
Addison Pozniak and Ashley Lawton,
and as Ind. Adm. of the ESTATE of
CHARLES LAWTON, deceased,
Petitioner,

vs. NO: 16 WC 18188

PACTIV CORPORATION,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, notice, employment, jurisdiction, causal connection, benefit rates, temporary total disability, medical expenses, prospective medical care, permanent partial disability, penalties and fees and "Other: procedural violations by IWCC" and being advised of the facts and law, affirms, and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, with the changes stated as follows.

While affirming and adopting the Decision of the Arbitrator, the Commission writes additionally to address the Motion to Dismiss filed by Respondent, Pactiv Corporation. The Commission notes the Arbitrator granted the Motion to Dismiss in favor of Respondent and so ruled in the Arbitration Decision. The Commission writes to vacate that ruling in that a Motion to Dismiss is not a procedure available under the Illinois Workers' Compensation Act. As such, the Commission vacates the portion of the Arbitrator's order granting Pactiv's Motion to Dismiss, while affirming the Arbitrator's denial of the claims against Respondent Pactiv Corporation.

Accordingly, the Commission vacates the Arbitrator's order granting Respondent, Pactiv's Motion to Dismiss.

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 July 27, 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.

January 19, 2024

o: 12/21/23
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	16WC018188
Case Name	Amanda Pozniak, individually and as guardian of dependent children Addison Pozniak and Ashley Lawton, and as Ind. Adm. of the Estate of Charles Lawton, deceased, v. Pactiv Corporation.
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	19
Decision Issued By	Steven Fruth, Arbitrator

Petitioner Attorney	Kurt Niermann
Respondent Attorney	Candice Drew

DATE FILED: 7/27/2023

THE INTEREST RATE FOR THE WEEK OF JULY 25, 2023 5.27%

/s/Steven Fruth, 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 POZNIAK, individually and as guardian of dependent children Addison Pozniak and Ashley Lawton, and as Ind.Adm. of the Estate of CHARLES LAWTON, deceased,
Employee/Petitioner

Case # **16 WC 18188**

v.

PACTIV CORPORATION.
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Steven Fruth**, Arbitrator of the Commission, in the city of **Chicago**, on **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? How many dependent children did Petitioner have?
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 Petitioner entitled to statutory funeral expenses?

FINDINGS

On **6/13/2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

On **6/13/2013**, an employee-employer relationship ***did*** exist between Petitioner and Respondent Pactiv. Pactiv was the borrowing employer for purposes of §1(a)4. Aerotek is the lending employer and is the Respondent in case 16 WC 18189. Per the written agreement between Pactiv and Aerotek, Aerotek agrees to indemnify Pactiv for any liability for any benefits under the Act.

On **6/13/2013**, Charles Lawton ***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*** causally related to the accident.

In the year preceding the injury, Petitioner earned $20,281.00; the average weekly wage was $**780.04**.

On the date of accident, Petitioner was 35 years of age, ***single*** with **3** dependent children.

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

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

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

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

ORDER

Petitioner's Application for Benefits is denied.

The Arbitrator grants Respondent Pactiv's Motion to Dismiss.

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

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

_____ **JULY 27, 2023**

Signature of Arbitrator

Amanda Pozniak individually and as guardian for dependent children Addison Pozniak and Ashley Pozniak, and Independent Administrator of the Estate of Charles Lawton, Jr., deceased v. Pactiv Corporation

16 WC 18188

consolidated with

Amanda Pozniak individually and as guardian for dependent children Addison Pozniak and Ashley Pozniak, and Independent Administrator of the Estate of Charles Lawton, Jr., deceased v. Aerotek

16 WC 18189

INTRODUCTION

This matter proceeded to hearing before Arbitrator Steven Fruth. The disputed issues were:

16 WC 18188(Pactiv): ***C:*** Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?; ***G:*** What were Petitioner's earnings?; ***H:*** Whether the deceased had any dependent children**.;** ***J:*** Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?; ***K:*** What temporary benefits are in dispute? TTD; ***L:*** What is the nature and extent of the injury?; ***M:*** Should penalties be imposed upon Respondent?; ***O:*** Whether Petitioner is entitled to statutory funeral expenses.

16 WC 18189 (Aerotek): ***C:*** Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?; ***G:*** What were Petitioner's earnings?; ***H:*** Whether the deceased had any dependent children**.;** ***J:*** Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?; ***K:*** What temporary benefits are in dispute? TTD; ***L:*** What is the nature and extent of the injury?; ***M:*** Should penalties be imposed upon Respondent?; ***O:*** Whether Petitioner is entitled to statutory funeral expenses.

Petitioner claim's Charles Lawton's average weekly wage was $823.75, which Respondents dispute. Respondents claim the average weekly was $780.04.

Petitioner's oral motion to continue the hearing to allow for obtaining evidence from an additional witness was denied for failure to present an offer of proof as to what evidence that witness would provide.

FACTUAL BACKGROUND

Charles Lawton, Jr. was employed by Respondent Pactiv Corp. (borrowing employer) on June 13, 2013 [AerotekX #2]. Mr. Lawton was employed through an Agreement for Temporary Employment Services between Pactiv and Respondent Aerotek (loaning employer) [PactivX #2]. Mr. Lawton was working for Pactiv on June 13, 2013 when he was injured in an incident at or near Pactiv's plant in Bedford Park, IL. Mr. Lawton died on July 13, 2013 from the injuries he sustained on June 13.

STATEMENT OF FACTS

Petitioner displayed video recordings from security cameras capturing the events at the issue (PX #16). The videos recorded a dark SUV entering Pactiv's parking lot and park next to a white van. The SUV then drove off the parking lot and parked on Mason street. Two individuals got out of the SUV and walked onto Pactiv's parking lot. After a time, an individual runs past a second person (presumably Charles Lawton) who began running also. A third person followed close behind the first two. The first 2 individuals ran onto Mason Street where they were followed by the 3 pursuers onto Mason Street. The video does not depict the actual trauma sustained by Mr. Lawton.

Amanda Pozniak testified that she was the girlfriend of Charles Lawton in June 2013. They lived together for a year before the incident at issue. Ms. Pozniak testified Mr. Lawton was sent to work at Pactiv by Aerotek. She identified PX #17, Order Declaring Heirship entered June 9, 2015 in the 18th Judicial Circuit, DuPage County. Ms. Pozniak explained that Elaina Lawton was born February 11, 1997. Elaina lived with her mother at the time in question, but Mr. Lawton " provided for her". Ms. Pozniak also testified that Mr. Lawton provided support for his daughter Ashley Lawton, Elaina 's sister, who was born July 14, 2002. Grace (Ortstadt), born January 8, 2001, is Mr. Lawton's natural child but was adopted. Grace was not living with Ms. Pozniak and Mr. Lawton.

Ms. Pozniak testified that Addison Pozniak is her daughter by Mr. Lawton (PX #5). Ms. Pozniak and Addison were living with Mr. Lawton at the time at issue. She testified that Mr. Lawton was providing support for her and Addison.

Ms. Pozniak testified Addison was in second grade even though she was supposed to be in third grade. She had struggled with meeting milestones ever since she was born. She was in the 50% range for her peers and was the oldest in the class. An Individualized Education Plan ("IEP") had been adopted for Addison (PX #12) The purpose of the IEP was to moderate the standards Addison had to satisfy so she did not have to be held to the higher standards other children were being held to. Addison's formal diagnoses included attention deficit hyperactivity disorder (ADHD) and oppositional defiant disorder (ODD). An adult has to sit with her at lunch to prevent her from choking. Addison also had a

vestibular movement swing in her room at home which settles her mind and to help her focus better.

Ms. Pozniak identified PX #20, the Order appointing her Independent Administrator of the Estate of Charles Lawton deceased, 2015 P 540, 18th Judicial Circuit, DuPage County.

On cross-examination Ms. Pozniak testified that she does not know whether Addison's diagnoses and other problems will continue into adulthood.

Testimony of Gabriel Ybarra (PX #7)

Mr. Ybarra testified by evidence deposition on August 24, 2020 (PX #7). He described the general layout of Pactiv's property. Four buildings were located in the area, three belonging to Pactiv. The two buildings to the west were Pactiv buildings and the northeast building was also Pactiv. He testified Pactiv had its employees take breaks in the parking lot area adjacent to the buildings to the west.

Ybarra took his break at Pactiv's southwest building. He saw Lawton and Brookhouse running across Pactiv's parking lot after two other people. Ybarra testified he joined the pursuit to see what was going on. Lawton and Brookhouse did not ask Ybarra to join them, he just saw them running and followed them. The people they were following got into a Jeep and ran over Lawton.

Ybarra testified he was behind Brookhouse and did not see the people who got into the Jeep. He heard screaming but could not make out any words. Ybarra testified the Jeep was not parked on Pactiv's property. He did not know what the area was used for. Ybarra did not characterize that area as an alleyway as it was a paved area. He did not know whether Pactiv parked its trailers in that area.

Ybarra was not aware of any Pactiv policy which prevented coworkers from helping other coworkers who were in trouble. He was not disciplined or terminated for his involvement in the incident. Pactiv had no fencing to keep non-Pactiv people from accessing the parking lots. There were no security guards to monitor Pactiv's lots. Pactiv hired a security firm to patrol their property after Lawton's incident.

Testimony of John Brookhouse (PX #8)

Mr. Brookhouse testified by evidence deposition on September 28, 2020 (PX #8). Brookhouse knew Mr. Lawton from work, noting that Mr. Lawton helped him out a lot at work by showing him how to do stuff. He and Mr. Lawton were taking a smoking break by Pactiv's 7600 building. Pactiv restricted smoking to a bench area and that is where they took their break. He got halfway through a cigarette when they saw two guys busting up car windows in Pactiv's lot. He did not know whose car it was.

Brookhouse heard windows being smashed and started yelling at the guys who were busting the windows. They started running back across Mason and Brookhouse, Lawton, and Gabe (Ybarra) chased after them. Lawton got in front of the car, and "they ran him over", dragging him through the parking lot.

Brookhouse explained that it was a natural response to follow the guys as he wanted them to get caught for what they were doing. He never intended to beat up the guys. Lawton did not express any interest in doing that either. Brookhouse and Gabriel stopped behind the vehicle. Lawton went to the front of the Jeep with his cellphone out, telling the occupants to "stop man" and that he was "calling the cops." That is when the accident happened.

Mr. Brookhouse testified he had seen this driver in Pactiv's lot during his 7:00 pm break. The driver was sitting in his Jeep in the parking lot. Brookhouse knew the man had no business being there but did not report it to anyone. He did not believe that Pactiv had a system in place to receive such reports about strangers in the lots. Pactiv had no rule which prohibited workers from going to the aid of fellow workers. Pactiv had no fences or security measures other than key fob access to the buildings. Pactiv did not hire security for its lot until Lawton was hurt. Pactiv did not protect its lots with gates, chain link fences or walls. Pactiv did not provide training on what to do when criminal events occurred on its property. Brookhouse testified Pactiv left it up to the employees as to how they should deal with criminal events outside the buildings.

After Mr. Lawton's accident, no supervisor told Brookhouse that he should not have joined Lawton in following the vandals. Brookhouse was not disciplined for assisting Lawton. He did not know if the roadway area where the accident happened was Pactiv property, but he believed it was because Pactiv parked its slip trucks at that location. Pactiv also had big tanks of stuff in that area.

Brookhouse testified Pactiv did not allow its workers to park in that roadway where the accident happened. Pactiv workers had to park in the Pactiv lot to the west. On cross-examination, Brookhouse admitted he did not know what the property lines were between the businesses. Brookhouse clarified that he had walked to his own car and got into it for a brief moment before the guys started breaking out the windows in the other car. He got out of his jumped out to join Lawton and Gabe at that point. He testified about the accident and details were clearer in his mind when it happened.

Brookhouse reiterated he was not going to physically apprehend the vandals, but only make sure they were held responsible for what they had done. Lawton just had time to tell the Jeep occupants "I'm calling the police" as he pulled his phone from his pocket before the Jeep ran over him. 30 to 40 seconds passed from the time Lawton stood in front of the Jeep to when it ran him over. He testified that there was nothing about the

vandals before the event that caused him to feel any need to call the police. He is unaware of any prior incident of vandalism in Pactiv's lot.

Slip trucks are parked in that area where the trucks that Pactiv used in the building he worked out of in the building west of Mason. Those trucks were parked in the alley area. There was no Pactiv policy requiring him to report strangers in the parking lot to supervisors. Pactiv's workers did not wear distinctive uniforms and there were always new people coming to work through staffing companies.

Brookhouse said when he saw the Jeep driver during the earlier shift, he did not think it was something to report to management. Pactiv's slip trucks were parked another 30 feet beyond where the Jeep was located at the time of the accident.

Testimony of Bedford Park Police Sergeant Andrew Smuskiewicz (PX #9)

Sergeant Smuskiewicz testified by evidence deposition on July 21, 2021 (PX #9). He was a Bedford Park police department detective at the time of Lawton's accident on June 13, 2013.

Sergeant Smuskiewicz was called out to Pactiv on the night of the incident. He explained the process of his investigation. where he interviewed a number of witnesses. Respondent Aerotek objected to the testimony on hearsay grounds, which was overruled. Much of Smuskiewicz' s account does consist of hearsay and Aerotek's running objection is well founded, striking this witness's testimony from the case to the extent it was based on what he was told. Aerotek also objected to the Bedford Park police report, which was not offered in evidence. The witness refreshed his memory from the report.

From his investigation, Sergeant Smuskiewicz learned that Lawton was part of a group of people who were trying to stop the crime from taking place and trying to get the offenders to stop so they could be arrested. He found no evidence that Lawton or his companions knew Garcia before the accident.

Respondent Aerotek renewed and reserved its objections to hearsay when it began cross-examination. Sergeant Smuskiewicz testified he never investigated whether Garcia and Ms. Fernandez had an affair. He testified that Bedford Park officers had been called out to Pactiv both before and after Lawton's incident for other incidents. Those calls involved disturbances among employees and supervisors. There was never a call involving an outsider coming onto the property.

Based on what he observed, Sergeant Smuskiewicz understood that that the vehicle involved did not enter Pactiv property after the incident. He agreed that civilians should stay out of police issues and just call 9-1-1. He advised people to not jeopardize their own safety.

Testimony of Jose Gasco Garcia (PX #10)

Jose Garcia testified by evidence deposition on March 28, 2022 (PX #10). He was one of the persons damaging the car in Pactiv's lot and was the driver who ran over Lawton. He testified from prison where he was serving time for Lawton's death.

Garcia had worked at Pactiv for years before the accident and he was still working at Pactiv on the weekends in June 2013. His wife Maria also worked at Pactiv. Garcia did not know Lawton, although he had seen him at work in the past. They worked in different Pactiv buildings.

Garcia identified DepX #1, a daylight photo of the area where he parked the Jeep between the buildings. Garcia parked where the red mark was located on the photo. DepX #2 is an overhead view of the same roadway area. Garcia parked his Jeep where the red X is located on DepX #2. The building at the top of this photo is Pactiv's building and the building at the bottom was some other business. Garcia testified he worked in the building at the top left of the photo with the white roof.

Garcia was not working at Pactiv the night of the accident. He came to Pactiv's property to make sure his wife was at work and to check her car. He parked his Jeep in a dark roadway to make sure that no one got his license plate. He backed his Jeep down the roadway between the buildings with his headlights off. He planned to damage Guadalupe Fernandez's car. He was not going after Lawton's car, and he had no intent to harm Lawton in any way. He was going after Fernandez for bothering his wife and getting involved in their family life.

Garcia testified another Pactiv employee came to assist Garcia that night. Garcia's wife and Fernandez were both working that evening. Fernandez had been harassing Garcia's wife for a long time. Fernandez did this with all the women at the plant. Female workers in that building had been complaining of Fernandez's sexual harassment for years before the accident. Garcia had damaged Fernandez's car on earlier occasions before Lawton's incident.

Garcia knew that Pactiv did not have security guards patrolling its lots before June 2013. He knew there were no security fences which would have stopped him from accessing Fernandez's car. Any person could access the lots, whether they worked there or not. There were no guards in place at Pactiv to keep strangers off the property.

Garcia testified he did not see Lawton in front of his Jeep before accelerating away. He did not intend to run Lawton over. He had nothing against Lawton. He felt something under his vehicle, but he thought it was a piece of concrete which was sometimes in Pactiv's parking lots. Mr. Garcia testified he was trying to get away from the people chasing him and did not see Mr. Lawton standing in front of his car when he drove away.

Garcia testified that during the eight years he worked at Pactiv, Pactiv had no training programs to explain what workers should do about sexual harassers in the plant. He was never told what he was supposed to do when a coworker kept sexually harassing his wife in the plant. Garcia did not intend to hurt anyone when he came to Pactiv on June 13, 2013. He said Lawton's injury was a pure accident.

On cross-examination, Garcia admitted he chose the location where he parked the Jeep because it was dark. There were no lights on the non-Pactiv building to his south. Pactiv had some lights on its building to the north, but not where he parked. He did not park in Pactiv's parking lots to the west because of Pactiv's cameras. He knew Pactiv had cameras on the buildings and did not park there for that reason.

Garcia testified he stopped vandalizing Fernandez's car after he finished what he wanted to do. He and his companion started walking back across Mason and then started to run when people started chasing.

On redirect examination, Garcia admitted that he had also worked in Pactiv's northeast building with the loading docks, shown at the top of DepX #2 with the dark roof. Pactiv used the trailers parked near that building to get the plates out of Pactiv's building. He saw those trailers pulling away from Pactiv's building onto Mason Street many times during the years he worked at Pactiv.

Testimony of Lawrence Liva (PX #19)

Mr. Liva testified by evidence deposition on June 13, 2022 (PX #19). He was a machine shop manager for Pactiv on June 13, 2013. He received a call at home that something had happened to a temporary employee at Pactiv, and that he needed to come into work. Liva did not recall whether he authored the Occupational Incident Report, a diagram, or investigative notes.

Liva testified that if an employee was involved in a major accident, he would meet with Dennis Davidson, Pactiv's Director of Engineering, and Davidson would tell him what to do or who to call. Liva worked the day shift, but he directly supervised Charlie Lawton, John Brookhouse and Gabriel Ybarra. If an incident happened, he would probably handwrite a report, but did not recall much about those reports.

On cross-examination Liva testified Pactiv operated three buildings at that campus, arranged in a L formation: one to the southwest, one to the northwest, and one to the northeast. The building to the southeast had nothing to do with Pactiv. (PX19 p.17) Between that building and the Pactiv building to its north, there was a roadway or a parking area.

Liva was shown the overhead view of the area (Garcia DepX #2). Liva confirmed that the trailers on the photo ran in and out of Pactiv's operations. To access the area where the trailers were, Pactiv would have to use the exit onto Mason. To the right of the

red "X" on Garcia DepX # 2, Liva saw a yellow barrier across the roadway but did not know whether that barrier delineated Pactiv's area of operation from the unrelated business in the south building.

Liva testified he did not know where the property lines were. He also did not know if Mason was a public rather than private road.

Liva did not recall giving Lawton new employee orientation. He did not handle the orientations, but he thought Pactiv's HR would orient new temp employees. He did not recall there being a written handbook of job rules for temporary employees. Liva had never seen a written or oral rule prohibiting workers from going to the aid of other workers who were in peril. He would never have discussed discouraging workers from going to the help of a coworker. In the years he was working at Pactiv, he did not recall there being any kind of rules which prohibited workers from going to the assistance of their coworkers.

Liva testified Brookhouse and Ybarra were not disciplined, written up, or even chastised for joining Lawton in addressing the emergency. He knew of no managers claiming that these workers should not have followed the people who were damaging property in the lot. The police came to him to look at camera footage from the cameras on his building. He saw no photos or video showing what happened down the roadway where Lawton was hurt.

Liva did not recall Pactiv providing training for temp employees as to how they were to address sexual harassment in the plant.

Liva identified the ground level view of the roadway between the buildings from July 2011, Garcia DepX #1. The photo shows pavement running from Pactiv's building on the left to the brick wall of the non-Pactiv building on the right. Liva walked the area a couple of days after the accident but could not recall what he saw.

Liva was asked about the Occupational Incident Report ("OIR"). The OIR listed him as the person receiving notice of Lawton's incident. Pactiv used these OIR forms for various types of incidents. Liva did not prepare this OIR, he would not have typed it up or phrased things the way they were written on the OIR. Brookhouse and Ybarra were both listed as witnesses on the OIR, and they were both reported as having given statements.

Liva was not aware of prior incidents like what happened to Lawton so he did not know who would take the statements or write the report. Even though the OIR said he was a machinist, Lawton did hand finishing work. The OIR said that "Supervisor/Team Lead should complete front page and top of the back of second page." Liva admitted he was Lawton's supervisor at the time, but different leads or supervisors may have completed the report. A box marked "Contributing Factors" was located at the bottom of

the first page. Liva did not know enough about the details of the event to determine who was at fault for the injury.

Liva reiterated that he was not aware of any Pactiv rules which prohibited workers to going to each other's aid to address sudden emergencies on Pactiv property. If something happened inside the building, he would hope that someone called 911. But he did not remember anything happening outside the building before Lawton's injury. Liva also did not author the Investigative Notes document. He had no idea whether other vehicles had been damaged prior to June 13, 2913. at night in Pactiv's lot. OIR forms should be filled out promptly after an event.

Pactiv's workers were given two breaks and a lunch break. Pactiv did require workers in the southwest building to take their breaks at the north end of the building. Workers were not prohibited from taking breaks in their cars. If Lawton and Brookhouse were in the north end of the building during their breaks, that is where the company expected them to be. Lawton was also allowed to take breaks with coworkers. Breaks were not scheduled for exact times. Workers did not have to clock out or notify the supervisor when going to break, but workers did clock out for lunchbreaks.

Testimony of Guadalupe Fernandez (AerotekX #3)

Guadalupe Fernandez testified at Jose Garcia's criminal trial August 28, 2017, People of the State of Illinois vs. Jose Garcia, 13 CR 1552. Mr. Fernandez identified photos of his car showing broken windows and a gang sign scratched into the car. Later, on June 13, 2013 he recognized "Jose" from a picture on TV and called the police about Garcia. Fernandez had worked with Garcia at Pactiv for 3 years before this night. Fernandez was confronted by Garcia in the canteen 2 months before the attack. Garcia said something to him about calling Garcia's wife or girlfriend, which Fernandez said was a lie. Garcia told him to watch his back.

Fernandez admitted he did not know if Garcia damaged his car because he was inside working. Fernandez went to the police station on June 20, 2013 and identified Garcia in a photo array. He also identified Garcia in a physical lineup at the Sheriff's office in Maywood, as well as in open court. During an interview with police, Fernandez talked about the disagreement he had with Garcia. Fernandez admitted he had had disagreements with other people at work.

Medical Records

Mr. Lawton was transported by Bedford Park Fire Department ambulance to Advocate Christ Hospital ("Christ") in Oak Lawn (PX #2). The EMS record identified multiple injuries (PX #1). The Christ trauma notes document significant deep tissue injuries. Procedures performed at Christ included washout of his right face, left upper extremity, right shoulder, and debridement of wounds.

Christ transferred Lawton to the Loyola University Medical Center ("Loyola"), where he was admitted to the burn unit on June 17, 2013 in an intubated and sedated state. He was hemodynamically stable at that point (PX #3). Loyola healthcare providers noted extensive degloving of the right side of the head, amputation of the right ear, right mastoid fracture with complete fracture and disarticulation of the zygomatic arch, fracture and exposure of the temporomandibular joint, and extensive exposure of deep facial muscles in the right side of the face and clavicle fractures. The left upper chest and shoulder also suffered degloving with exposure of muscle and soft tissue. The right upper extremity had dorsum degloving of hand down to the bone and deep muscle. The left upper extremity was extensively degloved from the shoulder down to the wrist, with a brachial artery bypass being done at Advocate. He had deep partial thickness/full thickness burns to his chest. Three surgical procedures were performed at Loyola, during which he remained sedated with mechanical ventilation while undergoing antibiotic treatment and dialysis for acute renal failure.

Mr. Lawton never regained consciousness or function and treatment ultimately failed. Lawton died on July 13, 2013. Loyola records included photos of Lawton's injuries.

Mr. Lawton's Death Certificate was admitted as PX #4.

Pactiv Occupational Incident Report was admitted as PX #18.

Respondent Pactiv's Motion to Dismiss was admitted as PactivX #1.

The temporary employment agreement between Pactiv and Aerotek was admitted as PactivX #2.

Respondent Aerotek's wage statement was admitted as AerotekX #1.

Respondent Aerotek's employment agreement was admitted as AerotekX #2.

The trial testimony of Guadalupe Fernandez was admitted as AerotekX #3.

CONCLUSIONS OF LAW

Respondent Pactiv filed a Motion to Dismiss, citing the written agreement between Pactiv and Respondent Aerotek, PactivX #2. The agreement states in pertinent part:

- [Aerotek] will, at its own expense, provide and keep in full force and effect during the term of this Agreement…Workers' compensation statutory coverage as required by the laws of the jurisdiction in which the Services are performed.
- [Aerotek] will indemnify, defend and hold Pactiv and its subsidiaries, affiliates, directors, officers, employees and agents from and against all demands, claims, actions, suits, losses, damages (including, but not limited to, property damage, bodily injury and wrongful death), judgments, costs

> and expenses…imposed upon or incurred by Pactiv arising out of…[a]ny claim of any nature asserted against Pactiv or workers compensation carriers by any [Aerotek] employee or agent of [Aerotek], or, in the event of death, by their personal representatives.

The facts here are similar to those in *Lachona v. Industrial Commission*, 87 Ill.2d 208, 427 N.E.2d 858 (1981), where a similar agreement was upheld. The Arbitrator finds that Pactiv is a borrowing employer and Aerotek is a loaning employer in accord with §1(a)4 of the Act. The Arbitrator also notes the stipulation at trial between Respondents Pactiv and Aerotek, whereby if any benefits are awarded to Petitioner as a result of the June 13, 2013 incident, that Aerotek retains full liability for any and all benefits, including, but not limited to, medical benefits, TTD benefits, death benefits, funeral expenses, penalties and fees, and permanency.

Respondent Pactiv's Motion to Dismiss is granted.

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

The Arbitrator finds that Petitioner failed to prove that an accident arose out of and in the course of the decedent's employment by Respondents Pactiv Corp. or Aerotek.

Charles Lawton, Jr. was employed by Respondent Pactiv Corp. on June 13, 2013. Mr. Lawton was employed as a temporary CNC Machinist through referral from Respondent Aerotek. On the evening of June 13 Mr. Lawton was taking a break with coworkers in an area abutting Pactiv's employee parking lot. Mr. Lawton and the others heard the sound of breaking glass and went to investigate. They discovered two individuals vandalizing a coworker's car. Jose Garcia was one of the individuals vandalizing the car. Mr. Lawton and coworkers John Brookhouse and Gabriel Ybarra gave chase of Mr. Garcia and the other vandal across the parking lot and onto Mason street which was the public way. Mr. Lawton placed himself in front of a Jeep operated by Mr. Garcia. In an effort to get away Mr. Garcia ran over and dragged Mr. Lawton down the roadway, causing fatal injuries to Mr. Lawton. Mr. Garcia was criminally charged and convicted for his actions.

An injury arises out of one's employment if its origin is from a risk connected with or incidental to employment activities. "Arising out of the employment" refers to the origin or cause of the claimant's injury. A risk is distinctly associated with employment if, at the time of the occurrence, the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform,

or acts which the employee might reasonably be expected to perform incident to his assigned duties.

An injury occurs "in the course of" of employment if it refers to the time, place, and circumstances of the accident. If an employee voluntarily and in an unexpected manner exposes himself to a risk outside any reasonable exercise of his duties, a resulting injury will not be within the course of employment unless the employer had knowledge or acquiesced in such unreasonable conduct.

Charles Lawton was employed by Pactiv as a machinist. There was no evidence that he was charged with any responsibilities relating to security of the workplace, of his employer's property or equipment, or of his coworkers. Pursuing criminals who had vandalized hey coworkers private vehicle Was not part of the duties of a machinist or incidental to the duties of a machinist. Mr. Lawton, along with Mr. Brookhouse and Ybarra, We're not engaged in protecting the property or equipment of Pactiv or protecting a coworker from harm. The risks associated with chasing the offenders off Pactiv's property and standing in front of their fleeing vehicle was a risk that was assumed solely by Mr. Lawton and was in no way connected to his employment with Respondents. Mr. Lawton voluntarily exposed himself to a risk that was outside of his job duties. There is no evidence that his employer had knowledge or acquiesced to the decedent assuming this type of risk. There was no evidence that Aerotek or Pactiv expected, required, or encouraged its employees or temporary employees to stop any sort of criminal activity that occurred on company property.

The Arbitrator finds that Mr. Lawton took himself outside the scope of his employment as a machinist not only when he chased the offenders off Pactiv's property and across Mason Street, but also when he placed himself in front of Mr. Garcia's vehicle in an attempt to stop the offenders from fleeing. If an employee voluntarily and in an unexpected manner exposes himself to a risk outside any reasonable exercise of his duties, as here, the resultant injury is not within the course of the employment.

Also, the Arbitrator does not find the Good Samaritan doctrine applicable to this case. In determining whether an accident is compensable under the Good Samaritan Doctrine, courts have focused on whether the conduct is reasonably foreseeable. It was not reasonably foreseeable by Respondents that Mr. Lawton what put himself in harm's way when a criminal act did not involve damage to the employers property or equipment or harm to a coworker.

The Arbitrator does not find the alleged relationship and/or harassment between Mr. Garcia, Mr. Garcia's wife, and Guadalupe Fernandez relevant because it did not involve Mr. Lawton whatsoever.

The Arbitrator also does not find it relevant that Pactiv placed security in the parking lot after the June 13, 2013 incident. There was no evidence that Bedford Park is a high crime area or that there was a pattern of vandalism or other criminal acts in the Pactiv parking lot. On the contrary, this incident appears to be isolated to the issues between Mr. Garcia and Mr. Fernandez.

G: *What were Petitioner's earnings?*

Petitioner's wage statement, PX #11, shows Mr. Lawton's earnings from November 8, 2012 through June 13, 2013. During that time, the decedent had regular earnings of $20,013.00 and $84.00 of overtime earnings at straight time pay, for a total of $20,097.00. Using the weeks and parts thereof method, Mr. Lawton worked a total of 130 days during that period, or 26 weeks. This computes to an average weekly wage of $772.96.

Respondent Aerotek wage statement, AerotekX #1, showed earnings of $20,281.00. and the Petitioner's average weekly wage, calculated pursuant to section 10 of the Act was $780.04. Using the weeks and parts thereof method, Mr. Lawton worked a total of 130 days during that period, or 26 weeks. This computes to an average weekly wage of $780.04.

The Arbitrator adopts the average weekly wage computation of Respondent Aerotek, $780.04.

H: *Whether the deceased had any dependent children***.**

The evidence established that Mr. Lawton was not married at the time of the incident at issue. According to the June 8, 2015 Order of Heirship, PX #17, the decedent had the following minor dependents at the time of his death: Addison Pozniak (DOB May 19, 2013), Ashley Lawton (DOB July 14, 2002), and Elaina Lawton (DOB February 11, 1997). Elaina Lawton was emancipated by age on February 11, 2015. There was evidence that Grace Orsatdt, decedent's natural child, had been adopted but there was no evidence of when the adoption took place and, therefore, no evidence of whether Grace was a minor dependent at the time of Mister Lawton 's death.

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

The Arbitrator has found that Petitioner failed to prove that Charles Lawton sustained his fatal injuries in an incident that arose out of and in the course of his employment. Therefore, this issue is mooted.

Notwithstanding the Arbitrator's finding that the incident at issue did not result in a compensable injury, it appears the medical services provided to Mr. Lawton were reasonable and necessary and there is no evidence to the contrary.

K: *What temporary benefits are in dispute? TTD*

The Arbitrator has found that Petitioner failed to prove that Charles Lawton sustained his fatal injuries in an incident that arose out of and in the course of his employment. Therefore, this issue is mooted.

Notwithstanding the Arbitrator's finding that the incident at issue did not result in a compensable injury, it appears the correct disputed period of TTD would be from June 14, 2013 through July 13, 2013, or a period of 4 & 2/7 weeks.

L: *What is the nature and extent of the injury?*

The Arbitrator has found that Petitioner failed to prove that Charles Lawton sustained his fatal injuries in an incident that arose out of and in the course of his employment. Therefore, this issue is mooted.

M: *Should penalties be imposed upon Respondent?*

The Arbitrator has found that Petitioner failed to prove that Charles Lawton sustained his fatal injuries in an incident that arose out of and in the course of his employment. Therefore, this issue is mooted.

Notwithstanding the Arbitrator's finding that the incident at issue did not result in a compensable injury, Respondents had good faith bases for denying benefits. It was neither vexatious nor frivolous to deny Petitioner's claim for benefits when Mr. Lawton exposed himself to a personal risk of harm that was outside the scope of his employment.

O: *Whether Petitioner is entitled to statutory funeral expenses.*

The Arbitrator has found that Petitioner failed to prove that Charles Lawton sustained his fatal injuries in an incident that arose out of and in the course of his employment. Therefore, this issue is mooted.

_____ _____

Steven J. Fruth, Arbitrator Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC018189
Case Name	Amanda Pozniak (Individually and as Guardian of Dependent Children Addison Pozniak and Ashley Lawton, and as Ind. Adm. of the Estate of Charles Lawton, deceased) v. Aeortek
Consolidated Cases	16WC018188;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0027
Number of Pages of Decision	22
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Kurt Niermann
Respondent Attorney	Anthony Gattuso

DATE FILED: 1/19/2024

/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

AMANDA POZNIAK, individually and as guardian of dependent children Addison Pozniak and Ashley Lawton, and as Ind. Adm. of the ESTATE of CHARLES LAWTON, deceased,

Petitioner,

vs. NO: 16 WC 18189

AEROTEK,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, notice, employment, jurisdiction, causal connection, benefit rates, temporary total disability, medical expenses, prospective medical care, permanent partial disability, penalties and fees and "Other: procedural violations by IWCC" and being advised of the facts and law, affirms, and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 27, 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.

January 19, 2024

o: 12/21/23
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	16WC018189
Case Name	Amanda Pozniak, individually and as guardian of dependent children Addison Pozniak and Ashley Lawton, and as Ind. Adm. of the Estate of Charles Lawton, deceased, v. Aeortek
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	19
Decision Issued By	Steven Fruth, Arbitrator

Petitioner Attorney	Kurt Niermann
Respondent Attorney	Anthony Gattuso

DATE FILED: 7/27/2023

THE INTEREST RATE FOR THE WEEK OF JULY 27, 2023 5.27%

/s/Steven Fruth, 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 POZNIAK, individually and as guardian of dependent children Addison Pozniak and Ashley Lawton, and as Ind. Adm. of the Estate of CHARLES LAWTON, deceased,
Employee/Petitioner

Case # **16 WC 18189**

v.

AEROTEK
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Steven Fruth**, Arbitrator of the Commission, in the city of **Chicago**, on **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? How many dependent children did deceased Petitioner have?
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 Petitioner entitled to statutory funeral expenses?

FINDINGS

On **6/13/2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

On **6/13/2013**, an employee-employer relationship ***did*** exist between Petitioner and Respondent Pactiv. Pactiv was the borrowing employer for purposes of §1(a)4. Aerotek is the lending employer and is the Respondent in case 16 WC 18189. Per the written agreement between Pactiv and Aerotek, Aerotek agrees to indemnify Pactiv for any liability for any benefits under the Act.

On **6/13/2013**, Charles Lawton ***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*** causally related to the accident.

In the year preceding the injury, Petitioner earned $20,281.00; the average weekly wage was $**780.04**.

On the date of accident, Petitioner was 35 years of age, ***single*** with **3** dependent children.

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

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

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

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

ORDER

Petitioner's Application for Benefits is denied.

The Arbitrator grants Respondent Pactiv's Motion to Dismiss.

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

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

_____ **JULY 27, 2023**

Signature of Arbitrator

Amanda Pozniak individually and as guardian for dependent children Addison Pozniak and Ashley Pozniak, and Independent Administrator of the Estate of Charles Lawton, Jr., deceased v. Pactiv Corporation

16 WC 18188

consolidated with

Amanda Pozniak individually and as guardian for dependent children Addison Pozniak and Ashley Pozniak, and Independent Administrator of the Estate of Charles Lawton, Jr., deceased v. Aerotek

16 WC 18189

INTRODUCTION

This matter proceeded to hearing before Arbitrator Steven Fruth. The disputed issues were:

16 WC 18188(Pactiv): ***C:*** Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?; ***G:*** What were Petitioner's earnings?; ***H:*** Whether the deceased had any dependent children**.;** ***J:*** Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?; ***K:*** What temporary benefits are in dispute? TTD; ***L:*** What is the nature and extent of the injury?; ***M:*** Should penalties be imposed upon Respondent?; ***O:*** Whether Petitioner is entitled to statutory funeral expenses.

16 WC 18189 (Aerotek): ***C:*** Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?; ***G:*** What were Petitioner's earnings?; ***H:*** Whether the deceased had any dependent children**.;** ***J:*** Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?; ***K:*** What temporary benefits are in dispute? TTD; ***L:*** What is the nature and extent of the injury?; ***M:*** Should penalties be imposed upon Respondent?; ***O:*** Whether Petitioner is entitled to statutory funeral expenses.

Petitioner claim's Charles Lawton's average weekly wage was $823.75, which Respondents dispute. Respondents claim the average weekly was $780.04.

Petitioner's oral motion to continue the hearing to allow for obtaining evidence from an additional witness was denied for failure to present an offer of proof as to what evidence that witness would provide.

FACTUAL BACKGROUND

Charles Lawton, Jr. was employed by Respondent Pactiv Corp. (borrowing employer) on June 13, 2013 [AerotekX #2]. Mr. Lawton was employed through an Agreement for Temporary Employment Services between Pactiv and Respondent Aerotek (loaning employer) [PactivX #2]. Mr. Lawton was working for Pactiv on June 13, 2013 when he was injured in an incident at or near Pactiv's plant in Bedford Park, IL. Mr. Lawton died on July 13, 2013 from the injuries he sustained on June 13.

STATEMENT OF FACTS

Petitioner displayed video recordings from security cameras capturing the events at the issue (PX #16). The videos recorded a dark SUV entering Pactiv's parking lot and park next to a white van. The SUV then drove off the parking lot and parked on Mason street. Two individuals got out of the SUV and walked onto Pactiv's parking lot. After a time, an individual runs past a second person (presumably Charles Lawton) who began running also. A third person followed close behind the first two. The first 2 individuals ran onto Mason Street where they were followed by the 3 pursuers onto Mason Street. The video does not depict the actual trauma sustained by Mr. Lawton.

Amanda Pozniak testified that she was the girlfriend of Charles Lawton in June 2013. They lived together for a year before the incident at issue. Ms. Pozniak testified Mr. Lawton was sent to work at Pactiv by Aerotek. She identified PX #17, Order Declaring Heirship entered June 9, 2015 in the 18th Judicial Circuit, DuPage County. Ms. Pozniak explained that Elaina Lawton was born February 11, 1997. Elaina lived with her mother at the time in question, but Mr. Lawton " provided for her". Ms. Pozniak also testified that Mr. Lawton provided support for his daughter Ashley Lawton, Elaina 's sister, who was born July 14, 2002. Grace (Ortstadt), born January 8, 2001, is Mr. Lawton's natural child but was adopted. Grace was not living with Ms. Pozniak and Mr. Lawton.

Ms. Pozniak testified that Addison Pozniak is her daughter by Mr. Lawton (PX #5). Ms. Pozniak and Addison were living with Mr. Lawton at the time at issue. She testified that Mr. Lawton was providing support for her and Addison.

Ms. Pozniak testified Addison was in second grade even though she was supposed to be in third grade. She had struggled with meeting milestones ever since she was born. She was in the 50% range for her peers and was the oldest in the class. An Individualized Education Plan ("IEP") had been adopted for Addison (PX #12) The purpose of the IEP was to moderate the standards Addison had to satisfy so she did not have to be held to the higher standards other children were being held to. Addison's formal diagnoses included attention deficit hyperactivity disorder (ADHD) and oppositional defiant disorder (ODD). An adult has to sit with her at lunch to prevent her from choking. Addison also had a

vestibular movement swing in her room at home which settles her mind and to help her focus better.

Ms. Pozniak identified PX #20, the Order appointing her Independent Administrator of the Estate of Charles Lawton deceased, 2015 P 540, 18th Judicial Circuit, DuPage County.

On cross-examination Ms. Pozniak testified that she does not know whether Addison's diagnoses and other problems will continue into adulthood.

Testimony of Gabriel Ybarra (PX #7)

Mr. Ybarra testified by evidence deposition on August 24, 2020 (PX #7). He described the general layout of Pactiv's property. Four buildings were located in the area, three belonging to Pactiv. The two buildings to the west were Pactiv buildings and the northeast building was also Pactiv. He testified Pactiv had its employees take breaks in the parking lot area adjacent to the buildings to the west.

Ybarra took his break at Pactiv's southwest building. He saw Lawton and Brookhouse running across Pactiv's parking lot after two other people. Ybarra testified he joined the pursuit to see what was going on. Lawton and Brookhouse did not ask Ybarra to join them, he just saw them running and followed them. The people they were following got into a Jeep and ran over Lawton.

Ybarra testified he was behind Brookhouse and did not see the people who got into the Jeep. He heard screaming but could not make out any words. Ybarra testified the Jeep was not parked on Pactiv's property. He did not know what the area was used for. Ybarra did not characterize that area as an alleyway as it was a paved area. He did not know whether Pactiv parked its trailers in that area.

Ybarra was not aware of any Pactiv policy which prevented coworkers from helping other coworkers who were in trouble. He was not disciplined or terminated for his involvement in the incident. Pactiv had no fencing to keep non-Pactiv people from accessing the parking lots. There were no security guards to monitor Pactiv's lots. Pactiv hired a security firm to patrol their property after Lawton's incident.

Testimony of John Brookhouse (PX #8)

Mr. Brookhouse testified by evidence deposition on September 28, 2020 (PX #8). Brookhouse knew Mr. Lawton from work, noting that Mr. Lawton helped him out a lot at work by showing him how to do stuff. He and Mr. Lawton were taking a smoking break by Pactiv's 7600 building. Pactiv restricted smoking to a bench area and that is where they took their break. He got halfway through a cigarette when they saw two guys busting up car windows in Pactiv's lot. He did not know whose car it was.

Brookhouse heard windows being smashed and started yelling at the guys who were busting the windows. They started running back across Mason and Brookhouse, Lawton, and Gabe (Ybarra) chased after them. Lawton got in front of the car, and "they ran him over", dragging him through the parking lot.

Brookhouse explained that it was a natural response to follow the guys as he wanted them to get caught for what they were doing. He never intended to beat up the guys. Lawton did not express any interest in doing that either. Brookhouse and Gabriel stopped behind the vehicle. Lawton went to the front of the Jeep with his cellphone out, telling the occupants to "stop man" and that he was "calling the cops." That is when the accident happened.

Mr. Brookhouse testified he had seen this driver in Pactiv's lot during his 7:00 pm break. The driver was sitting in his Jeep in the parking lot. Brookhouse knew the man had no business being there but did not report it to anyone. He did not believe that Pactiv had a system in place to receive such reports about strangers in the lots. Pactiv had no rule which prohibited workers from going to the aid of fellow workers. Pactiv had no fences or security measures other than key fob access to the buildings. Pactiv did not hire security for its lot until Lawton was hurt. Pactiv did not protect its lots with gates, chain link fences or walls. Pactiv did not provide training on what to do when criminal events occurred on its property. Brookhouse testified Pactiv left it up to the employees as to how they should deal with criminal events outside the buildings.

After Mr. Lawton's accident, no supervisor told Brookhouse that he should not have joined Lawton in following the vandals. Brookhouse was not disciplined for assisting Lawton. He did not know if the roadway area where the accident happened was Pactiv property, but he believed it was because Pactiv parked its slip trucks at that location. Pactiv also had big tanks of stuff in that area.

Brookhouse testified Pactiv did not allow its workers to park in that roadway where the accident happened. Pactiv workers had to park in the Pactiv lot to the west. On cross-examination, Brookhouse admitted he did not know what the property lines were between the businesses. Brookhouse clarified that he had walked to his own car and got into it for a brief moment before the guys started breaking out the windows in the other car. He got out of his jumped out to join Lawton and Gabe at that point. He testified about the accident and details were clearer in his mind when it happened.

Brookhouse reiterated he was not going to physically apprehend the vandals, but only make sure they were held responsible for what they had done. Lawton just had time to tell the Jeep occupants "I'm calling the police" as he pulled his phone from his pocket before the Jeep ran over him. 30 to 40 seconds passed from the time Lawton stood in front of the Jeep to when it ran him over. He testified that there was nothing about the

vandals before the event that caused him to feel any need to call the police. He is unaware of any prior incident of vandalism in Pactiv's lot.

Slip trucks are parked in that area where the trucks that Pactiv used in the building he worked out of in the building west of Mason. Those trucks were parked in the alley area. There was no Pactiv policy requiring him to report strangers in the parking lot to supervisors. Pactiv's workers did not wear distinctive uniforms and there were always new people coming to work through staffing companies.

Brookhouse said when he saw the Jeep driver during the earlier shift, he did not think it was something to report to management. Pactiv's slip trucks were parked another 30 feet beyond where the Jeep was located at the time of the accident.

Testimony of Bedford Park Police Sergeant Andrew Smuskiewicz (PX #9)

Sergeant Smuskiewicz testified by evidence deposition on July 21, 2021 (PX #9). He was a Bedford Park police department detective at the time of Lawton's accident on June 13, 2013.

Sergeant Smuskiewicz was called out to Pactiv on the night of the incident. He explained the process of his investigation. where he interviewed a number of witnesses. Respondent Aerotek objected to the testimony on hearsay grounds, which was overruled. Much of Smuskiewicz' s account does consist of hearsay and Aerotek's running objection is well founded, striking this witness's testimony from the case to the extent it was based on what he was told. Aerotek also objected to the Bedford Park police report, which was not offered in evidence. The witness refreshed his memory from the report.

From his investigation, Sergeant Smuskiewicz learned that Lawton was part of a group of people who were trying to stop the crime from taking place and trying to get the offenders to stop so they could be arrested. He found no evidence that Lawton or his companions knew Garcia before the accident.

Respondent Aerotek renewed and reserved its objections to hearsay when it began cross-examination. Sergeant Smuskiewicz testified he never investigated whether Garcia and Ms. Fernandez had an affair. He testified that Bedford Park officers had been called out to Pactiv both before and after Lawton's incident for other incidents. Those calls involved disturbances among employees and supervisors. There was never a call involving an outsider coming onto the property.

Based on what he observed, Sergeant Smuskiewicz understood that that the vehicle involved did not enter Pactiv property after the incident. He agreed that civilians should stay out of police issues and just call 9-1-1. He advised people to not jeopardize their own safety.

Testimony of Jose Gasco Garcia (PX #10)

Jose Garcia testified by evidence deposition on March 28, 2022 (PX #10). He was one of the persons damaging the car in Pactiv's lot and was the driver who ran over Lawton. He testified from prison where he was serving time for Lawton's death.

Garcia had worked at Pactiv for years before the accident and he was still working at Pactiv on the weekends in June 2013. His wife Maria also worked at Pactiv. Garcia did not know Lawton, although he had seen him at work in the past. They worked in different Pactiv buildings.

Garcia identified DepX #1, a daylight photo of the area where he parked the Jeep between the buildings. Garcia parked where the red mark was located on the photo. DepX #2 is an overhead view of the same roadway area. Garcia parked his Jeep where the red X is located on DepX #2. The building at the top of this photo is Pactiv's building and the building at the bottom was some other business. Garcia testified he worked in the building at the top left of the photo with the white roof.

Garcia was not working at Pactiv the night of the accident. He came to Pactiv's property to make sure his wife was at work and to check her car. He parked his Jeep in a dark roadway to make sure that no one got his license plate. He backed his Jeep down the roadway between the buildings with his headlights off. He planned to damage Guadalupe Fernandez's car. He was not going after Lawton's car, and he had no intent to harm Lawton in any way. He was going after Fernandez for bothering his wife and getting involved in their family life.

Garcia testified another Pactiv employee came to assist Garcia that night. Garcia's wife and Fernandez were both working that evening. Fernandez had been harassing Garcia's wife for a long time. Fernandez did this with all the women at the plant. Female workers in that building had been complaining of Fernandez's sexual harassment for years before the accident. Garcia had damaged Fernandez's car on earlier occasions before Lawton's incident.

Garcia knew that Pactiv did not have security guards patrolling its lots before June 2013. He knew there were no security fences which would have stopped him from accessing Fernandez's car. Any person could access the lots, whether they worked there or not. There were no guards in place at Pactiv to keep strangers off the property.

Garcia testified he did not see Lawton in front of his Jeep before accelerating away. He did not intend to run Lawton over. He had nothing against Lawton. He felt something under his vehicle, but he thought it was a piece of concrete which was sometimes in Pactiv's parking lots. Mr. Garcia testified he was trying to get away from the people chasing him and did not see Mr. Lawton standing in front of his car when he drove away.

Garcia testified that during the eight years he worked at Pactiv, Pactiv had no training programs to explain what workers should do about sexual harassers in the plant. He was never told what he was supposed to do when a coworker kept sexually harassing his wife in the plant. Garcia did not intend to hurt anyone when he came to Pactiv on June 13, 2013. He said Lawton's injury was a pure accident.

On cross-examination, Garcia admitted he chose the location where he parked the Jeep because it was dark. There were no lights on the non-Pactiv building to his south. Pactiv had some lights on its building to the north, but not where he parked. He did not park in Pactiv's parking lots to the west because of Pactiv's cameras. He knew Pactiv had cameras on the buildings and did not park there for that reason.

Garcia testified he stopped vandalizing Fernandez's car after he finished what he wanted to do. He and his companion started walking back across Mason and then started to run when people started chasing.

On redirect examination, Garcia admitted that he had also worked in Pactiv's northeast building with the loading docks, shown at the top of DepX #2 with the dark roof. Pactiv used the trailers parked near that building to get the plates out of Pactiv's building. He saw those trailers pulling away from Pactiv's building onto Mason Street many times during the years he worked at Pactiv.

Testimony of Lawrence Liva (PX #19)

Mr. Liva testified by evidence deposition on June 13, 2022 (PX #19). He was a machine shop manager for Pactiv on June 13, 2013. He received a call at home that something had happened to a temporary employee at Pactiv, and that he needed to come into work. Liva did not recall whether he authored the Occupational Incident Report, a diagram, or investigative notes.

Liva testified that if an employee was involved in a major accident, he would meet with Dennis Davidson, Pactiv's Director of Engineering, and Davidson would tell him what to do or who to call. Liva worked the day shift, but he directly supervised Charlie Lawton, John Brookhouse and Gabriel Ybarra. If an incident happened, he would probably handwrite a report, but did not recall much about those reports.

On cross-examination Liva testified Pactiv operated three buildings at that campus, arranged in a L formation: one to the southwest, one to the northwest, and one to the northeast. The building to the southeast had nothing to do with Pactiv. (PX19 p.17) Between that building and the Pactiv building to its north, there was a roadway or a parking area.

Liva was shown the overhead view of the area (Garcia DepX #2). Liva confirmed that the trailers on the photo ran in and out of Pactiv's operations. To access the area where the trailers were, Pactiv would have to use the exit onto Mason. To the right of the

red "X" on Garcia DepX # 2, Liva saw a yellow barrier across the roadway but did not know whether that barrier delineated Pactiv's area of operation from the unrelated business in the south building.

Liva testified he did not know where the property lines were. He also did not know if Mason was a public rather than private road.

Liva did not recall giving Lawton new employee orientation. He did not handle the orientations, but he thought Pactiv's HR would orient new temp employees. He did not recall there being a written handbook of job rules for temporary employees. Liva had never seen a written or oral rule prohibiting workers from going to the aid of other workers who were in peril. He would never have discussed discouraging workers from going to the help of a coworker. In the years he was working at Pactiv, he did not recall there being any kind of rules which prohibited workers from going to the assistance of their coworkers.

Liva testified Brookhouse and Ybarra were not disciplined, written up, or even chastised for joining Lawton in addressing the emergency. He knew of no managers claiming that these workers should not have followed the people who were damaging property in the lot. The police came to him to look at camera footage from the cameras on his building. He saw no photos or video showing what happened down the roadway where Lawton was hurt.

Liva did not recall Pactiv providing training for temp employees as to how they were to address sexual harassment in the plant.

Liva identified the ground level view of the roadway between the buildings from July 2011, Garcia DepX #1. The photo shows pavement running from Pactiv's building on the left to the brick wall of the non-Pactiv building on the right. Liva walked the area a couple of days after the accident but could not recall what he saw.

Liva was asked about the Occupational Incident Report ("OIR"). The OIR listed him as the person receiving notice of Lawton's incident. Pactiv used these OIR forms for various types of incidents. Liva did not prepare this OIR, he would not have typed it up or phrased things the way they were written on the OIR. Brookhouse and Ybarra were both listed as witnesses on the OIR, and they were both reported as having given statements.

Liva was not aware of prior incidents like what happened to Lawton so he did not know who would take the statements or write the report. Even though the OIR said he was a machinist, Lawton did hand finishing work. The OIR said that "Supervisor/Team Lead should complete front page and top of the back of second page." Liva admitted he was Lawton's supervisor at the time, but different leads or supervisors may have completed the report. A box marked "Contributing Factors" was located at the bottom of

the first page. Liva did not know enough about the details of the event to determine who was at fault for the injury.

Liva reiterated that he was not aware of any Pactiv rules which prohibited workers to going to each other's aid to address sudden emergencies on Pactiv property. If something happened inside the building, he would hope that someone called 911. But he did not remember anything happening outside the building before Lawton's injury. Liva also did not author the Investigative Notes document. He had no idea whether other vehicles had been damaged prior to June 13, 2913. at night in Pactiv's lot. OIR forms should be filled out promptly after an event.

Pactiv's workers were given two breaks and a lunch break. Pactiv did require workers in the southwest building to take their breaks at the north end of the building. Workers were not prohibited from taking breaks in their cars. If Lawton and Brookhouse were in the north end of the building during their breaks, that is where the company expected them to be. Lawton was also allowed to take breaks with coworkers. Breaks were not scheduled for exact times. Workers did not have to clock out or notify the supervisor when going to break, but workers did clock out for lunchbreaks.

Testimony of Guadalupe Fernandez (AerotekX #3)

Guadalupe Fernandez testified at Jose Garcia's criminal trial August 28, 2017, People of the State of Illinois vs. Jose Garcia, 13 CR 1552. Mr. Fernandez identified photos of his car showing broken windows and a gang sign scratched into the car. Later, on June 13, 2013 he recognized "Jose" from a picture on TV and called the police about Garcia. Fernandez had worked with Garcia at Pactiv for 3 years before this night. Fernandez was confronted by Garcia in the canteen 2 months before the attack. Garcia said something to him about calling Garcia's wife or girlfriend, which Fernandez said was a lie. Garcia told him to watch his back.

Fernandez admitted he did not know if Garcia damaged his car because he was inside working. Fernandez went to the police station on June 20, 2013 and identified Garcia in a photo array. He also identified Garcia in a physical lineup at the Sheriff's office in Maywood, as well as in open court. During an interview with police, Fernandez talked about the disagreement he had with Garcia. Fernandez admitted he had had disagreements with other people at work.

Medical Records

Mr. Lawton was transported by Bedford Park Fire Department ambulance to Advocate Christ Hospital ("Christ") in Oak Lawn (PX #2). The EMS record identified multiple injuries (PX #1). The Christ trauma notes document significant deep tissue injuries. Procedures performed at Christ included washout of his right face, left upper extremity, right shoulder, and debridement of wounds.

Christ transferred Lawton to the Loyola University Medical Center ("Loyola"), where he was admitted to the burn unit on June 17, 2013 in an intubated and sedated state. He was hemodynamically stable at that point (PX #3). Loyola healthcare providers noted extensive degloving of the right side of the head, amputation of the right ear, right mastoid fracture with complete fracture and disarticulation of the zygomatic arch, fracture and exposure of the temporomandibular joint, and extensive exposure of deep facial muscles in the right side of the face and clavicle fractures. The left upper chest and shoulder also suffered degloving with exposure of muscle and soft tissue. The right upper extremity had dorsum degloving of hand down to the bone and deep muscle. The left upper extremity was extensively degloved from the shoulder down to the wrist, with a brachial artery bypass being done at Advocate. He had deep partial thickness/full thickness burns to his chest. Three surgical procedures were performed at Loyola, during which he remained sedated with mechanical ventilation while undergoing antibiotic treatment and dialysis for acute renal failure.

Mr. Lawton never regained consciousness or function and treatment ultimately failed. Lawton died on July 13, 2013. Loyola records included photos of Lawton's injuries.

Mr. Lawton's Death Certificate was admitted as PX #4.

Pactiv Occupational Incident Report was admitted as PX #18.

Respondent Pactiv's Motion to Dismiss was admitted as PactivX #1.

The temporary employment agreement between Pactiv and Aerotek was admitted as PactivX #2.

Respondent Aerotek's wage statement was admitted as AerotekX #1.

Respondent Aerotek's employment agreement was admitted as AerotekX #2.

The trial testimony of Guadalupe Fernandez was admitted as AerotekX #3.

CONCLUSIONS OF LAW

Respondent Pactiv filed a Motion to Dismiss, citing the written agreement between Pactiv and Respondent Aerotek, PactivX #2. The agreement states in pertinent part:

- [Aerotek] will, at its own expense, provide and keep in full force and effect during the term of this Agreement…Workers' compensation statutory coverage as required by the laws of the jurisdiction in which the Services are performed.
- [Aerotek] will indemnify, defend and hold Pactiv and its subsidiaries, affiliates, directors, officers, employees and agents from and against all demands, claims, actions, suits, losses, damages (including, but not limited to, property damage, bodily injury and wrongful death), judgments, costs

> and expenses…imposed upon or incurred by Pactiv arising out of…[a]ny claim of any nature asserted against Pactiv or workers compensation carriers by any [Aerotek] employee or agent of [Aerotek], or, in the event of death, by their personal representatives.

The facts here are similar to those in *Lachona v. Industrial Commission*, 87 Ill.2d 208, 427 N.E.2d 858 (1981), where a similar agreement was upheld. The Arbitrator finds that Pactiv is a borrowing employer and Aerotek is a loaning employer in accord with §1(a)4 of the Act. The Arbitrator also notes the stipulation at trial between Respondents Pactiv and Aerotek, whereby if any benefits are awarded to Petitioner as a result of the June 13, 2013 incident, that Aerotek retains full liability for any and all benefits, including, but not limited to, medical benefits, TTD benefits, death benefits, funeral expenses, penalties and fees, and permanency.

Respondent Pactiv's Motion to Dismiss is granted.

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

The Arbitrator finds that Petitioner failed to prove that an accident arose out of and in the course of the decedent's employment by Respondents Pactiv Corp. or Aerotek.

Charles Lawton, Jr. was employed by Respondent Pactiv Corp. on June 13, 2013. Mr. Lawton was employed as a temporary CNC Machinist through referral from Respondent Aerotek. On the evening of June 13 Mr. Lawton was taking a break with coworkers in an area abutting Pactiv's employee parking lot. Mr. Lawton and the others heard the sound of breaking glass and went to investigate. They discovered two individuals vandalizing a coworker's car. Jose Garcia was one of the individuals vandalizing the car. Mr. Lawton and coworkers John Brookhouse and Gabriel Ybarra gave chase of Mr. Garcia and the other vandal across the parking lot and onto Mason street which was the public way. Mr. Lawton placed himself in front of a Jeep operated by Mr. Garcia. In an effort to get away Mr. Garcia ran over and dragged Mr. Lawton down the roadway, causing fatal injuries to Mr. Lawton. Mr. Garcia was criminally charged and convicted for his actions.

An injury arises out of one's employment if its origin is from a risk connected with or incidental to employment activities. "Arising out of the employment" refers to the origin or cause of the claimant's injury. A risk is distinctly associated with employment if, at the time of the occurrence, the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform,

or acts which the employee might reasonably be expected to perform incident to his assigned duties.

An injury occurs "in the course of" of employment if it refers to the time, place, and circumstances of the accident. If an employee voluntarily and in an unexpected manner exposes himself to a risk outside any reasonable exercise of his duties, a resulting injury will not be within the course of employment unless the employer had knowledge or acquiesced in such unreasonable conduct.

Charles Lawton was employed by Pactiv as a machinist. There was no evidence that he was charged with any responsibilities relating to security of the workplace, of his employer's property or equipment, or of his coworkers. Pursuing criminals who had vandalized hey coworkers private vehicle Was not part of the duties of a machinist or incidental to the duties of a machinist. Mr. Lawton, along with Mr. Brookhouse and Ybarra, We're not engaged in protecting the property or equipment of Pactiv or protecting a coworker from harm. The risks associated with chasing the offenders off Pactiv's property and standing in front of their fleeing vehicle was a risk that was assumed solely by Mr. Lawton and was in no way connected to his employment with Respondents. Mr. Lawton voluntarily exposed himself to a risk that was outside of his job duties. There is no evidence that his employer had knowledge or acquiesced to the decedent assuming this type of risk. There was no evidence that Aerotek or Pactiv expected, required, or encouraged its employees or temporary employees to stop any sort of criminal activity that occurred on company property.

The Arbitrator finds that Mr. Lawton took himself outside the scope of his employment as a machinist not only when he chased the offenders off Pactiv's property and across Mason Street, but also when he placed himself in front of Mr. Garcia's vehicle in an attempt to stop the offenders from fleeing. If an employee voluntarily and in an unexpected manner exposes himself to a risk outside any reasonable exercise of his duties, as here, the resultant injury is not within the course of the employment.

Also, the Arbitrator does not find the Good Samaritan doctrine applicable to this case. In determining whether an accident is compensable under the Good Samaritan Doctrine, courts have focused on whether the conduct is reasonably foreseeable. It was not reasonably foreseeable by Respondents that Mr. Lawton what put himself in harm's way when a criminal act did not involve damage to the employers property or equipment or harm to a coworker.

The Arbitrator does not find the alleged relationship and/or harassment between Mr. Garcia, Mr. Garcia's wife, and Guadalupe Fernandez relevant because it did not involve Mr. Lawton whatsoever.

The Arbitrator also does not find it relevant that Pactiv placed security in the parking lot after the June 13, 2013 incident. There was no evidence that Bedford Park is a high crime area or that there was a pattern of vandalism or other criminal acts in the Pactiv parking lot. On the contrary, this incident appears to be isolated to the issues between Mr. Garcia and Mr. Fernandez.

G: *What were Petitioner's earnings?*

Petitioner's wage statement, PX #11, shows Mr. Lawton's earnings from November 8, 2012 through June 13, 2013. During that time, the decedent had regular earnings of $20,013.00 and $84.00 of overtime earnings at straight time pay, for a total of $20,097.00. Using the weeks and parts thereof method, Mr. Lawton worked a total of 130 days during that period, or 26 weeks. This computes to an average weekly wage of $772.96.

Respondent Aerotek wage statement, AerotekX #1, showed earnings of $20,281.00. and the Petitioner's average weekly wage, calculated pursuant to section 10 of the Act was $780.04. Using the weeks and parts thereof method, Mr. Lawton worked a total of 130 days during that period, or 26 weeks. This computes to an average weekly wage of $780.04.

The Arbitrator adopts the average weekly wage computation of Respondent Aerotek, $780.04.

H: *Whether the deceased had any dependent children***.**

The evidence established that Mr. Lawton was not married at the time of the incident at issue. According to the June 8, 2015 Order of Heirship, PX #17, the decedent had the following minor dependents at the time of his death: Addison Pozniak (DOB May 19, 2013), Ashley Lawton (DOB July 14, 2002), and Elaina Lawton (DOB February 11, 1997). Elaina Lawton was emancipated by age on February 11, 2015. There was evidence that Grace Orsatdt, decedent's natural child, had been adopted but there was no evidence of when the adoption took place and, therefore, no evidence of whether Grace was a minor dependent at the time of Mister Lawton 's death.

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

The Arbitrator has found that Petitioner failed to prove that Charles Lawton sustained his fatal injuries in an incident that arose out of and in the course of his employment. Therefore, this issue is mooted.

Notwithstanding the Arbitrator's finding that the incident at issue did not result in a compensable injury, it appears the medical services provided to Mr. Lawton were reasonable and necessary and there is no evidence to the contrary.

K: *What temporary benefits are in dispute? TTD*

The Arbitrator has found that Petitioner failed to prove that Charles Lawton sustained his fatal injuries in an incident that arose out of and in the course of his employment. Therefore, this issue is mooted.

Notwithstanding the Arbitrator's finding that the incident at issue did not result in a compensable injury, it appears the correct disputed period of TTD would be from June 14, 2013 through July 13, 2013, or a period of 4 & 2/7 weeks.

L: *What is the nature and extent of the injury?*

The Arbitrator has found that Petitioner failed to prove that Charles Lawton sustained his fatal injuries in an incident that arose out of and in the course of his employment. Therefore, this issue is mooted.

M: *Should penalties be imposed upon Respondent?*

The Arbitrator has found that Petitioner failed to prove that Charles Lawton sustained his fatal injuries in an incident that arose out of and in the course of his employment. Therefore, this issue is mooted.

Notwithstanding the Arbitrator's finding that the incident at issue did not result in a compensable injury, Respondents had good faith bases for denying benefits. It was neither vexatious nor frivolous to deny Petitioner's claim for benefits when Mr. Lawton exposed himself to a personal risk of harm that was outside the scope of his employment.

O: *Whether Petitioner is entitled to statutory funeral expenses.*

The Arbitrator has found that Petitioner failed to prove that Charles Lawton sustained his fatal injuries in an incident that arose out of and in the course of his employment. Therefore, this issue is mooted.

_____ _____

Steven J. Fruth, Arbitrator Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC031555
Case Name	Alfred Rich v. Continental Tire North America
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0028
Number of Pages of Decision	19
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Eric Kirkpatrick
Respondent Attorney	James Keefe Jr

DATE FILED: 1/19/2024

/s/Christopher Harris, 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

ALFRED RICH,

Petitioner,

vs. NO: 20 WC 31555

CONTINENTAL TIRE,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary total disability (TTD) benefits and permanent partial disability (PPD) benefits, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator which is attached hereto and made a part hereof.

By the Request for Hearing form and the parties' Briefs, the parties had stipulated to the following TTD period: (1) August 28, 2018 through September 2, 2018, (2) January 8, 2019 through January 13, 2019, and (3) August 13, 2019 through August 21, 2019. (Arb. Ex. 1). Specifically in regards to the August 2019 period, the Arbitrator had awarded TTD benefits from August 19, 2019 through August 21, 2019. The Commission modifies the Arbitrator's Decision to conform with the parties' stipulation.

Petitioner next requested TTD benefits for the days he missed work due to doctors' appointments. The Arbitrator found that Petitioner was entitled to these benefits and awarded 3 3/7 weeks of TTD benefits for attending 24 doctors' appointments. With respect to TTD benefits, the Commission notes that the parties' dispute was limited to Petitioner's entitlement to TTD benefits for attending doctors' appointments. The parties were not disputing, and Petitioner made no claim for, any other TTD period.

> The fundamental purpose of the Act is to provide injured workers with financial protection until they can return to the work force. (Citation omitted). Therefore, when determining whether an employee is entitled to TTD benefits, the test is whether the

> employee remains temporarily totally disabled as a result of a work-related injury and whether the employee is capable of returning to the work force. *Interstate Scaffolding, Inc. v. Ill. Workers' Comp. Comm'n*, 236 Ill. 2d 132, 146 (2010).

Stated differently, and as referenced by our Supreme Court, "an employee has the burden of showing not only that he is not working, but that he *cannot* work." *Id.* at 148; see also *Freeman United Coal Mining Co. v. Indus. Comm'n*, 318 Ill. App. 3d 170, 175 (2000).

The evidence herein demonstrated that Petitioner attended 24 medical appointments for continued complaints and treatment between April 4, 2018 through March 11, 2022 with Drs. Solman, Paletta and Blake. Not only was Petitioner under light duty restrictions at the time of his appointments, but he also testified that Respondent was able to accommodate his work restrictions, that he had returned to light duty work with Respondent and that his duties were within his physicians' restrictions. (T.20-25; T.41). The Commission finds that although Petitioner alleges that he was unable to work on the days he attended his doctors' appointments, he had in fact been returned to the workforce in a light duty capacity, he was able to work in the accommodated position and continued to do so through the arbitration date. Petitioner did not offer any other testimony to the contrary. Therefore, the Commission finds that Petitioner was not temporarily and totally disabled at the time he attended his doctors' appointments, and as defined by our Act and case law. As such, Petitioner is not entitled to TTD benefits for the 24 doctors' appointments and the Arbitrator's TTD award specific to these appointments is hereby stricken.

With respect to PPD benefits, the Commission modifies the Arbitrator's findings regarding the second factor – the occupation of the injured employee. The Commission finds that Petitioner sustained work-related injuries that partially incapacitated him from pursing the duties of his usual and customary line of employment as an Apex operator but did not result in an impairment of his earning capacity. Prior to his work injury on January 22, 2018, Petitioner's job duties involved making beads for truck drivers and using his arms to lift, push and pull "books" on wheels that comprised of 50 beads per book. The books weighed approximately 1,000 pounds and they were on wheels. The medical records further corroborated Petitioner's heavy duty work with truck tires.

Dr. Solman subsequently gave Petitioner permanent restrictions that severely restricted the use of his arms. Petitioner returned to work for Respondent but no longer performed the same duties as he had pre-accident. He testified that he now assisted a co-worker who stripped beads. "I take the beads to him, he strips the beads, and I weigh up the scrap. I put the bead on the rack for him, and he strips the bead. He stacks the beads, and then I haul them off." (T.22). Petitioner confirmed that his current job duties did not require much physically and was within his work restrictions. The Commission modifies the weight assigned to this second factor and gives it moderate weight.

The Commission further modifies the Arbitrator's findings related to the fifth factor – evidence of disability. Petitioner specifically underwent a left shoulder arthroscopy, extensive debridement of the labrum, debridement of the partial thickness rotator cuff tear, a subacromial decompression, bursectomy and acromioplasty, open sub-pectoral biceps tenodesis and open distal clavicle excision. Dr. Paletta performed this surgery on August 28, 2018. Petitioner's post-

operative diagnoses were left shoulder SLAP tear, partial thickness rotator cuff tear, impingement syndrome and AC joint pain with degenerative joint disease.

On January 18, 2019, Dr. Paletta performed a left shoulder arthroscopic revision subacromial decompression, bursectomy and acromioplasty as well as left shoulder open revision sub-pectoral biceps tenodesis. His post-operative diagnoses were: (1) left shoulder pain status post previous arthroscopy with labral debridement and biceps tenotomy, (2) biceps tenodesis, (3) failed biceps tenotomy with recurrent biceps deformity and persistent pain and (4) recurrent impingement syndrome.

Petitioner then had a third surgery with Dr. Solman on August 13, 2019 for his right shoulder. He underwent an arthroscopic subacromial decompression, distal clavicle resection, supraspinatus repair and open sub-pectoral biceps tenodesis. Petitioner's post-operative diagnoses were right shoulder subacromial impingement syndrome, AC joint arthritis, rotator cuff tear and full thickness long head biceps tear.

Overall, Petitioner's bilateral shoulder injuries necessitated injections, physical therapy, two surgeries to the left shoulder and one surgery to the right shoulder. At Petitioner's last appointment with Dr. Solman on March 11, 2022, Petitioner remained symptomatic with pain and popping in both shoulders. Dr. Solman examined Petitioner, recommended additional surgeries to both shoulders and gave Petitioner permanent work restrictions. Petitioner testified that he did not proceed with the recommended additional surgeries to both shoulders due to fear. He further testified to limitations with lifting and pain. His shoulders continued to pop and it would hurt, his left arm would get sore after 30 to 40 minutes of driving and he had issues with gripping in both hands. Petitioner also testified regarding his left bicep muscle deformity. The Commission finds that this fifth factor merits significant weight.

In light of the foregoing, with no single enumerated factor being the sole determinant of disability, the Commission affirms the Arbitrator's PPD award of 25% loss of use of the person as a whole for the left shoulder but modifies up the award for the right shoulder to 20% loss of use of the person as a whole. The Commission finds that this PPD award is in accordance with the evidence pertaining to the nature and extent of Petitioner's disability and is consistent with prior, similar claims.

Finally, the Commission strikes the Arbitrator's Order on Page 2 of the Decision stating that "Respondent shall pay Petitioner compensation that has accrued from February 17, 2022, (MMI) through October 21, 2022 (Trial), and shall pay the remainder of the award, if any, in weekly payments." Based on the Commission's modification of the Arbitrator's Decision, as stated above, there was no accrued compensation due and owing to Petitioner at the time of hearing on October 21, 2022.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner temporary total disability benefits of $675.15 per week for three weeks, commencing

August 28, 2018-September 2, 2018, January 8, 2019-January 13, 2019, and August 13, 2019-August 21, 2019, for a total of $2,025.45, as stipulated by the parties and provided by Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit of $2,025.45 for TTD benefits previously paid to Petitioner.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of TTD benefits for the 24 doctors' appointments is hereby stricken.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner permanent partial disability benefits of $607.64 per week for 225 weeks because the injuries sustained caused 25% loss of use of the person as a whole for the left shoulder (125 weeks) and 20% loss of use of the person as a whole for the right shoulder (100 weeks) pursuant to Section 8(d)2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's Order on Page 2 of the Decision related to accrued compensation is stricken as stated above.

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

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

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

January 19, 2024

CAH/pm
O: 12/7/23
052

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

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

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC031555
Case Name	Alfred Rich v. Continental Tire North America
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	14
Decision Issued By	Jeanne AuBuchon, Arbitrator

Petitioner Attorney	Eric Kirkpatrick
Respondent Attorney	James Keefe Jr.

DATE FILED: 3/6/2023

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

/s/ Jeanne AuBuchon, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Alfred Rich
Employee/Petitioner

v.

Continental Tire North America
Employer/Respondent

Case # **20** WC **31555**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeanne L. AuBuchon**, Arbitrator of the Commission, in the city of **Herrin**, on **10/21/22**. 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 **1/22/18**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**52,661.96**; the average weekly wage was $**1,012.73**.

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

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

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

Respondent shall be given a credit of $**2,025.45** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**2,025.45**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $675.15/week for 3 weeks, commencing 8/28/18 through 9/2/18, 1/8/19 through 1/13/19 and 8/19/19 through 8/21/19, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $2,025.45 for TTD paid.

Respondent shall pay additional TTD benefits of $675.15 for 3 and 3/7 weeks as provided in Section 8(b) of the Act for days of work missed for attending 24 doctors' visits.

Respondent shall pay Petitioner permanent partial disability benefits of $607.64/week for 200 weeks, because the injuries sustained caused the 40% loss of person as a whole (25% for the left shoulder and 15% for the right shoulder), as provided in Section 8(d)(2) of the Act.

Respondent shall pay Petitioner compensation that has accrued from February 17, 2022, (MMI) through October 21, 2022 (Trial), 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.

Jeanne L. AuBuchon

Signature of Arbitrator

MARCH 6, 2023

PROCEDURAL HISTORY

This matter proceeded to trial on October 21, 2022. The issues in dispute are: 1) the causal connection between the accident and the Petitioner's current work restrictions; 2) entitlement to temporary total disability payments for missing work due to doctor's visits; and 3) the nature and extent of the Petitioner's injury.

FINDINGS OF FACT

At the time of the accident, the Petitioner, who was 55 years old and left-handed, was employed by the Respondent as an Apex operator making beads for truck tires, which required squeezing, lifting, pushing and pulling. (AX1, T. 11, 31) On or about January 22, 2018, the Petitioner developed injuries to his arms. (AX1, T. 13)

The Petitioner apparently some care between January 22, 2018, and the date of the first treatment notes submitted, as there was physical therapy and nerve conduction tests alluded to in the medical records, and an MRI was performed on his right shoulder on March 14, 2018, that showed a tear in the biceps tendon and degenerative arthritis. (PX1, PX2, PX9) Aside from the MRI, these records were not submitted at arbitration.

On April 4, 2018, the Petitioner sought care from Dr. Cory Solman, Jr., an orthopedic surgeon at Orthopedic Spots Medicine & Spine Care Institute. (PX2) The Petitioner complained of pain in his shoulders, right slightly more than left, and that the physical therapy he underwent did not provide relief. (Id.) Dr. Solman noted that the Petitioner had been on light duty of no lifting, no overhead use and no use of the hands. (Id.) After reviewing the MRI and nerve studies and performing an examination, Dr. Solman diagnosed the following for the Petitioner's right shoulder: rotator cuff syndrome, possible partial thickness tear or tendinopathy of the supraspinatus, biceps tenosynovitis and possible intra-articular biceps tendon tear. (Id.) For the

left shoulder, he diagnosed: pain with subacromial impingement, acromioclavicular (AC) joint arthrosis, biceps tenosynovitis, rotator cuff syndrome and possible partial thickness tear versus tendinopathy of the supraspinatus. (Id.) He also diagnosed status post-bilateral carpal tunnel releases with hand numbness appearing to possibly be related to cervical spine pathology as opposed to recurrent carpal tunnel syndrome. (Id.) He recommended a left shoulder MRI, a cortisone injection to the right shoulder and physical therapy. (Id.)

On May 2, 2018, the Petitioner underwent a left shoulder MRI that showed a suspected tear of the posterior inferior labrum with adjacent paraseptal cyst, a suspected superior labrum anterior posterior (SLAP) tear and degenerative changes. (PX9) On May 9, 2018, Dr. Solman diagnosed bilateral shoulder pain with subacromial impingement, AC joint degenerative disease, right shoulder partial thickness supraspinatus tear and left shoulder superior and posterior superior labral tears. (PX2) He performed steroid injections on both shoulders. (Id.) On June 13, 2018, the Petitioner reported that the injections did not give much relief, and Dr. Solman recommended surgery. (Id.) The Petitioner said he was going for a second opinion prior to being approved for surgery. (Id.)

The Respondent sent the Petitioner to Dr. George Paletta, an orthopedic surgeon at The Orthopedic Center of St. Louis. (T. 20) After reviewing Dr. Solman's records and imaging studies and performing an examination, Dr. Palette diagnosed right shoulder pain with AC joint arthritis and split of the long head of the biceps and left shoulder pain with AC joint arthritis and a posterior/inferior labral tear with paralabral cyst and associated SLAP tear. (PX1) He recommended injections to the glenohumeral joints and said that if those failed, surgery would be reasonable. (Id.)

On July 2, 2018, those injections were performed by Dr. Helen Blake, a pain management specialist at Pain and Rehabilitation Specialists of St. Louis. (Id.) When the Petitioner returned to Dr. Paletta on August 13, 2018, the Petitioner noted that he had dramatic relief of his symptoms immediately afterward, but the pain returned after a couple of days. (1d.) He did not feel that therapy helped him significantly. (Id.) On August 28, 2018, Dr. Paletta performed the following procedures on the Petitioner's left shoulder: exam under anesthesia, diagnostic arthroscopy, arthroscopy with extensive debridement of the labrum, arthroscopic debridement of a partial thickness rotator cuff tear, subacromial decompression, bursectomy and acromioplasty, open subpectoral biceps tenodesis and open distal clavicle excision. (PX1, PX3)

At a follow-up visit on September 10, 2018, the Petitioner was doing quite well overall. (PX1) On October 17, 2018, he reported to Dr. Paletta that during physical therapy he felt a pop in the bicep muscle, the muscle "slipped down" and he had "some crampy discomfort in that area." (Id.) Dr. Paletta diagnosed probably slippage of biceps tenodesis in the left shoulder. (Id.) On January 8, 2019, Dr. Paletta performed the following procedures on the Petitioner's left shoulder: exam under anesthesia; diagnostic arthroscopy; arthroscopic revision subacromial decompression, bursectomy and acromioplasty; and open revision subpectoral biceps tenodesis. (PX1, PX4)

Once again, the Petitioner was doing well at his first post-operative visit but later reported that his "muscle dropped again." (PX1) On March 18, 2018, Dr. Paletta modified the Petitioner's physical therapy regimen. (Id.) On April 29, 2019, the Petitioner reported continuing biceps symptoms, but Dr. Paletta was not inclined to recommend additional surgery as the Petitioner had two failed attempts at tenodesis. (Id.) At his last visit to Dr. Paletta on June 12, 2019, the Petitioner continued to complain of crampy discomfort at the biceps after repetitive use and deformity of the biceps. (Id.) Aside from the biceps deformity and discomfort, a physical examination showed

good function, strength and range of motion. (Id.) Dr. Paletta recommended a functional capacity evaluation (FCE) to determine objectively the Petitioner's current level of performance and help guide determination of any permanent restrictions. (Id.) After reviewing the FCE, Dr. Paletta found the Petitioner to be capable of working in the light-duty physical demand level with a permanent 15-pound lift limit for the left arm. (Id.) The FCE report was not submitted as evidence at arbitration.

The Petitioner testified that because the two surgeries by Dr. Paletta failed, he returned to Dr. Solman for care of his right arm. (T. 20) On August 13, 2019, Dr. Solman performed the following procedures on the Petitioner's right shoulder: arthroscopy, arthroscopic subacromial decompression, arthroscopic distal clavicle resection, arthroscopic supraspinatus repair and open subpectoral biceps tenodesis. (PX2, PX5) At follow-up visits, the Petitioner was doing fairly well overall. (PX2) On October 30, 2019, he reported not having issues with light-duty work. (Id.) He underwent physical therapy and continued to report improvement with his right arm. (Id.) On March 4, 2020, he reported having trouble with overhead activities and that his left shoulder was still giving him problems, and Dr. Solman recommended an FCE for both shoulders. (Id.)

The second FCE was performed on April 23, 2020. (PX7) On May 27, 2020, Dr. Solman reviewed the FCE and found the Petitioner to be at maximum medical improvement. (PX2) He gave permanent restrictions for both arms of no pushing/pulling greater than 30 pounds, no lifting greater than 15 pounds from waist to floor and no lifting from waist to overhead greater than 5-10 pounds. (Id.) Dr. Solman released the Petitioner from care. (Id.)

The Petitioner returned to Dr. Solman on August 6, 2021, and reported pain in the left shoulder biceps area, pain in the subacromial space of the left shoulder and increased popping in the right shoulder AC joint. (Id.) Dr. Solman stated the Petitioner was likely having some

overcompensating pain in the right shoulder AC joint and performed a steroid injection. (Id.) He recommended a new MRI of the left shoulder to evaluate the rotator cuff and was concerned about the biceps. (Id.) On October 29, 2021, the Petitioner reported that the injection helped for a period of time. (Id.) Dr. Solman reviewed the new left shoulder MRI and said there appeared to be some thinning in the area of the supraspinatus at its previous point of attachment but not complete tearing. (Id.) He said there was some down-sloping of the acromion that could have been creating some of the impingement-type pain. (Id.) Regarding the right shoulder, Dr. Solman believed that an arthroscopy with simple AC joint debridement and resection of the ore distal clavicle bone would be beneficial. (Id.) Regarding the left shoulder, Dr. Solman said it was possible that the Petitioner may require a repeat arthroscopy with subacromial decompression and a possible rotator cuff repair revision and/or graft augmentation of the rotator cuff. (Id.) He recommended restrictions on both arms of no repetitive motions more than three to five times per hour, no lifting, pushing and pulling more than 10-15 pounds and no overhead lifting. (Id.) Regarding the left biceps tendon, Dr. Solman suggested surgery but gave no guarantee because it may be too scarred to appropriately repair and/or it may not provide him with any relief. (Id.) Dr. Solman said he would try to obtain approval for surgery. (Id.)

At the Petitioner's last visit to Dr. Solman on March 11, 2022, he continued to complain of pain and popping in both shoulders and pain in his left biceps. (Id.) Dr. Solman continued to recommend surgery and modified work restrictions to no lifting, pushing or pulling greater than 5 pounds with the right arm, no overhead lifting with both arms, no lifting with the left arm at all and no repetitive motions with the right arm more than five to ten times per hour. (Id.) The Petitioner testified that he did not want to have any more surgeries because he is afraid to. (T. 45)

The Petitioner underwent a Section 12 examination on February 17, 2022, by Dr. Lyndon Gross, an orthopedic surgeon at The Orthopedic Center of St. Louis. (RX1) His report was not submitted as evidence at arbitration, but he testified at a deposition on September 15, 2022. (Id.) Dr. Gross reviewed medical records and imaging studies, interviewed the Petitioner and performed an examination. (Id.) The Petitioner had 5/10 pain at the top and front of both shoulders and in the biceps tendon area of the left shoulder. (Id.) Examination showed pain with range of motion of his left shoulder actively and better motion passively. (Id.) He had provocative signs in the left shoulder with maneuvers for rotator cuff or labral biceps pathology and tenderness with palpation over the upper arm area on the left side and the anterior aspect of his left shoulder. (Id.) He said the October 2021 MRI of the left shoulder showed: degenerative tendinopathy of this rotator cuff but no full-thickness tear; increased space between his acromion and clavicle, which may represent surgical intervention; mild arthritis of his glenohumeral joint; and no other significant abnormalities. (Id.) Dr. Gross did not believe the Petitioner required any further surgery to his left shoulder. (Id.) He said it was not uncommon to still have shoulder pain after two surgeries. (Id.)

Regarding the Petitioner's right shoulder, Dr. Gross found mild restrictions in his active range of motion as compared to his passive range of motion. (Id.) That shoulder also had provocative signs for rotator cuff or labral pathology with tenderness to palpation over the anterior aspect of the shoulder. (Id.) He said the source of the Petitioners right shoulder pain was residual from the surgery. (Id.) Similarly, he did not believe the Petitioner required any further surgery to his right shoulder. (Id.)

As to work restrictions, Dr. Gross said he would abide by the findings of the FCEs. (Id) He did believe the Petitioner's subjective complaints were more significant than what his disability

was. (Id.) He had the Petitioner fill out a QuickDASH survey to look at what problems the Petitioner claimed to have when performing normal activities. (Id.) The Petitioner's score was significantly high, placing him in a category that he would not be able to do normal activities of daily living – such as getting dressed – without assistance. (Id.) Dr. Gross said the score was higher than he would have expected based on the imaging studies, surgical interventions and his examination. (Id.)

On cross-examination, Dr. Gross said he had not seen Dr. Solman's latest work restrictions from March 2022. (Id.) Based on the FCEs, he did not believe any restrictions would be required regarding repetitive activities. (Id.)

Dr. Solman testified consistently with his records at a deposition on August 9, 2022. (PX6) He said that without additional surgery on the left shoulder, the Petitioner will be left with some chronic cramping and aching in the biceps muscle belly with any activity with the shoulder and potential for the rotator cuff to worsen over time. (Id.) As to his latest restrictions, Dr. Solman said those would be permanent if the Petitioner continued to have pain in both shoulders with work-related activities that did not improve. (Id.)

The Petitioner has continued to work for the Petitioner taking beads to a coworker, who strips them, weighing scrap and hauling off the beads after the beads have been stripped. (T. 22) He said he did not think the job he was doing existed before in his 28 years of working for the Respondent. (T. 25) He said the work does not require much from a physical standpoint. (T. 23) The Petitioner was able to reach his left arm out in front of him and said he can't hold anything out in front of him for very long or reach for his wallet with his left hand. (T. 27) He said he could not move his left arm over his head but could move it to the side to shoulder level. (T. 28) He said his right arm was not as bad as his left and he could hold more with his right arm than his left,

but he could not lift very much with it either and could not hold it over his head without it hurting. (T. 31) He said that when he experiences pain at work, he is allowed to sit in the break room. (T. 32) He said he has had to call off work because his arm will be completely numb and he can't move it. (T. 33) He said most of the time, his arms hurt worse when he gets home from work. (T. 33-34)

The Petitioner testified that the injuries have affected his daily living in that he could no longer fish, hunt, hold his grandkids or put a shirt on over his head. (T. 29) He said he had difficulties with personal hygiene because he could not reach his backside very well with either hand. (T. 30-31) He said that before the surgeries, he was able to do things around the house but afterwards he could only mow his yard on a riding lawn mower. (T. 34) He said he could not pick up a gallon of milk with his left hand but could with his right. (T. 34-35) He said he does not drive very far because his left arm gets tired and sore being raised up on the steering wheel after about 30 or 40 minutes. (T. 36-37) He said he also had problems with his hands and could not hardly grip anymore. (T. 37-38) He said he reported all of his issues to his doctors. (T. 41)

On cross-examination, the Petitioner testified that he was receiving his same pay and working 40 hours per week. (T. 41-42) He said that if he was having symptoms at work, he was given additional breaks. (T. 42) He acknowledged having previous workers' compensation claims for his hands and elbows. (T. 43-44)

The Petitioner stated that during his treatment, he had to miss a day of work to get to and from his doctor's appointments but was not paid for that time. (T. 38) He said that every time he went to the doctor, he was given a slip that he brought to the nurse at work. (T. 40)

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

CONCLUSIONS OF LAW

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

Although the Respondent accepted liability for the Petitioner's bilateral shoulder conditions being caused by repetitive trauma at work, it disputes causation of the Petitioner's current condition of requiring work restrictions.

Dr. Solman placed rather strict restrictions on the Petitioner when the Petitioner last saw him on March 11, 2022, after the Petitioner complained of continuing symptoms. Dr. Gross agreed with the restrictions Dr. Solman gave previously, but he had not seen the latest treatment note and did not offer an opinion as to those restrictions. The Petitioner's QuickDash score revealed exaggeration of the Petitioner's complaints as opposed to Dr. Gross's objective findings. However, there is no indication that the Petitioner was exaggerating to Dr. Solman, and the Arbitrator trusts that Dr. Solman would impose restrictions based on his observations, examination and medical judgment.

Therefore, the Arbitrator finds that the Petitioner has met his burden of proving by a preponderance of the evidence that the repetitive injuries that manifested January 22, 2018, and the subsequent surgeries caused the need for the work restrictions ordered by Dr. Solman.

Issue K: What temporary benefits are in dispute? (TTD)

According to the Request for Hearing (AX1), the Petitioner is seeking temporary total disability benefits for the days he had doctor's appointments with Dr. Solman and Dr. Paletta, which the Petitioner estimated to be about 30. The Petitioner did not enumerate any details of

these trips, such as the time it took to travel to and from the doctors or the dates for which he was seeking TTD.

A Google search showed that a one-way trip from the Petitioner's home in West Frankfort to the offices of Dr. Solman, Dr. Paletta's or Dr. Blake would take approximately two hours. With a four-hour round trip plus the time spent for treatment, the Petitioner would be unable to put in even a half-day's work. The Arbitrator finds that it would be reasonable for the Petitioner to miss a day of work to get treatment for his work-related injuries. Upon review of the medical records, the Petitioner had 14 visits to Dr. Solman, nine to Dr. Paletta and one to Dr. Blake during the times when he was not receiving TTD. Therefore, the Arbitrator finds the Petitioner is entitled to additional TTD benefits for 3 and 3/7 weeks.

Issue L: What is the nature and extent of the Petitioner's injury?

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

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

(ii) **Occupation.** The Petitioner still works for the Respondent but in a different position that takes into account his restrictions. It appears from the evidence that this position was created specifically for the Petitioner and his needs. This effort by the Respondent to keep the

Petitioner working is laudable. However, if the Petitioner had to seek work elsewhere, it is unlikely that he would find work within his restrictions. The Arbitrator places some weight on this factor.

(iii) **Age.** The Petitioner was 55 years old at the time of the injury. He has several work years left during which time he will need to deal with the residual effects of the injuries. The Arbitrator places some weight on this factor.

(iv) **Earning Capacity.** There was no evidence of limitation of the Petitioner's earning capacity. Therefore, the Arbitrator places no weight on this factor.

(v) **Disability.** The Petitioner testified to his continuing symptoms that prohibit many arm movements, with the left being worse than the right. These symptoms affect both his work and activities of daily living. As stated above, Dr. Solman has imposed very strict work restrictions. The Arbitrator puts significant weight on this factor.

Therefore, the Arbitrator finds the Petitioner's permanent partial disability to be 25 percent of the body as a whole as it pertains to the Petitioner's left shoulder and 15 percent of the body as a whole as it pertains to the Petitioner's right shoulder.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC029641
Case Name	Carol Odunleye v. Walmart
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0029
Number of Pages of Decision	24
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Rodney Thompson
Respondent Attorney	Julie Schum

DATE FILED: 1/22/2024

/s/Christopher Harris, 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

CAROL ODUNLEYE,
Petitioner,

vs. NO: 18 WC 29641

WALMART, INC.,
Respondent.

DECISION AND OPINION ON REVIEW

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

The Arbitrator awarded the Petitioner "1 percent of the right leg as a result of her knee injury." However, the Arbitrator awarded 5% loss of use of the right leg in the Order section of her Decision. The Commission, therefore, corrects the clerical error on page 18 of the Decision to reflect that the Petitioner is entitled to 5% loss of use of the right leg, consistent with the Arbitrator's Order.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed January 30, 2023, is hereby corrected as stated above and otherwise affirmed and adopted.

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

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 $15,100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

January 22, 2024

O: 12-07-23
CAH/tdm
052

/s/ Marc Parker
Marc Parker

/s/ Carolyn M. Doherty
Carolyn M. Doherty

DISSENT

The evidence fails to establish that Petitioner sustained an injury to her left eye on June 22, 2018. Petitioner testified that she tripped, fell forward onto her knees, and whilst trying to break her fall with her arms, struck the area above her left eye. Petitioner testified that shortly after the accident, she was told by a coworker that her eye appeared to droop. Petitioner testified that she immediately went to the bathroom, looked in the mirror and noted that it "looked like she had a stroke", as her left eye was drooping. At the end of her shift, Petitioner completed an accident report indicating that she tripped and fell forward and injured her right knee, leg and hip. Petitioner made no mention of her hitting her head, did not indicate that she may have lost consciousness, or that she had injured her left eye. Additionally, a witness report was completed and noted that Petitioner was rubbing her knee after the fall. Swelling and bruising was neither observed nor noted at this time.

The first mention of injury to her left eye does not appear in the record until July 8, 2018. Prior to this date, there was no mention of an injury to her head or her eye, despite Petitioner consistently working from June 22nd through July 8, 2018. Further, there was no evidence that she had any visible bruising or swelling during this period.

Both Dr. Mizen and Dr. Kuritza noted that the CT scan revealed an old fracture of the left orbital floor. They both provided credible testimony that there was no possible way for the orbital fracture to have made that much healing progress as seen on the CT scan taken only two weeks after the accident. They both noted that the Petitioner would have experienced significant bruising and swelling had she struck her eye during the fall. Dr. Espinoza does not offer any credible testimony as to how that fracture would have manifested itself, but simply indicates that the eye socket being struck could have caused the injury. Even if that conclusion is believed, that would not remotely prove that the injury occurred on June 22, 2018 – the date which Petitioner argued that the injury wholly occurred on. As such, the credible medical evidence – that a fracture would have had apparent bruising and swelling upon occurrence – is the critical fact in this case which should sound the death knell for Petitioner's claim.

It is unbelievable that Petitioner blacked out, discovered her newly drooping eye, returned to work, and then later that shift complained of leg, knee and hip pain, while choosing to remain silent regarding her eye, with no apparent bruising or swelling over the subsequent two weeks. This manifest lack of credibility taints all the medical records and diagnoses which rely upon her recitation of her injury. I therefore respectfully dissent.

/s/ Christopher A. Harris
Christopher A. Harris

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC029641
Case Name	Carol Odunleye v. Walmart
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	21
Decision Issued By	Jeanne AuBuchon, Arbitrator

Petitioner Attorney	Rodney Thompson
Respondent Attorney	Julie Schum

DATE FILED: 1/30/2023

THE INTEREST RATE FOR THE WEEK OF JANUARY 24, 2023 4.68%

/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

Carol Odunleye
Employee/Petitioner

v.

Walmart, Inc.
Employer/Respondent

Case # **18** WC **029641**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeanne L. AuBuchon**, Arbitrator of the Commission, in the city of **Collinsville**, on **August 30, 2022**. After reviewing all 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 during 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 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 as to her eye/head and right knee ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**18,673.20**; the average weekly wage was $**359.10**.

On the date of accident, Petitioner was **57** 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 $**3.094.04** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**3,094.04**.

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

ORDER

Respondent shall pay reasonable and necessary medical services listed in Petitioner's Exhibits 12-15, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be entitled to a credit for any medical expenses paid.

Respondent shall pay Petitioner temporary total disability benefits of $**239.40**/week for **9-2/7** weeks, commencing July 8, 2018, through September 10, 2018, as provided in Section 8(b) of the Act. Respondent shall be entitled to a credit of $3,094.04 for TTD paid.

Respondent shall pay Petitioner permanent partial disability benefits of $**220.00**/week for **27.15** weeks, because the injuries sustained caused **5**% loss of the **body as a whole**, as provided in §8(d)2 of the Act, and **5**% loss of use of the **right leg** as provided in §8(e)12 of the Act.

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

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

Jeanne L. PuBuchon
Signature of Arbitrator

January 30, 2023

PROCEDURAL HISTORY

This matter proceeded to trial on August 30, 2022. The issues in dispute are: 1) the causal connection between the accident and the Petitioner's various medical conditions; 2) liability for medical bills; 3) entitlement to TTD benefits from July 8, 2018, through September 10, 2018, based on liability; and 4) the nature and extent of the Petitioner's injuries.

FINDINGS OF FACT

At the time of the accident, the Petitioner, who was 57 years old, was employed by the Respondent as deli personnel. (AX1, T. 11) The Petitioner was previously retired from being a staff development officer for the Missouri Department of Mental Health after working there for almost 31 years. (T. 9-10) The Petitioner testified that on June 22, 2018, she was having no physical complaints, but acknowledged that she had been taking prescription medication for back pain prior to that date. (T. 13, 54) She said she had not taken any medication for months or years before June 22, 2018. (T. 62)

On June 22, 2018, the Petitioner was putting away a stack of bowls when she tripped over a vat from the fryer and fell forward and onto her knees, toppling over because of the momentum of her fall. (T. 14-15) She had difficulty remembering the fall because she believed she had passed out. (Id.) She said she hurt her knees, scraped her right thumb and struck her head above her left eye. (T. 15-16) She said she got up, brushed herself off and went back to work. (T. 17) She said a coworker asked what was wrong with her eye, so she went to the bathroom to see and noticed that her eye was drooping as though she had a stroke and she had particles of rock on her head, which she brushed off before going back to work. (Id.) On cross-examination, the Petitioner testified that although her eye looked like she had a stroke, it didn't concern her enough to seek

medical treatment. (T. 44) She said she moved it around and it returned to normal, and she went to work. (T. 44-45)

The Petitioner testified that later that day, she informed the managers that she fell and filled out an injury report. (T. 17-18) In the report, she described falling forward on her knee and listed injuries to her right knee, leg and hip. (RX6) The Petitioner acknowledged that she did not report striking her head or having any kind of eye problem because she "really didn't know what happened," having passed out or being knocked out. (T. 18-19) Coworker Damon Swisher gave a witness statement that when he approached the Petitioner, she was on the ground rubbing her knee. (RX5) The Petitioner testified that Mr. Swisher's statement was wrong and that when he found her, she was face down. (T. 57-58)

The Petitioner stated that the following day, she had a little contusion on her head, and her eye was drooping. (T. 19) She said she did not work that day and the next because she was already scheduled off. (T. 47) She acknowledged working the next three days, being off a day, then working another two days and not telling management about any symptoms. (T. 49) She said she was having daily headaches that would not go away and caused her to report the accident to the manager on July 8, 2018. (T. 21, 63) She said that before then, she had not equated her headaches with the fall and did not remember hitting her head until then. (T. 63, 68) The Petitioner completed another accident report, again reporting that she injured her right knee and adding that she had a knot on her head the next day. (RX7)

The Application for Adjustment of Claim filed in this case states the body parts affected as face, eye, head, neck, spinal column, left shoulder, low back, both knees, both wrists and both hands. (AX2)

The Petitioner testified that after making the second accident report, her manager sent her to Gateway Regional Medical Center. (T. 22) She reported to medical personnel that she fell on June 22, 2018, hit her head and had a bump to the left eyebrow. (PX1) She said she had to take pain medication every day since it happened due to severe headaches. (Id.) An examination showed that the periorbital structures appeared normal with no abrasion, no cellulitis (skin infection), no contusion, no ecchymosis (skin discoloration caused by bleeding under the skin), no erythema (redness), no laceration and no swelling. (Id.) A facial CT scan revealed a displaced posterior medial and lateral orbital floor fracture without orbital entrapment. (Id.) A head CT scan showed no evidence of an acute intracranial process. (Id.) The Petitioner was discharged with a referral to an ophthalmologist. (Id.) She refused pain medication. (Id.)

On July 9, 2018, the Petitioner was seen at the SLUCare Medical Group Ophthalmology Department by nurse practitioner Angela Keller under the supervision of Dr. Gabriela Espinoza. (PX10) Surgery was scheduled for July 13, 2018, and the Petitioner was taken off work. (Id.)

On July 11, 2018, the Petitioner went to the emergency room at SSM Health St. Louis University Hospital and reported persistent pain in her head, at the base of her neck radiating into her shoulders and in her right knee. (PX2) She said she had some blurring/"watering" of vision and pressure in the left eye with upward gaze. (Id.) She clarified she was not actually having pain inside her head but over her left forehead and left temporal scalp. (Id.) She reported that she tripped over a vat, falling forward and hitting her head, right knee and elbows. (Id.) She said she had a CT scan that showed orbital fractures. (Id.) X-rays of the knee and shoulder were negative for fractures, and CT scans of the head and cervical spine were negative for fracture or intercranial hemorrhage. (Id.) The radiologist reading the CT scan of the head stated that other than an old left lamina papyracea fracture, the visualized portions of the orbits, paranasal sinuses and mastoids

appeared normal and no acute fracture was identified. (Id.) The CT report stated that no prior study was available for comparison. (Id.) The Petitioner was diagnosed with muscle strain and acute pain of the right knee, had an ace wrap applied to her knee, was prescribed a muscle relaxer and was instructed to follow up with an internist. (Id.)

On July 13, 2018, the Petitioner underwent eye surgery at SSM Health St. Louis University Hospital. (PX3) During her pre-surgery examination, she reported that she fell at work, woke up the next day to a contusion on her head, had no nausea or vomiting, had to swelling to her eyelid, had double vision intermittently, had a drooping eyelid in the morning that resolved throughout the day and had headaches daily. (Id.) Dr. Espinoza performed a fracture repair of the left orbit with implants. (Id.)

At a follow-up visit with NP Keller on July 20, 2020, the Petitioner reported that her blurred vision and overall pain was improving. (PX10) She said her pain worsened with cold and she had scalp pain making it difficult to comb her hair. (Id.) She also said she had wrist and knee pain. (Id.) Due to the Petitioner's other physical complaints, NP Keller made referrals to orthopedics and neurology, which were not approved. (Id.)

The Petitioner saw NP Keller again on August 16, 2018, and reported that the pain above her eye was a little better but below the eye was still very painful as well as her nose, jaw and face. (Id.) She said she was still having headaches and her vision was fine when looking straight ahead but blurred and doubled when looking down. (Id.) She said that when she looked up, she could only go so far before it became painful. (Id.) She complained of pain in her knees, leg, shoulders, left side of her neck, her back, hip, wrists and elbow. (Id.) She was prescribed amitriptyline (Elavil) for neuropathic pain. (Id.) The Petitioner saw NP Keller on August 30, 2018, and reported that she still had numbness to her face, shooting pains to the forehead with soreness to touch,

occasional burning sensation to the eyes and throbbing pain under the eye with cold. (PX7) She said she did not take the medication. (Id.) NP Keller gave no further restrictions from an ophthalmology standpoint. (Id.)

On August 4, 2018, the Petitioner went to the emergency room at Gateway Regional Medical Center complaining of musculoskeletal pain "all over" – around her knees, shoulders, arms, neck and chest. (PX4) The records initially noted no visual changes or headache, but later in the records it was stated that she had "this headache" since the orbital fracture. (Id.) The Petitioner reported that she saw a physician for the orbital fracture but never followed up. (Id.) The records later stated that she had a fracture of her face fixed but did not remember exactly what was broken. (Id.) Triage assessment notes stated that the Petitioner complained of pain in the face, left hip, right arm and left arm, that the pain did not radiate and that it was currently a 10/10. (Id.) She was not interested in taking medication because "after the orbital fracture she put herself on pain medications and did not like the way she became addicted to them, so she stopped the medication several weeks ago." (Id.) Cervical X-rays showed degenerative disc changes. (Id.) Chest X-rays were normal. (Id.) An MRI was ordered, but after about 45 minutes of waiting, the Petitioner was sitting up comfortably, had no more pain and was knitting. (Id.) She signed out of the emergency room against medical advice but said she would follow up on an outpatient basis to get the MRI. (Id.) At arbitration, the Petitioner did not recall going to the emergency room that day. (T. 57)

The Petitioner testified that prior to her eye surgery, Dr. Espinoza required that she stop taking pain medication, which caused her to start feeling other symptoms – a feeling of needles shooting in her back, down her legs and across her foot and a feeling of someone sticking things in her back, especially under her ribcage. (T. 28) She said that after the accident, she had been

taking medication almost twice a day. (T. 62) On cross-examination, the Petitioner stated that she stopped taking the pain medication after she was seen in the emergency room on July 8, 2018. (T. 54-55) She agreed that when she was seen at St. Louis University Hospital on July 11, 2018, she had been off the pain medication, but her only complaints of pain were in her head, the base of her neck and her right knee – not her left knee or lower back. (T. 55)

On August 13, 2018, the Petitioner saw Dr. Matthew Bayes, a sports medicine specialist at Bluetail Medical Group, to whom the Petitioner said she was referred by the Respondent's insurance adjuster. (PX5, T. 29) The Petitioner's chief complaint was bilateral knee, bilateral hip and low back pain. (PX5) She reported the accident, saying she broke her fall forward with her right arm, fell on to the front of her knees and hips and hit the left side of her face. (Id.) She said her pain was mostly a shooting pain down the side of her hips, over the front of her knees and into her feet. (Id.) Knee and hip X-rays were normal. (Id.) Lumbar spine X-rays revealed diffuse facet arthrosis (a type of arthritis in which cartilage wears down), significant L5-S1 disc space narrowing, some bony overgrowth and near early auto fusion (vertebral segments fusing together). (Id.) Dr. Bayes said the Petitioner's lower extremity complaints and low back pain were consistent with likely flare of chronic degenerative disc disease – moderate to severe – with osteoarthritis of the lumbar spine. (Id.) He diagnosed bilateral knee pain and low back pain, ordered an MRI of the lumbar spine and prescribed oral steroids. (Id.) In a letter dated August 31, 2018, Dr. Beyer reiterated his findings and said the Petitioner was referred to pain management to address and diagnose her low back pain. (Id.) He said it was medically reasonable to allow time off work from August 13, 2018, through September 10, 2020, for her knee and hip pain to be addressed and prevent further injury. (Id.)

The MRI of the Petitioner's lumbar spine was performed on August 15, 2018, by radiologist Dr. Matthew Ruyle at Imaging Partners of Missouri. (PX6) Dr. Ruyle found a minimal circumferential disc bulge at L4-5 with severe erosive facet arthropathy (arthritis affecting the joints at the back of the spine), resulting in moderate right greater than left foraminal stenosis (narrowing of the space where nerves exit the spine) but no central canal stenosis (narrowing of the space occupied by the spinal cord. (Id.) At L5-S1, Dr. Ruyle found disc height loss, endplate spurring (bone spurs at the top of bottom edges of the vertebrae where they interact with the disc) and circumferential disc bulge resulting in severe right greater than left foraminal stenosis but no central canal stenosis. (Id.)

The Petitioner testified that Dr. Bayes did not tell her that her back complaints were likely a product of degenerative disc disease but were probably because she had compression fractures. (T. 59) The Petitioner acknowledged that she was offered a chance to return to work for the Respondent at the end of August 2018 but refused. (T. 60) In explaining why she did not go back to work, the Petitioner said she felt that she hadn't been seen for all of the injuries she had and that she didn't think she had been cleared for or in shape to work. (T. 65)

On September 20, 2018, the Petitioner saw physician assistant Heidi Roeder at SSM Health St. Louis University for evaluation of her right knee, in which she was experiencing soreness, swelling, pain and buckling. (PX8, T. 32) She testified that she was experiencing symptoms in both knees but stopped mentioning the symptoms in her left knee because she did not put it in her injury report. (T. 32) She informed PA Roeder that she first noticed symptoms after her fall. (Id.) X-rays showed mild degenerative changes in the medial compartment (inner half of the knee joint). (Id.) PA Roeder diagnosed right knee osteoarthritis, recommended physical therapy and use of over-the-counter anti-inflammatory and joint pain medication and vitamin D. (Id.) The Petitioner

declined a corticosteroid injection. (Id.) The Petitioner testified that physical therapy was not approved. (T. 30-31)

On October 12, 2018, the Petitioner saw Drs. Aninda Acharya and Kevin Yeboah, neurologists at SSM Health St. Louis University regarding her head symptoms. (PX10, T. 33) The Petitioner reported the fall and that she lost consciousness. (PX10) She said that after the eye surgery, she continued to have pain around her left eye and in her left temple that was constant and reproduced by pressure to that area. (Id.) She also had pain with eye movements up and to the left in her left eye, some blurred vision in the left eye at times and photosensitivity in the left eye. (Id.) She reported some intermittent painful sensations that shoot down her arms and occasionally affect her legs. (Id.) She said the Elavil helped her pain symptoms. (Id.) A neurologic exam was relatively unremarkable. (Id.) The Petitioner was diagnosed with traumatic brain injury, post-traumatic headache and cervical and lumbar radiculopathy versus neuropathy. (Id) The dosage of Elavil was increased, and blood tests were ordered. (Id.) On October 15, 2018, Dr. Acharya reviewed the blood tests and recommended folic acid and vitamin B supplements. (Id.) The Petitioner testified that the Elavil had very little impact on her condition. (T. 34-35)

The Petitioner returned to the SLUCare Medical Group ophthalmology department on October 17, 2018, and saw Dr. Mary Haschke. (PX10) The Petitioner reported that she still had headaches, pains and a persistent burning sensation around the upper and lower eyelid, numbness of the lower eyelid, intermittent blurred vision especially when in pain and a shooting pain behind the ears and down her neck. (Id.) She said the Elavil helped the tingling around the eye and tenderness around the jaw to the temple. (Id.) Dr. Haschke recommended using artificial tears and warm compresses. (Id.)

Dr. Espinoza testified consistently with her records at a deposition on November 26, 2019. (PX11) She said her examination of the Petitioner and the CT scan confirmed that the Petitioner had orbital fractures on the left eye that could account for her pain on eye movements, her double vision and her droopy eyelid. (Id.) During the surgery, Dr. Espinoza found an exposed section of the infraorbital neurovascular bundle, which contains the major blood vessel that gives blood supply to the face and a major trunk of the nerve that gives feeling to the face. (Id.) She said the exposed neurovascular bundle can cause pain, numbness or tingling in the cheek and gums. (Id.) She said the nerve branch that goes to the cheek and upper gums was compressed, and she performed a release to decompress the nerve. (Id.) She said the implants were used to help heal the fractures. (Id.) Also during the surgery, Dr. Espinoza found that the fracture contained a small crack through which fat slipped past and got caught, which was why the Petitioner had difficulties moving her eye and double vision. (Id.) She said that once she brought that fat back out and covered the crack, the Petitioner's double vision went away. (Id.)

Dr. Espinoza also testified regarding two follow-up visits in 2019, for which records were not produced at arbitration. (Id.) At those visits, the Petitioner had occasional blurred vision, dry eye symptoms, some pain and tingling and sensitivity to cold but no double vision. (Id.) Dr. Espinoza said the Petitioner's complaints were consistent with her injuries. (Id.) She had recommended the Petitioner follow up with the neurologist, which the Petitioner was still doing in October 2019. (Id.) These records were not produced at arbitration. Dr. Espinoza said the neuropathic pain the Petitioner experienced after the surgery was due to the injury to the neurovascular bundle. (Id.)

Regarding causation, Dr. Espinoza did not give a formal opinion but said the Petitioner's injuries were consistent with a fall. (Id.)

On November 26, 2019, Dr. Thomas Mizen, an ophthalmologist at Rush Presbyterian-St. Luke's Medical Center, performed a records review. (RX2) He noted several inconsistencies: the orbital fracture would be associated with significant swelling and discoloration of the skin that was not initially reported and was not present at the time of examination; the Petitioner did not report any ocular or orbital symptoms until 17 days after the injury, which was inconsistent with the orbital findings having occurred at the time of the injury; and the July 11, 2018, St. Louis University CT scan suggested there was no acute fracture but a healed fracture. (Id.) He said that from his evaluation of the records, the onset of the fracture was age-indeterminate and the cause was indeterminate. (Id.)

Dr. Mizen stated that the Petitioner's current ocular symptoms were most likely related directly to the surgical manipulation performed at the time of the surgical repair. (Id.) He said the original report of the Petitioner falling on her right knee, leg and hip could not result in an injury to the left side of the face and orbit. (Id.) He stated that the Petitioner's post-surgical symptoms were subjective neuropathic pain. (Id.) Dr. Mizen said the treatment of the orbital fracture was appropriate as determined by the surgeon. (Id.) He agreed with the return to work and said the Petitioner reached maximal medical improvement but may require further therapy for the neuropathic pain she consistently reported. (Id.)

Dr. Mizen testified consistently with his report at a deposition on September 3, 2021. (RX1) He said that in his experience, patients with trauma to the orbit to the extent of producing bony fractures would not be able to return to work because they are very uncomfortable and don't see well because of swelling. (Id.) As to the CT scan report of a healed fracture, he did not believe a fracture at the time of the fall would have healed in that time. (Id.) He said a hairline fracture without displacement can begin to heal between six days and six weeks, while a displaced fracture

would take a couple of months to heal. (Id.) Dr. Mizen said he did not believe the CT scan findings in the radiology report occurred as a result of the fall. (Id.) He stated that a blow to the forehead would not cause an orbital fracture – rather there would have to be a blow a bit lower and hitting the lateral orbital rim. (Id.) He said the fall as described by the Petitioner would not have been a mechanism of injury for an aggravation of an orbital fracture. (Id.) On cross-examination, he said that if a pre-existing orbital fracture is bruised again, that can aggravate some of the symptoms. (Id.) But he added that there was no reported prior orbital history. (Id.) He acknowledged that he could not determine when the fracture occurred but said it definitely didn't happen on June 22, 2018. (Id.) He agreed that it was possible that swelling and other soft tissue damage could have receded by the time the Petitioner saw Dr. Espinoza. (Id.)

Regarding the Petitioner's reports of double vision, Dr. Mizen said that the Petitioner reported that her eye movements were not restricted – with restriction being a sign of muscle entrapment. (Id.) He said that without entrapment, which was not reported on the CT scan, the eye moves normally and there is no double vision. (Id.) On cross-examination, Dr. Mizen acknowledged that nerve or muscle damage without entrapment can cause double vision, which is sometimes interpreted as blurred vision. (Id.) When asked about the fat that Dr. Espinoza removed from the orbit, Dr. Mizen agreed that if there is a deformity in the orbital floor or wall, fat could escape. (Id.) He said the fat would be removed to restore normal anatomy and take out any extraneous tissue that might inhibit normal mobility. (Id.) He said that over time, such fat will turn very soft and dissolve. (Id.)

As to the Petitioner's pain complaints, Dr. Mizen said pain following surgery is not uncommon, but it usually clears up within six to eight weeks. (Id.) On cross-examination, he acknowledged that complaints of neuropathic pain due to impingement of the fifth cranial nerve

are unusual but not uncommon. (Id.) He said release of that nerve would have improved or lessened the amount of discomfort, but physiologically they don't return to a normal function. (Id.) He said referral to a neurologist would be consistent with that type of complaint. (Id.)

Dr. Mizen acknowledged that he did not review the actual CT scans. (Id.) He also said he does not do orbital fracture repair surgery. (Id.)

On March 31, 2021, radiologist Dr. George Kuritza also reviewed records and the CT scans from July 8, 2018. (RX3, Deposition Exhibit 3) He said the CT scan demonstrated old fractures of the posterior, medial and lateral left orbital floor without entrapment. (Id.) He said there was no post-traumatic swelling, bleeding or inflammatory changes in the orbit or the adjacent structures such as muscles, sinuses, nasal bones, septum (wall between the sinuses) or turbinates (small structures inside the nose that cleanse and humidify air that passes through the nostrils). (Id.) He said there was no soft tissue swelling, edema or inflammatory changes in the left face or periorbital soft tissues, which would be a hallmark of recent and significant orbital and facial trauma. (Id.)

Dr. Kuritza testified consistently with his report at a deposition on August 20, 2021. (RX3) He explained that in acute fractures, the edges of the bone are sharp and distinct, which he did not see in the CT scan. (Id.) Also, he did not see fluid in the adjacent sinuses or in the orbit, which would be another hallmark of an acute fracture. (Id.) Another hallmark of an acute fracture would be soft tissue swelling, which he did not see. (Id.) He said the fractures he saw were completely healed. (Id.) He could not say how long it would have taken for the fracture to heal, but said bones take an average of three or four to six weeks to heal to have new bone formation. (Id.) He said fluid in the sinuses could take a couple of weeks to resolve, and facial swelling may resolve in a couple of days or a week. (Id.)

The Petitioner testified that she still has a sore spot on her head that she can touch and feel a shooting pain that runs down the front of her face and into her tooth. (T. 33-34, 38) She still has the occasional headache and a shooting pain on the side of her head that runs down her shoulder and to her hand. (T. 38-39) Every once in a while, she gets a sore spot on the side of her elbow. (T. 38-39) She said the biggest problem is her back – feeling like it doesn't want to bend, like she wants to stretch or pop it out but it never does and like needles sticking from the sides. (T. 39) She said her back hurts every day, especially when she is up and around – grocery shopping and cleaning her house. (T. 42-43) She said her back, right hip and right leg hurt. (T. 43) Later in her testimony, she said both legs and hips hurt. (T. 66) She said she has a very difficult time evacuating her bowels. (Id.) She said she experiences a type of smell almost like gas – like she's breathing cold or something. (T. 39-40) She said she feels cold all the time and that when she gets cold, the pain in her face starts. (T. 40, 66) Regarding her eye, she said it is blurry sometimes, but the eyelid drooping is gone. (Id.) She said sometimes her shoulder swells up a little bit. (Id.) She said she doesn't take any medication for her complaints. (T. 41)

The Petitioner testified that she has not worked since the accident. (T. 37)

CONCLUSIONS OF LAW

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

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

In the Petitioner's Application for Adjustment of Claim, she contends that she injured her face, eye, head, neck, spinal column, left shoulder, low back, both knees, both wrists and both hands. Based on the totality of the evidence, the Arbitrator finds there was no medical proof to

back up the Petitioner's contention that the accident caused injuries to the Petitioner's neck, spinal column, left shoulder, wrists or hands. This analysis will focus on the Petitioner's face/eye and right knee.

The Respondent concedes that the Petitioner injured her right knee in the accident. The Petitioner had one visit to a specialist regarding her knee and X-rays showed arthritis. She had no further treatment. The Arbitrator finds that the Petitioner's knee injury was in the nature of a contusion or strain/sprain.

As a preliminary matter in determining the cause of the Petitioner's eye injury, the Arbitrator looks at the Petitioner's credibility and finds it be lacking. The inconsistencies in her testimony and reports to her doctors are too numerous to list but are apparent in the recitation of facts above. The Arbitrator finds that her claims are exaggerated and therefore relies on the evidence elicited by the medical professionals.

Regarding the delay in reporting additional symptoms from an accident or seeking medical treatment, the Arbitrator finds this is not fatal to the Petitioner's claim. It is common for injured employees to not immediately report symptoms or seek treatment until they believe the symptoms will not go away on their own.

Dr. Mizen's reading of the CT scan report that the orbital fracture was old. However, the examining radiologist's report on the first CT scan on July 8, 2018, did not mention this. It was stated in the CT scan report from July 11, 2018. Also, the July 8, 2018, CT scan report stated that there was a "displaced posterior medial and lateral orbital floor fracture," while the July 11, 2018, report said there was "an old left lamina papyracea fracture." The doctors did not explain what the difference, if any, was between this terminology.

The Arbitrator notes that Dr. Mizen did not see the actual CT scans and acknowledged that he does not perform orbital fracture repair. He also did not personally examine or interview the Petitioner and did not witness first-hand what Dr. Espinoza saw during the surgery.

Dr. Kuritza's findings were similar to Dr. Mizen's. He said the orbital fracture was completely healed at the time of the July 8, 2018, CT scan. Much of his testimony was speculation as to what he would expect to see on the scan if there was acute trauma versus a healed fracture. It had very little to do with the nature of the Petitioner's injuries.

On the other hand, Dr. Espinoza did examine and interview the Petitioner. Her observations during the surgery are the most compelling evidence to support that the Petitioner suffered fractures in the fall. She never referred to the fracture as old or healed. During surgery, she found an exposed section of the infraorbital neurovascular bundle and a compressed nerve branch, which would cause pain, numbness or tingling. She also found that the fracture contained a small crack through which fat slipped past and got caught, which was why the Petitioner had difficulties moving her eye and double vision. She described removing the fat and covering the crack, which caused the Petitioner's double vision to go away. There was no evidence that Dr. Espinoza had to rebreak a healed orbital bone to repair it.

Further justification for finding this was an acute injury lies in Dr. Mizen's testimony related to the fat that Dr. Espinosa saw had leaked through the fracture. He agreed that if there is a deformity in the orbital floor or wall, fat could escape. He said that fat will turn very soft and dissolve. Based on this, it appears that if this were an old, healed fracture, there would have been no need to remove the fat.

Also, as a treating physician, Dr. Espinoza had more opportunities to become familiar with the Petitioner and her condition. She saw the injuries first-hand. The Arbitrator does not believe

she would have performed a surgical repair of an orbital fracture that was already healed. For all these reasons the Arbitrator gives her opinions and her reasons for treatment greater weight.

Therefore, the Arbitrator finds that the Petitioner has met her burden of proving by a preponderance of the evidence that the accident of June 22, 2018, was caused the Petitioner's eye injuries.

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

The right to be compensated for medical costs associated with work-related injuries is at the very heart of the Workers' Compensation Act. *Hagene v. Derek Polling Const*., 388 Ill. App. 3d 380, 383, 902 N.E.2d 1269, 1273 (2009).

Based on the findings above regarding causation and the opinion of Dr. Mizen that the medical treatment of the orbital fracture was appropriate as determined by the surgeon, the Arbitrator finds the expenses related to the orbital fracture and the resulting neuropathic pain to be reasonable and necessary. The treatment for the Petitioner's right knee also was reasonable. The Arbitrator finds the visit to Dr. Bayes and diagnostics regarding the Petitioner's lumbar spine to be reasonable and necessary to rule out any acute or severe injuries.

Therefore, the Respondent is ordered to pay the medical expenses contained in Petitioner's Exhibits 12, 13, 14 and 15 pursuant to Section 8(a) of the Act and in accordance with medical fee schedules. The Respondent shall have credit for any amounts already paid or paid through its group carrier. Respondent shall indemnify and hold Petitioner harmless from any claims arising out of the expenses for which it claims credit.

Issue K: What temporary benefits are in dispute? (TTD)

According to the Request for Hearing (AX1), the parties dispute temporary total disability benefits for the period of July 8, 2018, through September 10, 2018. An employee is temporarily totally incapacitated from the time an injury incapacitates him for work until such time as he is as far recovered or restored as the permanent character of his injury will permit. *Archer Daniels Midland Co. v. Indus. Comm'n*, 138 Ill.2d 107, 118 (1990).

There was no dispute as to the days the Petitioner was ordered to be off work. Based on the findings above regarding causation, the Arbitrator finds that the Petitioner was entitled to TTD benefits from July 8, 2018, through September 10, 2018. The Respondent is entitled to a credit of $3,094.04 in TTD benefits paid.

Issue L: What is the nature and extent of the Petitioner's injury?

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

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

(ii) **Occupation.** The Petitioner is no longer working, although she was released to return to work. She turned down an opportunity to return to work. Aside from the Petitioner's

complaints, there was no evidence that she could not work. Therefore, the Arbitrator places little weight on this factor.

(iii) **Age.** The Petitioner was 57 years old at the time of the injury. Presumably, she would have several work years left during which time she would need to deal with the residual effects of the injury. The Arbitrator places some weight on this factor.

(iv) **Earning Capacity.** There was no evidence of limitation of the Petitioner's earning capacity. Therefore, the Arbitrator places no weight on this factor.

(v) **Disability.** The Petitioner testified that she still experiences pain in many body parts. Due to the credibility issues noted above, it is difficult to determine the veracity of these complaints. Again, the Arbitrator relies on the doctors. Both Dr. Espinoza and Dr. Acharya believed the Petitioner suffered from neuropathic pain from the eye injury. Dr. Mizen acknowledged that these complaints are not uncommon when an ocular nerve is damaged. From the medical evidence and the lack of treatment for any sequelae, it appears the Petitioner has made a full recovery. The Arbitrator puts some weight on this factor.

Therefore, the Arbitrator finds the Petitioner's permanent partial disability to be 5 percent of the body as a whole as a result of her eye/head injuries and 1 percent of the right leg as a result of her knee injury.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC002993
Case Name	Michael F Hunley v. Prairie Farms Dairy Inc
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0030
Number of Pages of Decision	16
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Joshua Humbrecht
Respondent Attorney	Matthew Terry

DATE FILED: 1/22/2024

/s/Marc Parker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF)
JEFFERSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Michael F. Hunley,

Petitioner,

vs. NO: 21 WC 2993

Prairie Farms Dairy, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 16, 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 $7,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

January 22, 2024

MP:yl
o 1/11/24
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	21WC002993
Case Name	Michael F. Hunley v. Prairie Farms Dairy, Inc.
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Jeanne AuBuchon, Arbitrator

Petitioner Attorney	Joshua Humbrecht
Respondent Attorney	David Green

DATE FILED: 11/16/2022

THE INTEREST RATE FOR THE WEEK OF NOVEMBER 15, 2022 4.44%

/s/ Jeanne AuBuchon, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF JEFFERSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Michael F. Hunley
Employee/Petitioner

v.

Prairie Farms Dairy, Inc.
Employer/Respondent

Case # 21 WC 002993

Consolidated cases: N/A

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Jeanne L. AuBuchon, Arbitrator of the Commission, in the city of Mt. Vernon, on June 15, 2022. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, January 19, 2021, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**77,920.59**; the average weekly wage was $**1,124.47**.

On the date of accident, Petitioner was **28** 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 $ for TTD, $ for TPD, $N/A for maintenance, and $N/A for other benefits, for a total credit of $N/A.

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

ORDER

Respondent shall pay for medical expenses as listed in Petitioner's Exhibit 8 pursuant to Section 8(a) of the Act. Respondent is entitled to a credit for all benefits paid.

Respondent shall authorize medical care – specifically further evaluation and treatment, including bilateral carpal tunnel releases and follow-up care as recommended by Dr. Brown.

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

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

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

NOVEMBER 16, 2022

Jeanne L. AuBuchon

Signature of Arbitrator

PROCEDURAL HISTORY

This matter proceeded to trial on June 15, 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 his employment; 2) the causal connection between the accident and the Petitioner's bilateral carpal and cubital tunnel syndromes; 3) payment of medical bills; and 4) entitlement to prospective medical care. The parties stipulated that if group medical insurance paid on a bill, the Respondent would receive a credit pursuant to 8(j) of the Act for any payments made.

FINDINGS OF FACT

The Petitioner has been employed with Respondent in the maintenance department for the past five years. (T. 12, 15) As of January 19, 2021 – the date of injury – the Petitioner was 28 years old. (AX1) He began working for the Respondent in September 2015 and has worked in various departments. (T. 11, 15) For the first four months, he worked as an "unload/pull off #4," which entailed unloading trailers and putting product on the floor. (T. 18-19) He would pick up cases – for example containing four gallons of milk in each case – and stack it. (T. 22) He would then use hook and chain to put the stack on the line for the picker to pick. (Id.) For the next four months, the Petitioner worked as a "pull off #4," which consisted of pulling off half pints and half gallons that were made at the plant with a hook and chain and putting them on the floor for pickers to pick. (T. 26-28) For the next four months, he worked as a "swingman," performing the jobs of other employees who were on vacation or off work. (T. 29-30) For the next five months, he worked as a "gallon operator #2," making sure the milk goes into the jugs with the correct labels and caps as well as taking the machine apart and cleaning it. (T. 31-32) He then spent a month as a "load out 3 picker," which entailed picking stacks and cases of product with his hands to go to

stores and dragging stacks with the hook. (T. 35-36) He said he loaded "bossy carts" that would hold 16 gallons per shelf with five shelves and shove the carts into trailers for delivery. (T. 41)

In his current job in maintenance, he would disassemble machines, repair them and replace parts using his hands and hand tools (screw drivers, wrenches, socket sets, hammer, chisel, punch, drill, grinder, impact wrenches and welder and torch). (T. 43-45, 52, 55) He said he uses drills that vibrate. (T. 47-48) He said he performs weekly maintenance on machines. (T. 38, 52) He also worked in other department when working overtime of when he gets pulled away to work another position. (T. 51) He said his arms and hands were sore some days with the various jobs he performed. (T. 25-26, 28-29, 38, 42) His descriptions of the tasks he performed were detailed.

The Respondent submitted job descriptions for the various positions the Petitioner held that contained lists of tasks but did not describe the duration and frequency of such tasks. (RX5) When the Petitioner underwent an essential job functions assessment for his employment physical on September 18, 2015, the following essential job functions and durations for an eight-hour shift were listed as: pushing and pulling 90 percent, lifting and carrying 1-5 pounds five percent, 15-30 pounds 10 percent, 30-45 pounds 10 percent, 45-60 pounds 75 percent and 60-90 pounds 10 percent; repetitive hand/wrist simple grasping 90 percent, firm grasping 90 percent and noise/vibration 90 percent. (PX6)

The Petitioner testified that when he filed his Application for Adjustment of Claim (February 4, 2021), he had been having problems with his hands and arms for a little over a year. (AX2, T. 12) He said his symptoms worsened throughout 2020. (T. 12) He said he did not have issues with numbness and tingling in his fingers and hands before working for the Respondent. (T. 63) The Petitioner testified that he was not diabetic and this his only hobby is bow hunting deer with a compound bow. (T. 65, 84)

On January 21, 2021, the Petitioner saw Dr. Brian Atwood, a family medicine specialist at Atwood Medical, and complaints of wrist pain and his wrists and arms going numb at work over more than a year. (PX6) Dr. Atwood diagnosed bilateral carpal tunnel syndrome and referred the Petitioner to a hand surgeon. (Id.) On February 25, 2021, the Petitioner saw Dr. Lisa Sasso, an orthopedic hand surgery specialist at Southern Illinois Hand Center. (PX4) She sent him to Neurologist Dr. Saffan Nemani at Advanced Sleep and Neurodiagnostic Services, who performed electromyography (EMG) and nerve condition studies (NCS) on March 3, 2021, that were supportive of a diagnosis of mild right carpal tunnel syndrome. (PX5) The Petitioner returned to Dr. Sasso on March 11, 2021. (PX4) She diagnosed bilateral carpal and cubital tunnel syndrome and recommended surgical releases. (Id.) The Petitioner testified that he stopped seeing Dr. Sasso because she wanted to operate right away, and he wanted a second opinion. (T. 73-74)

The Petitioner then saw Dr. David Brown, an orthopedic surgeon at The Orthopedic Center of St. Louis specializing in hand and upper extremity surgery, on June 14, 2021. (PX2) He told Dr. Brown that he worked 8-15 hours a day, 50-60 hours a week performing maintenance on machines that involved using hand and power tools throughout the day, including wrenches, screwdrivers, drills and hammers. (Id.) He said he lifted up to 15 pounds. (Id.) Dr. Brown recommended that the EMG and NCS tests be repeated because there was a discrepancy between the March 3, 2021, studies and the Petitioner's symptoms and findings on examination. (Id.) Dr. Brown stated that based on the Petitioner's description of hand and arm intensive job duties using hand and power tools throughout the day combined with exposure for six years, his young age and lack of medical problems that would but him at risk for carpal and cubital tunnel syndromes, he would consider the Petition's work activities as a contributing factor for the need for further evaluation and treatment. (Id.)

On June 14, 2021, the Petitioner underwent EMG and NCS testing by Dr. Daniel Phillips, a neurologist at the Neurological & Electrodiagnostic Institute that were positive for moderate carpal tunnel neuropathy on the right, mild left carpal tunnel neuropathy on the left and mild bilateral ulnar neuropathies across the elbows. (Id.) The Petitioner returned to Dr. Brown on June 15, 2021, and Dr. Brown recommended bilateral carpal tunnel releases and conservative treatment and observation of his ulnar neuropathy. (PX2)

On August 4, 2021, the Petitioner underwent a Section 12 examination by Dr. W. Chris Kostman, an orthopedic surgeon at Performance Orthopedics. (RX1, Deposition Exhibit 2) Dr. Kostman gave the following description of the Petitioner's work duties: changing tires 1-5 times a week, less in the winter, using an impact drill; using a handheld grinder 4-6 times a week for 10-15 minutes a session; using a wrench, hammer and screwdriver 20-30 minutes a day each; lifting and carrying 10-50 pounds 20-30 minutes a day; and operating a forklift 4-5 times a week for 10-15 minutes at a time. (Id.) Dr. Kostman stated the Petitioner did not perform any activities he described as heavy grasping. (Id.) Dr. Kostman reviewed the job descriptions provided by the Respondent and medical records. (Id.)

Dr. Kostman agreed with the diagnosis of bilateral carpal tunnel syndrome and a "very mild" case of bilateral cubital tunnel syndrome. (Id.) He did not believe the Petitioner's work activities permanently aggravated or caused these conditions, and the conditions were from an idiopathic cause with the presentation not specific for a right-handed laborer. (Id.) He believed any activities that involved grasping and lifting may temporarily aggravate the Petitioner's symptoms. (Id.) However, he said the Petitioner did not participate in a significant amount of vibratory tool activity or heavy grasping. (Id.)

Regarding treatment, Dr. Kostman said that if conservative management for the Petitioner's bilateral carpal tunnel syndrome failed, he may elect to proceed with carpal tunnel release. (Id.) He did not recommend treatment for the Petitioner's bilateral elbows. (Id.)

Dr. Brown testified consistently with his records at a deposition on February 25, 2022. (PX1) He said he was board certified in plastic reconstructive surgery and in the subspeciality of hand surgery and limits is practice to patients with hand, wrist and elbow problems. (Id.) He explained how carpal and cubital tunnel syndromes develop, stating that forceful gripping, pinching and using hand tools – hammers, grinders, etc. – can, over time, increase the risk of developing the conditions. (Id.) He said that in determining whether work activities could be a factor in developing the conditions, he looks at whether the frequency of the activities is on a daily basis versus a monthly basis and how many months or years has the person been exposed to these risks. (Id.) He said he also looks at a patient's personal risk factors, of which he said the Petitioner had none. (Id.)

On cross-examination, Dr. Brown acknowledged that he did not have knowledge of several details of the Petitioner's work – specifically, the kind of wrenches he used, how much the wrenches weighed, a detailed physical demand analysis or measurements of force generated using tools. (Id.) Dr. Brown admitted that obesity is a risk factor for developing carpal and cubital tunnel syndromes. (Id.) He said that when he saw the Petitioner, his body mass index (BMI) was 28.5, which is less than the threshold of 30 to qualify as obese. (Id.)

Dr. Kostman testified consistently with his report at a deposition on March 9, 2022. (RX1) He stated that obesity is a risk factor for carpal or cubital tunnel syndrome and that the Petitioner's body mass index (BMI) was 30, which is the lowest score for obesity. (Id.) He believed a person of the Petitioner's age and with his BMI could develop idiopathic peripheral neuropathy. (Id.)

On cross-examination, Dr. Kostman acknowledged that he was a general orthopedic surgeon and not fellowship trained with any subspeciality in hand or arm surgery. (Id.) He agreed that mechanical tool work is known to be causative in the development of carpal and cubital syndromes in some cases, depending on the amount. (Id.) He agreed that the treatment the Petitioner received this far was reasonable and necessary. (Id.)

The Petitioner testified that the job descriptions contained in Dr. Kostman's report were very generic and did not contain information about weights or volume of materials or the number of products that would come in off the trucks and did not quantify the number of machines for which he was responsible for maintenance. (T. 17) He also disagreed with Dr. Kostman's statement that the Petitioner did not perform any activities he described as heavy grasping. (T. 56-57) He said there was not a day when he wasn't doing grasping. (T. 57) As to the durations of performing the activities described in Dr. Kostman's report, the Petitioner said the descriptions were fair statements but testified that those were on the low end, and there are days when the duration is more. (T. 58-60, 77-78) He also said he lifted more than 50 pounds on some days. (Id.) He was surprised by the durations and weights listed in Dr. Kostman's report. (T. 63) He said he worked 40-80 hours per week. (T. 61) He said that most of the time when he works a lot of hours, he's rebuilding a piece of machinery. (T. 62)

On cross-examination, the Petitioner said use of the impact drill, grinder, wrench, hammer and screwdriver and driving a forklift was not consistent or continuous – meaning every day, non-stop – but depended on the day. (T. 78-81)

The Petitioner stated that he has numbness and tingling in his fingers on a daily basis at work, while driving and at night when sleeping. (T. 65) He said he has wrist and elbow pain and using vibrating tools, a screwdriver or wrench aggravates his symptoms. (T. 66) He said

sometimes his hand will lock up, like when using a wrench, and he has to pry the wrench out of his hand because it is numb and tensed up. (Id.) He said the symptoms were getting worse and more frequent. (T. 67) He said he wants to undergo the surgery recommended by Dr. Brown. (T. 84-85)

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)

Further, a Petitioner's job duties need not be repetitive in the sense that the same task is done over and over again as on an assembly line to result in a compensable injury. *City of Springfield v. Illinois Workers' Comp. Comm'n*, 388 Ill.App.3d 297, 901 N.E.2d 1066, 327 Ill.Dec.

333 (4th Dist., 2009). Intensive use of hands and arms can result in cumulative injuries that are compensable. *Id*.

The Petitioner's testimony was credible. His descriptions of the tasks he has performed over the past seven years were detailed, and his description of his work activities in the maintenance department was consistent with his reports to the medical providers. However, the doctors apparently only considered the work activities involved in his work in the maintenance department. The job descriptions submitted by the Respondent and reviewed by Dr. Kostman contained no details of frequency and duration of the tasks. The job function assessment from 2015 did contain these details, but neither doctor apparently considered this.

The doctors agreed that the Petitioner suffered from bilateral carpal and cubital tunnel syndromes but disagreed on whether they were related to the Petitioner's work. Dr. Kostman said the cause was idiopathic but did not identify an idiopathic cause other than obesity, for which the Petitioner had the lowest BMI to qualify as being obese. At Dr. Brown's examination, the Petitioner's BMI fell under the obesity level. Also, Dr. Kostman said the Petitioner's work may temporarily aggravate his symptoms. However, if the Petitioner has to perform these tasks daily and suffers these symptoms at work and at home, this is more than a temporary aggravation. From all the evidence, it appears to be an aggravation that never ceases. The Arbitrator does not qualify that as temporary.

In weighing the doctors' testimony, the Arbitrator also looks at their professional backgrounds and finds that Dr. Brown is more qualified to render an opinion as to the cause of the Petitioner's carpal and cubital tunnel conditions. In addition, Dr. Brown's testimony was thorough and based on medical literature and studies.

For all these reasons, the Arbitrator gives greater weight to the opinions of Dr. Brown than those of Dr. Kostman.

From the evidence as a whole, it appears that the Petitioner's work over the past seven years involved grasping, lifting, pushing and pulling heavy objects and use of hand tools and vibrating tools on a frequent basis that caused his physical structure to give way. Therefore, the Arbitrator finds that the Petitioner has proved by a preponderance of the evidence that his carpal and cubital tunnel syndromes arose out of and in the course of his employment.

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 his carpal and cubital tunnel conditions are causally related to his employment.

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).

Despite his causation opinion, Dr. Kostman agreed that the medical services the Petitioner received were unreasonable or unnecessary. Therefore, the Arbitrator finds that these services were reasonable and necessary and orders the Respondent to pay the medical expenses contained in Petitioner's Exhibit 8. 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).

Again, despite his causation opinion, Dr. Kostman agreed that the appropriate treatment for the Petitioner was surgery for carpal tunnel and conservative treatment/observation for cubital tunnel. Therefore, the Arbitrator finds that the Petitioner is entitled to prospective medical care as recommended by Dr. Brown, 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	18WC011090
Case Name	Joseph Mattes v. Hall Enterprises
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0031
Number of Pages of Decision	13
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Ruth Stelzman, Jose Rivero
Respondent Attorney	John Karis

DATE FILED: 1/22/2024

/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

Joseph Mattes,

Petitioner,

vs. NO: 18 WC 11090

Hall Enterprises,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 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.

January 22, 2024

MP:yl
o 1/11/24
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	18WC011090
Case Name	MATTES,JOSEPH v. HALL ENTERPRISES
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	10
Decision Issued By	Ana Vazquez, Arbitrator

Petitioner Attorney	Jose Rivero, Ruth Stelzman
Respondent Attorney	John Karis

DATE FILED: 7/17/2023

/s/Ana Vazquez, Arbitrator

Signature

THE INTEREST RATE FOR THE WEEK OF JULY 11, 2023 5.27%

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
NATURE AND EXTENT ONLY

Joseph Mattes
Employee/Petitioner

v.

Hall Enterprises
Employer/Respondent

Case # **18** WC **011090**

Consolidated cases: _____

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Ana Vazquez**, Arbitrator of the Commission, in the city of **Chicago**, on **January 5, 2023**. By stipulation, the parties agree:

On the date of accident, **April 12, 2017**, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $**65,520.00**, and the average weekly wage was $**1,260.00**.

At the time of injury, Petitioner was **33** years of age, ***married*** with **1** dependent child.

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

Respondent shall be given a credit of $**53,367.52** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**53,367.52**.

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

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of **$756.00/week** for **175 weeks**, because the injuries sustained caused the **35% loss of the person-as-a-whole**, as provided in Section 8(d)2 of the Act.

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

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

Ana Vazquez

Signature of Arbitrator

July 17, 2023

PROCEDURAL HISTORY

This matter proceeded to arbitration on January 5, 2023 in Chicago, Illinois before Arbitrator Ana Vazquez. The only issue in dispute is the nature and extent of the injury. Arbitrator's Exhibit ("Ax") 1. All other issues have been stipulated.

FINDINGS OF FACT

Petitioner testified that he works for Respondent and that his position at Respondent in 2017 was automotive technician. Transcript of Proceedings on Arbitration ("Tr.") at 8. Petitioner has worked as a mechanic at Respondent since 2001. Tr. at 8. Petitioner testified that prior to 2017, he worked Monday through Friday from 8 a.m. to 5 p.m. Tr. at 9. Petitioner testified that he would volunteer to work overtime, and that prior to 2017, he would volunteer for overtime "all the time." Tr. at 10.

Accident

Petitioner agreed that he had an accident at work on April 12, 2017, while he was lifting a passenger's seat out of an Audi. Tr. at 10-12.

Medical records summary

X-rays of Petitioner's lumbar spine were obtained on April 16, 2017, which demonstrated no evidence for compression or fracture or subluxation and L5-S1 degenerative disc disease. Petitioner's Exhibit ("Px") 2 at 29.

On April 17, 2017, Petitioner presented at Northwest Community Healthcare with complaints of right-sided pain and was seen by Dr. Kristin M. Trevino. Px4 at 4-3. Petitioner was diagnosed with lumbar radiculopathy and was referred to an orthopedic specialist.

Petitioner presented at Barrington Orthopedic Specialists on May 4, 2017 and was seen by Dr. Anubhav P. Jagadish for complaints of lumbar spine pain. Px3 at 8-12. Petitioner was also experiencing numbness in the right foot. Dr. Jagadish's assessments were low back pain and intervertebral disc disorder with radiculopathy, lumbar region. Dr. Jagadish noted that Petitioner's symptoms were consistent with a mild disc herniation with low back pain. Dr. Jagadish prescribed Mobic and ordered physical therapy.

Petitioner participated in eight sessions of physical therapy between May 16, 2017 and July 5, 2017. Px4 at 7-31.

Petitioner followed up at Northwest Community Healthcare on September 19, 2017, September 20, 2017, and October 11, 2017. Px4 at 32-41. On October 11, 2017, it was noted that Petitioner had one more epidural steroid injection, and that Petitioner would most likely need surgery. Px4 at 41.

Petitioner presented at Lake Cook Orthopedics on October 17, 2017 and was seen by Dr. Gregory Brebach for evaluation of his lumbar spine. Px2 at 16-17. Dr. Brebach noted that he reviewed Petitioner's lumbar spine MRI, and that Petitioner had a large, herniated disc on the right at L5-S1, degeneration at the L5-S1 level, with some Modic changes noted in the inferior aspect of the L5 vertebral body. Dr. Brebach noted that Petitioner's assessment was herniated disc on the right at L5-S1 causing radiculopathy. He recommended Petitioner proceed with a right L5-S1 discectomy. Petitioner next saw Dr. Brebach on January 16, 2018 for follow up. Px2 at 14-15.

On January 19, 2018, Petitioner underwent a right L5-S1 microdiscectomy. Px2 at 20-21. Petitioner's postoperative diagnosis was right leg radicular pain with right-sided disc herniation.

Petitioner followed up with Dr. Brebach on January 30, 2018 and February 22, 2018. Px2 at 10-13. On February 22, 2018, Dr. Brebach recommended an epidural steroid injection. Px2 at 10-11. Petitioner saw Dr. David S. Schneider on March 6, 2018, at which time a lumbar transforaminal steroid injection was administered. Px2 at 8-9. Petitioner returned to Dr. Brebach for follow up on March 22, 2018, at which time Dr. Brebach's assessments were lumbosacral region radiculopathy and other intervertebral disc displacement in the lumbosacral region. Px2 at 6-7. Dr. Brebach ordered a new MRI.

Petitioner participated in 11 sessions of physical therapy between February 6, 2018 and March 13, 2018. Px2 at 40-43.

Petitioner underwent a lumbar spine MRI on March 30, 2018, which revealed (1) right hemilaminectomy at L5-S1 with epidural fibrosis surrounding the right S1 nerve root and a mildly bulging disc at this level without nerve root compression and (2) mild neural foraminal narrowing at L5-S1 due to the bulging disc and osteophyte spurring. Px2 at 18-19.

Petitioner followed up with Dr. Brebach on April 3, 2018, at which time Dr. Brebach noted that the MRI revealed a moderate-sized recurrent disc bulge at L5-S1 and advanced disc degeneration at L5-S1, which concerned him. Px2 at 4-5. Dr. Brebach recommended a revision discectomy.

On May 4, 2018, Petitioner underwent a right L5-S1 hemilaminotomy and discectomy and re-exploration, performed by Dr. Edward Goldberg. Px1 at 50-51, 199-202. Petitioner's postoperative diagnosis was recurrent right herniated nucleus pulposus, L5-S1. Px1 at 50. Petitioner testified that Dr. Goldberg was his second opinion, and that he started to try to find another doctor after Dr. Brebach told him he needed a revision. Tr. at 15-16.

Petitioner returned to Dr. Goldberg on August 22, 2018, at which time Dr. Goldberg released Petitioner to work full duty without restrictions and placed Petitioner at maximum medical improvement ("MMI"). Px1 at 325.

Petitioner underwent a lumbar spine MRI on September 18, 2019, which demonstrated (1) interval revision at L5-S1 discectomy, residual right subarticular broad-based disc protrusion smaller in size since prior MRI of March 30, 2018, resulting in partial effacement of right lateral recess abutting the traversing right S1 nerve root with mild posterior displacement, (2) mild enhancement in the right lateral and anterior aspect of the epidural space at L5-S1 representing postsurgical changes, and (3) no high-grade spinal canal or foraminal narrowing elsewhere. Px1 at 255-256.

Petitioner followed up with Dr. Goldberg on September 18, 2019. Px1 at 323-324. Dr. Goldberg noted that Petitioner had been released to full duty in August, but that he continued to have axial low back pain since. He also noted that he reviewed the lumbar spine MRI, which demonstrated severe disc degeneration at L5-S1, where the prior discectomies were, as well as some disc bulging on the right with scarring, some foraminal stenosis on the right, and Modic changes at L5-S1. Dr. Goldberg noted that Petitioner had discogenic back pain from the degeneration with two prior discectomies due to a work-related accident. Petitioner was given a few options, including continue with a home exercise program, live with the symptoms, or consider an anterior lumbar interbody fusion at L5-S1. Dr. Goldberg ordered additional physical therapy. Petitioner was released to full duty work. Dr. Goldberg noted that Petitioner had been placed at MMI at his last visit, and that Petitioner continued to be at MMI with chronic residual symptoms.

Petitioner underwent a lumbar spine MRI on December 16, 2020, which demonstrated (1) no significant interval change since prior MRI of September 18, 2019, (2) stable degenerative changes at L5-S1 with a small right subarticular disc herniation with minimal cranial angulation abutting and displacing the traversing right S1 nerve root with mild dural compression and mild right foraminal narrowing, and (3) no high-grade spinal canal or foraminal narrowing elsewhere. Px1 at 253-254.

On March 23, 2021, Petitioner underwent (1) an anterior interbody fusion, L5-S1, (2) insertion of intervertebral cage device with integral instrumentation, L5-S1, and (3) cancellous allograft. Px1 at 45-49, 158-173. Petitioner's postoperative diagnoses were degenerative disc disease with neural foraminal spinal stenosis, L5-S1 and status post discectomy x2 at L5-S1. Px1 at 49.

Petitioner followed up with Dr. Goldberg on April 5, 2021, May 3, 2021, June 21, 2021, August 2, 2021, and September 20, 2021. Px1 at 491-492, 496-497, 613-614, 735-736, 740-741. On May 3, 2021, Dr. Goldberg recommended Petitioner begin formal therapy. Px1 at 735. Petitioner participated in 36 sessions of physical therapy from May 3, 2021 through July 28, 2021. Px1 at 498-609, 616-734. On August 2, 2021, Dr. Goldberg recommended Petitioner progress to work conditioning, which Petitioner attended. Px1 at 496, 385-388, 392-396.

Petitioner underwent a lumbar spine CT scan on October 1, 2021, which demonstrated (1) status post anterior discectomy and interbody fusion at L5-S1, fusion hardware was intact, there was a residual small central disc protrusion and right foraminal osteophyte along the disc margin, and resultant residual mild spinal stenosis with moderate right and mild left foraminal stenosis and (2) mild disc bulge at L4-5 causing mild bilateral foraminal narrowing. Px1 at 251.

On October 1, 2021, Dr. Goldberg recommended Petitioner undergo a functional capacity evaluation ("FCE"). Px1 at 482-483.

On October 19, 2021, Petitioner underwent an FCE. Px1 at 52-64, 72-83. The results of the FCE indicated that Petitioner demonstrated the ability to meet the physical demand requirements of a mechanic, as well as the ability to function in the heavy physical demand category. Px1 at 52.

Petitioner followed up with Dr. Goldberg on October 27, 2021, at which time Dr. Goldberg noted that the CT scan showed some healing of the fusion at L5-S1 in the stand-alone cage, but it was not fully healed. Px1 at 477-478. He also noted that Petitioner reported that he was willing to attempt to return to work per the FCE parameters, which Dr. Goldberg noted would be a trial return as he did not have a copy of Petitioner's job description.

Petitioner returned to Dr. Goldberg on December 20, 2021. Px1 at 472-473. Dr. Goldberg noted that Petitioner had returned to work with restrictions, and that Petitioner reported that he continued to work and continued to have low back pain. Dr. Goldberg recommended Petitioner continue to work with a 90-pound lifting restriction and avoid prolonged bending. Dr. Goldberg noted that Petitioner should follow up in February 2022 and ordered a lumbar spine CT scan to be obtained prior to Petitioner's next visit.

Petitioner underwent a lumbar spine CT scan on February 11, 2022, which demonstrated (1) anterior lumbar interbody fusion L5-S1 without hardware complication, (2) developmental narrowing of the canal, disc bulges at L2-3 through L4-5, no high-grade canal stenosis, and (3) disc spur complex at L5-S1 with mild to moderate bilateral neural foraminal stenoses. Px1 at 248-249.

Petitioner testified that his last appointment with Dr. Goldberg was on February 14, 2022. Tr. at 16-18. On February 14, 2022, Dr. Goldberg released Petitioner with restrictions, including no lifting, pushing, or pulling greater than 70 pounds and no prolonged bending. Px1 at 208. On cross examination, Petitioner agreed that he has not returned to Dr. Goldberg since February 14, 2022, and that he has not asked Dr. Goldberg to make any modifications to his restrictions. Tr. at 33. Petitioner testified that Dr. Goldberg suggested he follow up with his primary care physician for pain medication refills. Tr. at 34.

Return to work/Earnings

Petitioner testified that he returned to work at Respondent as a mechanic and was working at Respondent as a mechanic at the time of arbitration. Tr. at 18. On cross examination, Petitioner testified that he continues to work with the restrictions given to him by Dr. Goldberg on February 14, 2022. Tr. at 33. Petitioner testified that he has been working at Respondent since "give or take" November 1, 2021. Tr. at 33.

Petitioner testified that since his return to work, he has tried to not do the same work that he was doing prior to the injury, and that he has the help of an apprentice. Tr. at 18. Petitioner testified that he tries to let his apprentice do most of the work. Tr. at 19. Petitioner testified that he still cannot lift seat pods, and has his apprentice lift the seat pods out. Tr. at 20-21. Petitioner testified that work has become complicated, and that he loses time when his apprentice takes longer on a job. Tr. at 21.

Regarding his work hours, Petitioner testified that his work hours differ now than from the hours he worked prior to his injury. Tr. at 25. Petitioner testified that his hours differ now because his apprentice is doing a majority of the work. Tr. at 25, 26. Petitioner testified that "Audi, Andy, and Scott, our dispatcher, have been more than accommodating I would say with my situation." Tr. at 25. Petitioner testified that since the work injury, he does not work overtime. Tr. at 26.

On cross examination, Petitioner was shown Px5, which he identified as paycheck stubs. Tr. at 35. Petitioner agreed that Px5 did not reflect all the dates or weeks he has worked. Tr. at 35. When asked why he chose the weeks reflected in Px5, Petitioner responded, "So I was asked, you know, like, 'Are you making as much or not making as much?' And I said, 'That's very hard to judge because I've had an apprentice literally this whole time.'" Tr. at 36. Petitioner further explained that his last apprentice was making 60 hours a week by himself, and the week after the apprentice quit, was a 39 or 40-hour workweek. Tr. at 36. Petitioner testified that was the only week where he worked by himself, and that he got another apprentice. Tr. at 36-37. Petitioner testified that Px5 included paystubs for 2015 and 2016, which were prior to him being hurt, and that he would not be able to hit those same numbers again "unless I'm given the best and the best work and am able to turn and burn on those." Tr. at 37.

Petitioner explained that he is paid a dollar amount for the hours that he books. Tr. at 38. Petitioner explained that they charge two hours for a break job, and that he is paid for two hours if the brake job takes 15 minutes or three hours. Tr. at 38. Petitioner testified that "…you find ways to make, you know, a 40-hour workweek turn into a 50, 60, 70-hour workweek." Tr. at 39. Referring to page 10 of Px5, Petitioner testified that he did not work the 50.29 hours reflected, and that those hours included a lunch and that "that's getting a job and turning it out faster than what it pays. And that's how everyone in our shop tries to work." Tr. at 39-40. Referring to the pay period of August 10, 2016, which reflected 10.29 hours, Petitioner agreed that it was his booked pay, and that those were jobs that he did quicker than typical. Tr. at 40. Petitioner testified that tax season affects hours booked, and that if there is a job that comes in that he cannot do, then he sits and waits longer. Tr. at 40. Petitioner testified that there are times that he is waiting for jobs to come in, but not recently and that it had been "crazy" at work, and there had been a lot of work. Tr. at 41. Petitioner testified that his apprentice does the work, and that Petitioner takes the hours. Tr. at 41. Petitioner testified that he was earning $30.00 per hour prior

to the injury, and that at the time of arbitration he was earning $39.00 per hour or more. Tr. at 40-41. Petitioner testified that he was making more money post injury than he was prior to the injury, "but it's not that easy, but yes." Tr. at 42. Petitioner testified that he worked 8 a.m. to 5 p.m. prior to and after the injury. Tr. at 42. Petitioner testified that the "BKBNS" referenced on the paystubs in Px5, is for any hours after 40 hours, and "we get like a dollar fifty extra. And then after 50, we get another dollar fifty. And then after 60, I think that's the last tier. And then, you know, if we book 70, 80, there's no more bumps in pay, But, yes, after that, yeah, every ten hours after that is a bump in pay." Tr. at 43. Petitioner testified that he always gets paid for 32 hours. Tr. at 43. Petitioner responded "[p]ossibly, yes," when asked if he would be earning greater than $65,520 a year. Petitioner testified that if there is a job that he cannot do, he has to give it away. Tr. at 46. Petitioner testified that he has had an apprentice since he returned to work from his last surgery. Tr. at 48.

Current condition

Petitioner testified that prolonged bending causes him pain. Tr. at 22. Petitioner testified that the radiculopathy and numbness is gone, but that he still has pain behind his left thigh and buttocks, which he described as bubbling or burning. Tr. at 22-23. Petitioner testified that he gets a sharp pain sometimes just sweeping with a push broom at work. Tr. at 23. Regarding lifting, Petitioner testified that he has to think carefully about whether he is going to pick something up, and he explained that he now will put rotors on a cart and push them to his bay instead of grabbing them and walking over with them to his bay. Tr. at 24. Petitioner testified that he still cannot lift seat pods, and that he has his apprentice lift them. Tr. at 25. Regarding bending, Petitioner testified that depending on the pain he is in, he has to make sure that his right leg is straight before bending down because that alleviates his pain. Tr. at 24. Petitioner testified that the best thing he can do for his back pain is walk, and that sitting down is not a relief and that laying down is "not good." Tr. at 24. Petitioner testified that he wakes up from sleep in pain, and that he sometimes has sleepless nights. Tr. at 25. Petitioner testified that he is pain in the morning and at night, and that during the day he walks around at work, which helps. Tr. at 26.

Petitioner testified that he has bought a lawn mower, specifically for his back, with suspension, and that he has also had to purchase a bed specifically for his back. Tr. at 26-27. Petitioner testified that he does not do chores around the house like he used to, and that his house has fallen into disrepair over the past four or five years. Tr. at 27. Petitioner testified that the pain levels he experiences limit his ability to do chores and have also altered his mood. Tr. at 27-28. Petitioner testified that he is now able to pick up his children, but that for the past couple of years he would have to tell his children that he could not pick them up. Tr. at 29. Petitioner testified that he cannot roughhouse with his children, and that he is scared of roughhousing with them. Tr. at 29.

Petitioner testified that he stretches, walks, and stays active to alleviate the pain. Tr. at 30. Petitioner testified that he is taking Diclofenac Sodium and Ibuprofen for the pain and tries to eat anti-inflammatory foods. Tr. at 30.

Testimony of David Andrew Emberton

Respondent called David Andrew Emberton to testify on its behalf. Tr. at 50. Mr. Emberton testified that he is employed at Respondent as the service director, and that he has worked at Respondent for 13 years. Tr. at 50-51.

Mr. Emberton agreed that he is Petitioner's boss. Tr. at 51. Mr. Emberton testified that Petitioner's position was certified technician, and that at the time of arbitration, Petitioner was working in the same position that he was working prior to the April 12, 2017 injury. Tr. at 51. Mr. Emberton testified that Petitioner provided an accurate explanation of how technicians are paid at Respondent, and that it was an industry standard. Tr. at 51.

Regarding Petitioner's testimony that at times he is waiting for jobs, Mr. Emberton testified that they had more work than they know what to do with and that he could not imagine that there was ever a time where anybody was waiting more than a couple of minutes without having something to do. Tr. at 52. Mr. Emberton testified that at the time of arbitration, Petitioner's hourly pay was significantly more per booked hour than it was in 2017. Tr. at 52-53. Mr. Emberton testified that Petitioner was making somewhere in the range of $30 to $32 an hour in 2017, and that Petitioner was making $41 per flat rate booked hour at the time of arbitration. Tr. at 52-53. Mr. Emberton testified that Petitioner earns $41 per hour for every single hour Petitioner books from zero hours to 40 hours, and that between 40 hours and 50 hours, Petitioner earns $42.50 an hour, that between 50 and 60 hours he earns $43.50 an hour, and that anything over 60 hours, Petitioner earns $44.50 an hour per booked hour. Tr. at 53. Regarding whether work ebbs and flows at Respondent, Mr. Emberton testified that over the last year, they have been busy and that there's been a constant flow of work. Tr. at 53. Mr. Emberton testified that there is rarely ever a time where there is not work in the office to be handed out, and that maybe there were a couple of days in mid-December where they ran out of work once or twice. Tr. at 54. Mr. Emberton testified that Petitioner's hours have not been intentionally reduced since his return to work. Tr. at 54.

On cross examination, Mr. Emberton testified that the rate of pay is based off the union, and that they are not a union shop, but they try to keep the rate close to the union rate. Tr. at 55.

CONCLUSIONS OF LAW

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

Decisions of an arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). The burden of proof is on a claimant to establish the elements of his right to compensation, and unless the evidence considered in its entirety supports a finding that the injury resulted from a cause connected with the employment, there is no right to recover. *Board of Trustees v. Industrial Commission,* 44 Ill. 2d 214 (1969).

Credibility is the quality of a witness which renders his evidence worthy of belief. It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence and assign weight to witness testimony. *O'Dette v. Industrial Commission*, 79 Ill. 2d 249, 253 (1980); *Hosteny v. Workers' Compensation Commission*, 397 Ill. App. 3d 665, 674 (2009). Where a claimant's testimony is inconsistent with his actual behavior and conduct, the Commission has held that an award cannot stand. *McDonald v. Industrial Commission,* 39 Ill. 2d 396 (1968); *Swift v. Industrial Commission,* 52 Ill. 2d 490 (1972).

In the case at hand, the Arbitrator observed Petitioner's behavior and conduct during the hearing and finds him to be a credible witness. The Arbitrator compared Petitioner's testimony with the totality of the evidence submitted and did not find any material contradictions that would deem the witness unreliable.

Issue L, as to the nature and extent of the injury, the Arbitrator finds as follows:

The Arbitrator notes that pursuant to Section 8.1b of the Act, permanent partial disability shall be established using five enumerated criteria, with no single factor being the sole determinant of disability. Per 820 ILCS 305/8.1b(b), the criteria to be considered includes: (i) the reported level of impairment pursuant to AMA; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records.

With regard to subsection (i) of Section 8.1b(b), the Arbitrator notes that an AMA Impairment Rating was not offered, and therefore the Arbitrator assigns no weight to this factor.

With regard to subsections (ii) and (iii) of Section 8.1b(b), the Arbitrator notes that at the time of the accident, Petitioner was 33 years of age and was employed at Respondent as an automotive technician. The evidence demonstrates that Petitioner returned to work at Respondent in the same capacity in November 2021, with the permanent restrictions of no pushing, pulling, or lifting more than 70 pounds and no prolonged bending. The Arbitrator assigns moderate weight to these factors.

With regard to subsection (iv) of Section 8.1b(b), the Arbitrator notes that Petitioner has not demonstrated that his future earning capacity has been affected by the accident and there is no evidence of reduced earning capacity in the record. The Arbitrator assigns less weight to this factor.

With regard to subsection (v) of Section 8.1b(b), the medical records reflect that following the April 12, 2017 injury, Petitioner was diagnosed with a herniated disc at L5-S1 with radiculopathy. Petitioner's treatment consisted of (1) a right L5-S1 microdiscectomy, (2) right L5-S1 hemilaminectomy, discectomy, and re-exploration, and (3) anterior fusion at L5-S1 with insertion of intervertebral cage device with integral instrumentation and cancellous allograft. Petitioner was ultimately given permanent restrictions by Dr. Goldberg, consisting of no pushing, pulling, or lifting more than 70 pounds and no prolonged bending. Petitioner returned to work in November 2021 and has continued to work within those restrictions with the help of an apprentice. Petitioner has not returned for treatment with Dr. Goldberg since February 2022 and continues to follow up with his primary care physician for pain medication refills. At arbitration, Petitioner testified that he continues to experience pain daily, and that he stretches, walks, and remains active to alleviate the pain. The Arbitrator assigns more weight to this factor.

Upon consideration of the foregoing evidence and factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 35% loss of the person-as-a-whole, pursuant to Section 8(d)2 of the Act.

Ana Vazquez

ANA VAZQUEZ, ARBITRATOR

July 17, 2023

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC024449
Case Name	Chris Newberry v. Spee Dee Delivery Service, Inc.
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0032
Number of Pages of Decision	12
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Matthew Brewer
Respondent Attorney	Paul Berard

DATE FILED: 1/22/2024

/s/Christopher Harris, 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

CHRIS NEWBERRY,

Petitioner,

vs. NO: 18 WC 24449

SPEE DEE DELIVERY SERVICE, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, temporary total disability (TTD) benefits and permanent partial disability (PPD) benefits, and being advised of the facts and law, modifies the Decision of the Arbitrator with respect to the medical treatment awarded but otherwise affirms and adopts the Decision of the Arbitrator which is attached hereto and made a part hereof.

In this claim, Respondent hired Dr. Timothy Wang, a practicing chiropractor, to conduct a utilization review (UR) of Petitioner's chiropractic treatment with Dr. Jeffrey Dickhut at Central Illinois Spine. Prior to Petitioner treating with Dr. Dickhut, Petitioner had completed 10 chiropractic treatments with Dr. John Zozzaro at Zozzaro Chiropractic and Rehab. The Arbitrator noted that Dr. Zozzaro had opined that Petitioner required eight additional chiropractic treatments to reach maximum medical improvement (MMI) for his work-related injury. Petitioner did not undergo further treatment with Dr. Zozzaro but instead continued treatment with Dr. Dickhut. He had nearly 70 more visits with Dr. Dickhut.

The Arbitrator found that although Dr. Wang opined that some of Petitioner's treatment was reasonable, he believed much of it was excessive. Thus, and in line with Dr. Zozzaro's recommendation and Dr. Wang's opinion, the Arbitrator determined that Petitioner's medical treatment through October 31, 2018, which included eight additional chiropractic treatments with Dr. Dickhut, was reasonable and necessary.

The Commission agrees that the chiropractic care Petitioner received from Dr. Dickhut was helpful but according to the records from his office, any improvement plateaued around early November 2018, or about a month after commencing treatment. Based on this, the Commission

awards an additional six more chiropractic sessions with Dr. Dickhut, through November 12, 2018, and finds that this treatment was reasonable, necessary and supported by the evidence – particularly Dr. Wang's October 12, 2020 UR report which allowed up to 24 chiropractic visits per the guidelines.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 13, 2023 is hereby modified as stated and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the reasonable, necessary, and related medical bills from the date of accident through November 12, 2018, as evidenced in Petitioner's Exhibit 8, and pursuant to Sections 8(a) and 8.2 of the Act.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $35,600.00. 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 the Circuit Court.

January 22, 2024

CAH/pm
O: 1/11/24
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	18WC024449
Case Name	Chris Newberry v. Spee Dee Delivery Service, Inc.
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	9
Decision Issued By	Adam Hinrichs, Arbitrator

Petitioner Attorney	Matthew Brewer
Respondent Attorney	Paul Berard

DATE FILED: 6/13/2023

THE INTEREST RATE FOR THE WEEK OF JUNE 13, 2023 5.15%

/s/Adam Hinrichs, Arbitrator

Signature

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

Chris Newberry
Employee/Petitioner

v.

Spee Dee Delivery Service, Inc.
Employer/Respondent

Case # **18** WC **024449**

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 **Adam Hinrichs**, Arbitrator of the Commission, in the city of **Bloomington**, on **April 28, 2023**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **March 20, 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 $38,844.40; the average weekly wage was $747.01.

On the date of accident, Petitioner was **27** years of age, ***married*** with **2** dependent children.

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

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

Respondent shall be given a credit of $**0.00** 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** under Section 8(j) of the Act.

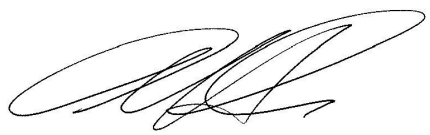
ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $448.21/week for 40 weeks, because the injuries caused the 8% loss of use to Petitioner's body as a whole, as provided in Section 8(d)2 of the Act.

The Arbitrator orders the Respondent to pay all reasonable and necessary medical services from the date of accident through October 31, 2018, as set forth in Petitioner's exhibits, pursuant to the medical fee schedule, and as provided in Section 8(a) and 8.2 of the Act. Respondent shall make this payment directly to Petitioner's attorney in accordance with Section 9080.20 of the Rules Governing Practice before the IWCC.

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

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



Signature of Arbitrator

JUNE 13, 2023

FINDINGS OF FACT

Petitioner testified he was employed by Respondent on March 20, 2018, as a mechanic, and had held that position for nine years. (Tr. 11:9-19). He testified that his job required lifting, bending, twisting, and replacing parts anything that dealt with a vehicle's mechanical side. (Tr. 12:4-6). He testified he would work on vehicles ranging from a car to tractor trailer. (Tr. 12:9-11).

Petitioner testified that on March 20, 2018, he was working on a semi-truck, doing a full maintenance work upon the semi, and replacing eight drive tires weighing between 100 and 140 pounds each. (Tr. 12:20; 13:1-2). He testified that upon finishing and completing the job he felt he had done something, like an exercise strain, but did not think anything of it until after he went home. (Tr. 13:9-13). He began to notice tightness in his back from his shoulders down to his hips and thought that he might have pulled a muscle. (Tr. 14:6-12). Petitioner notified his employer and was sent to OSF Occupational Health. (Tr. 14:13-14; Tr. 15:17-19).

On March 21, 2018, Petitioner presented to Dr. Mary Yee-Chow at OSF St. Joseph Medical Center. (PX 2, p. 25-29) He reported developing low back pain at work the day prior while removing and replacing eight semi tires. (PX 2, p. 25). Dr. Yee-Chow diagnosed a back strain. (PX 2, p. 27). Dr. Yee-Chow did not find that Petitioner required additional workup and released him back to full-duty work. (PX 2, p. 27).

On April 16, 2018, Petitioner began chiropractic treatment with John Zozzaro, DC, for lower back, mid back, upper back and neck pain. (PX 3, p. 1, 6-8). Petitioner rated his pain as a 3 out of 10. (PX 3, p. 6). Dr. Zozzaro recommended five weeks of chiropractic treatment. (PX 3, p. 1).

Petitioner continued to follow up with Dr. Yee-Chow in April and May 2018. (PX 2, p. 4-24). On April 2, 2018, Petitioner reported his back was feeling better. (PX 2, p. 20). At his April 24, 2018, follow up with Dr. Yee-Chow, Petitioner was rating his back pain as a 2/10. (PX 2, p. 9).

Petitioner continued to undergo chiropractic treatment with Dr. Zozzaro for back pain from April 18, 2018, through May 7, 2018. (PX 3, p. 9-31). At each of these treatments, Petitioner rated his back pain as a 3 out of 10. (PX 3, p. 9-31). On May 7, 2018, Dr. Zozzaro reported that Petitioner was 80% improved, was not quite ready to return to work full duty, still had pain with active and passive lumbar extension, and required 8 additional treatments over the next 4 weeks. In four weeks, with the recommended treatment, Dr. Zozzaro reported that Petitioner would be able to return to work full duty.

On May 11, 2018, Petitioner followed up with Dr. Yee- Chow, and rated his pain as a 1-2/10. Dr. Yee-Chow put further chiropractic and physical therapy appointments on hold as Petitioner had limited improvement, referred Petitioner to an orthopedic back specialist, and released him to return to work with a 35-pound lift/push/pull restriction. (PX 2, p. 4-6).

On June 15, 2018, Petitioner began treating with Dr. Christopher Rink, a physical medicine and rehabilitation physician, for predominantly low back pain. (PX 4, p. 4-7). Petitioner rated his back pain as a 3/10. (PX 4, p. 4). Dr. Rink diagnosed persistent low back pain with suspicion of facet joint/posterior element involvement. (PX 4, p. 6). Dr. Rink recommended a lumbar spine MRI. (PX 4, p. 6).

Petitioner underwent a lumbar spine MRI on July 3, 2018. (PX 5, p. 10). The radiologist's impression was low-grade degenerative changes in the lower lumbar spine. (PX 5, p. 10).

On July 9, 2018, Petitioner sought follow up care with Dr. Rink to discuss his recent MRI. (PX 4, p. 7-8). Dr. Rink stated that, in general, "it looks really good" and "overall the MRI looks very good." (PX 4, p. 7). Dr. Rink opined that Petitioner's "discs look excellent" and he has very good and symmetrical hydration of his

discs. (PX 4, p. 7). Dr. Rink recommended consideration of either facet injection or medial branch blocks. (PX 4, p. 8).

On July 13, 2018, Dr. Jesse Butler performed a Section 12 exam at Respondent's request. Dr. Butler interviewed the Petitioner, performed a physical exam, and reviewed medical records and objective tests. Petitioner reported injuring his low back on March 20, 2018, while moving eight semi tires. Petitioner denied any radicular pain complaints in his lower extremities. Petitioner indicated he was working with restrictions and nearing a release to full duty. (RX 1, p. 1)

Dr. Butler diagnosed a resolved lumbar strain that was causally related to Petitioner's March 20, 2018, work injury. Dr. Butler stated Petitioner could work without restrictions and would be at MMI by July 20, 2018. Dr. Butler opined that Petitioner required no further medical treatment, but that all medical treatment to date had been reasonable, necessary and related to his work injury. (RX 1, p. 4).

On August 9, 2018, Petitioner followed with Dr. Rink, who found his presentation more consistent with facet joint involvement. (Ex. 4, p. 8-10). Dr. Rink recommended L4-5 facet joint injections and L4 and L5 medial branch blocks. (Ex. 4, p. 9).

Dr. Rink performed bilateral lumbar facet joint injections at L4-5 on August 27, 2018. (Ex. 4, p. 9-12).

Petitioner last saw Dr. Rink on October 8, 2018. (Ex. 4, p. 12-15). Petitioner stated he did not receive much relief from his injections. (Ex. 4, p. 12). Dr. Rink's impression was suspected facet mediated chronic back pain, and recommended medial branch blocks, and if those failed, a radiofrequency ablation. (Ex. 4, p. 14). Petitioner testified that Dr. Rink recommended a radiofrequency ablation, but he was not interested in a "band-aid" given the pain he felt after the facet join injections. (Tr. 23-24: 14-2)

On October 16, 2018, Petitioner began another round of chiropractic treatment, this time with Jeffrey Dickhut, DC. Dr. Dickhut's assessment was symptoms related to lumbar radiculitis, lumbar discopathy IVD displacement, deconditioning syndrome, muscle spasms and restricted motion in the lumbar spine. Dr. Dickhut performed chiropractic manipulations. (PX 6, p. 58-64).

Petitioner testified that he obtained a new job at Nord Outdoor Power working on lawnmowers beginning in January 2019. (Tr. 30:5-18). He was continuing to undergo chiropractic treatment at this time. (Tr. 39:19-20; 40:1). Petitioner agreed that his chiropractic records indicated that he had increased pain complaints after starting his new job at Nord Outdoor Power. (Tr. 40:6-9). Petitioner testified that his job at Nord Outdoor Power required bending and other necessary movements of a mechanic. (Tr. 40:13-19).

Petitioner underwent 65 chiropractic treatments with Dr. Dickhut between October 17, 2018, and September 6, 2019. (PX 6, p. 65-320).

On May 29, 2019, Petitioner presented to Dr. Craig Carmichael at McLean County Orthopedics, on referral from Dr. Dickhut. Petitioner gave a consistent history of a work accident, complained of pain at the lumbosacral junction radiating the back of his thigh that only alleviates by changing positions. Petitioner underwent an EMG that day that Dr. Carmichael reported was normal, and Petitioner was referred back to Dr. Dickhut.

Petitioner underwent an additional five chiropractic treatments with Dr. Dickhut between September 16, 2019, and September 28, 2020. (PX 6, p. 324-335). Petitioner's Medical Bill Exhibit 8 does not include charges for Petitioner's treatments between September 16, 2019, and July 17, 2020, but does include his charges for his September 28, 2020, treatment. (PX 8; 24-43).

Petitioner testified he was 27 years old at the time of his accident and had never had any back problems. (Tr. 14:17-20). He testified he had been working full duty as a mechanic for nine years prior to his accident. (Tr. 15:8-14).

Testimony of Dr. Dickhut

Dr. Jeffrey Dickhut testified by evidence deposition on October 1, 2020. (PX 9). He received his Doctor of Chiropractic from Palmer College of Chiropractic in 2002. (PX 9, p. 6:12-22).

Dr. Dickhut testified that he first saw Petitioner on October 16, 2018 for low back pain. (PX 9, 9:21-23; 10:1-3; 11:13-14). Dr. Dickhut testified that he reviewed Petitioner's MRI films and interpreted them showing protruding discs at L4-5. (PX 9, p. 14:22-23). Dr. Dickhut testified Petitioner's MRI shows the disc sticking into the intervertebral foramen of L4-5 and L5-S1, it also shows a central protrusion of the L4 over or out into the L4 disc between L4 and L5. (PX 9, p. 77:17-20).

Dr. Dickhut testified that he diagnosed Petitioner with lumbar discopathy with lumbar radiculitis, deconditioning syndrome or muscle weakness, muscle spasms and restricted motion in his lumbar spine. (PX 9, p. 17:2-9). Dr. Dickhut testified he recommended DRX treatments, physical therapy, ultrasound, muscle stimulation and ice, decompressive treatment and Class IV laser to reduce pain and inflammation. (PX 9, p. 17:12-22).

Dr. Dickhut testified that Petitioner reported feeling like he was going backwards in January 2019. (PX 9, p. 106:20-23; 107:1).

Dr. Dickhut testified that he placed Petitioner at MMI on September 6, 2019. (PX 9, p. 60:20-23). Dr. Dickhut testified that he believed all of the treatment that he rendered to Petitioner was reasonable and necessary. (PX 9, p. 65:17-21).

Dr. Dickhut acknowledged that the ODG Guidelines only recommend up to 18 chiropractic visits for a diagnosis of low back strain. (PX 9, p. 103:9-21). Dr. Dickhut, however, testified that all 65 of his visits were reasonable and necessary based on his diagnosis (PX 9, p. 104:18-23). He testified that the ODG Guidelines are not supposed to be used for a cookie cutter treatment planning device. (PX 9, p. 105:1-15).

Dr. Dickhut testified he believes the ODG Guidelines state that the treating physician should have the majority of the input on how the patient responds. (PX 9, p. 105:12-15). Dr. Dickhut did not specifically address what circumstances in Petitioner's case necessitated an additional 48 visits above the 18 recommended by the ODG. (PX 9, p. 105:4-15).

Testimony of Dr. Butler

Dr. Jesse Butler testified by evidence deposition on December 11, 2020. (RX 2). Dr. Butler is a board-certified spine surgeon. (RX 2, p. 5:2-15). Dr. Butler testified he performed a physical examination of Petitioner that "was entirely normal." (RX 2, p. 11:9-12). Dr. Butler testified that Petitioner sustained a lumbar strain. (RX 2, p. 11:19). Dr. Butler testified that Petitioner's MRI was "completely normal" with no degenerative disc disease of any significance. (RX 2, p. 12:6-10)

Dr. Butler testified that Petitioner was at MMI without restrictions by July 20, 2018. (RX 2, p. 14:4-9). Dr. Butler testified Petitioner did not require any additional medical treatment related to his work accident at the time of his exam. (RX 2, p. 13-12-13).

Dr. Butler testified he did not believe Petitioner's chiropractic treatment with Dr. Dickhut was necessary because it began 7 months after his injury and when Petitioner had already developed improvement with only 1-2/10 pain. (RX 2, p. 15:17-24; 16:1-11). Dr. Butler testified he could not think of any justification for the amount of chiropractic treatment Dr. Dickhut performed. (RX 2, p. 11-20).

Testimony of Dr. Wang

Dr. Timothy Wang testified on November 11, 2022. (PX 11). Dr. Wang testified he has been a practicing chiropractor since 2013. (PX 11, p. 5:13-20). He also performs peer reviews which accounts for less than five percent of his practice. (PX 11, p. 5:23-24; 5:1-6).

Dr. Wang testified that he performed a peer review of Dr. Dickhut's chiropractic treatment of Petitioner. (PX 11, p. 7:21-24). He testified he reviewed 173 pages of medical and administrative records. (PX 11, p. 8:14-20).

Dr. Wang testified that that Dr. Dickhut's treatment was excessive because he was offering seven different services at one time. (PX 11, p. 12:3-15). Dr. Wang testified that Dr. Dickhut did not include any valid and reliable outcome assessment measures to demonstrate Petitioner's improvement with his treatment and based his treatment on Petitioner's subjective complaints. (PX 11, p. 16:14-22).

Testimony of Dr. Meder

Dr. David Meder testified on November 14, 2022. (PX 10). Dr. Meder testified he is a part-time practicing chiropractor who also performed utilization reviews. (PX 10, p. 5:12-20).

Dr. Meder testified he performed a peer review of Dr. Dickhut's chiropractic treatment of Petitioner. (PX 10, p. 6:13-24; 7:1-9). Dr. Meder testified that Dr. Dickhut's records and utilization review appeal did not include sufficient information with objective findings to certify his treatment. (PX 10, p. 8:1-19). Dr. Dickhut testified he non-certified Dr. Dickhut's treatment after he was unable to complete a peer-to-peer call with him. (PX 10, p. 8:13-24).

CONCLUSIONS OF LAW

With respect to Issue (F)? Is Petitioner's current condition of ill-being causally related to the injury? The Arbitrator finds as follows:

Respondent's Section 12 examiner, Dr. Butler, opined that Petitioner sustained a lumbar strain related to his work-related accident of March 20, 2018. Petitioner's initial treating physician, Dr. Mary Yee-Chow agreed with this assessment. In May 2018, Petitioner's initial treating chiropractor, Dr. Zozzaro, found Petitioner 80% improved from his spine injury with a few weeks of chiropractic care, and would require only 8 additional chiropractic treatments to return to work full duty as a mechanic. Dr. Butler opined Petitioner reached MMI on July 20, 2018 and required no further medical care.

Petitioner's treating orthopedic back specialist, Dr. Rink, disagreed with Dr. Butler, and diagnosed persistent low back pain with suspicion of facet joint/posterior element involvement. Dr. Rink ordered a lumbar spine MRI, which both he and Dr. Butler agreed looked very good. However, given Petitioner's pain complaints, Dr. Rink recommended L4-5 facet joint injections and L4 and L5 medial branch blocks. Dr. Rink performed the L4-5 facet joint injections, which Petitioner reported were not helpful. Petitioner testified that Dr. Rink recommended a radiofrequency ablation ("RFA"), but Petitioner was not interested and discontinued care with Dr. Rink.

Petitioner instead opted to return for additional chiropractic care with Dr. Dickhut in October 2018. Petitioner testified that his chiropractic records indicate he had increased pain complaints after starting his new job at Nord Outdoor Power in January 2019. Dr. Dickhut's testimony confirmed that Petitioner reported he was regressing in January 2019. The records and testimony support Petitioner's condition worsening after he obtained subsequent employment in January 2019.

Based on the chain of events, the treating records of Drs. Yee- Chow, Zozzaro, Rink and Dickhut, as well as the opinion of Dr. Butler, the Arbitrator finds that Petitioner has proven that his current condition of ill-being in his low back is causally related to his work accident.

With respect to Issue (J): Were the medical services that were provided to Petitioner reasonably and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services? The Arbitrator finds as follows:

Incorporating the above, the parties agree that all medical services provided prior to Dr. Butler's exam were reasonable and necessary. In addition to those stipulated bills, the Arbitrator finds that the treatment recommendations of Petitioner's treating physician, Dr. Rink, were reasonable, necessary, and related to Petitioner's undisputed work injury.

Moreover, in relation to the other disputed medical bills following Dr. Butler's Section 12 exam, Dr. Butler opined that Dr. Dickhut's treatment of Petitioner was not reasonable, necessary or related to Petitioner's work accident. Dr Wang opined that some of Dr. Dickhut's treatment was reasonable, while much of it was excessive. Dr. Zozzaro opined that Petitioner required 8 additional chiropractic treatments to reach MMI for his work-related injury. Dr. Rink also recommended further care, in the form of an RFA, to treat the Petitioner's complaints in October 2018, but Petitioner did not wish to pursue that course of care. Dr. Dickhut opined that all of his chiropractic treatment, totaling $32,773.57, was reasonable, necessary and related to Petitioner's work injury.

Given the totality of the evidence, the Arbitrator finds the medical services provided to Petitioner through October 31, 2018, which includes all of Dr. Rink's care, as well as the care provided by Dr. Dickhut over the course of 8 visits, to be reasonable and necessary.

The Arbitrator orders the Respondent to pay all reasonable and necessary medical services from the date of accident through October 31, 2018, as set forth in Petitioner's exhibits, pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act.

With respect to Issue (L): The nature and extent of the injury. The Arbitrator finds as follows:

Pursuant to §8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability for accidental injuries occurring on or after September 1, 2011. After reviewing the five factors enumerated in Section 8.1b, 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 gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the Arbitrator notes that Petitioner was employed as a mechanic at the time of his accident and was able to continue working as a mechanic with no lost time following his work accident. The Arbitrator gives some weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 27-years-old at the time of the accident. The Arbitrator gives more weight to this factor

With regard to subsection (iv) of §8.1b(b), the Arbitrator notes that Petitioner is earning significantly more money now than on the date of accident, as he is now in a managerial role. The Arbitrator gives some weight to this factor.

With regard to subsection (v) of § 8.1b(b), Petitioner denied having any prior low back issues before this accident and testified credibly that his low back condition has continued to bother him and significantly effect and impact his life since the accident up through the date of trial. The Petitioner's testimony is consistent with the medical records. 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 of 8% loss of use to his body as a whole, pursuant to §8(d)2 of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC009787
Case Name	Joseph Bozarth v. The American Coal Company
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0033
Number of Pages of Decision	13
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Kirk Caponi
Respondent Attorney	Kenneth Werts, Julie Webb

DATE FILED: 1/22/2024

/s/ Deborah Simpson, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Joseph Bozarth,
Petitioner,

vs. NO: 19 WC 9787

The 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, disablement 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 June 21, 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 $29,800.00. 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.

January 22, 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	19WC009787
Case Name	BOZARTH, JOSEPH v. THE AMERICAN COAL COMPANY
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	11
Decision Issued By	Linda Cantrell, Arbitrator

Petitioner Attorney	Kirk Caponi
Respondent Attorney	Kenneth Werts

DATE FILED: 6/21/2022

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

/s/Linda Cantrell, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JOSEPH BOZARTH
Employee/Petitioner

v.

THE AMERICAN COAL COMPANY
Employer/Respondent

Case # **19-WC-009787**

Consolidated cases: _____

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

DISPUTED ISSUES

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

FINDINGS

On **08/17/17**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$68,521.96**; the average weekly wage was $**1,317.73.**

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

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

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

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

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

ORDER

Respondent shall pay Petitioner the sum of $**790.64 (Max. rate)**/week for a period of **37.5** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused permanent partial disability to the extent of **7.5% loss of Petitioner's body as a whole.**

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

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

JUNE 21, 2022

Arbitrator Linda J. Cantrell

STATE OF ILLINOIS)
) SS
COUNTY OF WILLIAMSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JOSEPH BOZARTH,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 19-WC-009787
	)	
THE AMERICAN COAL COMPANY,	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Herrin on March 25, 2022 on all issues. An Application for Adjustment of Claim was filed on April 1, 2019, wherein Petitioner alleges he sustained an occupational disease of his lungs, heart, pulmonary system, and respiratory tracts as the result of inhaling coal mine dust, including, but not limited to, coal dust, rock dust, fumes, and vapors for a period in excess of 35 years. The parties made an oral motion at arbitration to amend the date of last exposure to August 17, 2017. The issues in dispute are disease, causal connection, the nature and extent of Petitioner's injuries, and Sections 1(d)-(f) of the Occupational Diseases Act. All other issues have been stipulated.

TESTIMONY

Petitioner is 64 years old, married, with no dependent children. He graduated from high school in West Frankfort, Illinois, and received an Associates Degree in Mining Tech from Rend Lake College. During the course of his mining career, in addition to coal dust, he was regularly exposed to and breathed silica dust and diesel fumes. He worked 35 years in the mining industry all of which were underground.

Petitioner last worked in the mines on August 17, 2017. On that day he worked for Respondent at its New Future Mine as a shuttle car operator. He was exposed to coal dust on that day and was laid off. Petitioner testified he has had no post mining employment. Petitioner began his mining career at Old Ben Coal Company in 1979 as a trainee/red hat. He built stoppings to support the roof of the mine and shoveled the belt line. After his three-month training period, Petitioner became a shuttle car operator and continued that position until he left that mine in 1993. A shuttle car operator pulls up behind the continuous miner machine where the coal is cut from the face. The continuous miner then dumps the coal into the shuttle car and takes it to the belts to be unloaded. Petitioner continued this process the entire day and stated it was rather dusty because he is situated where the coal is cut and dumped into the shuttle cars. Petitioner was

also exposed to quite a bit of dust when the shuttle car dumps the coal onto the belts. Petitioner left Old Ben in 1993 due to mine closure.

Petitioner worked at a boat factory for a couple years and Maytag making washing machines for one year. Petitioner also performed general construction jobs for a friend. In 2000, Petitioner returned to mining for American Coal and worked there until the mine closed in 2017. Petitioner was hired as a shuttle car operator and testified that the duties and dust exposures were similar to the previous mine. Petitioner was a mine examiner the last five years of his mining career. His job duties included inspecting the mine for hazardous conditions.

Petitioner first started noticing breathing problems not long after he started working at Old Ben. He got winded easy and coughed up mucous with coal dust. From the time he noticed breathing difficulties until the time he left the mine he felt his breathing difficulties stayed about the same. Since leaving the mine until the time of trial, his breathing has gotten better. He does not currently cough up mucous with coal dust. Petitioner uses an inhaler and his breathing affects his everyday living. He has to take breaks with strenuous activities. Petitioner testified he can walk a quarter of a mile on level ground at a normal pace before becoming winded. He can climb two flights of stairs before having to stop and rest.

Petitioner testified that his treating physician Dr. Salem was aware that he worked in a coal mine and he spoke to him about his breathing problems. Petitioner is a never smoker. Other than breathing difficulties, Petitioner has diabetes which is controlled with a pill.

MEDICAL HISTORY

Petitioner was examined by Dr. Suhail Istanbouly who is board-certified in internal medicine, pulmonary medicine, and sleep medicine. (PX1) Dr. Istanbouly is employed by the Hines VA Hospital in Chicago, Illinois. He comes to Southern Illinois once a month and has a satellite clinic at Marshall Browning Hospital in DuQuoin, Illinois. Hines VA is one of the major VAs in the USA, it is the largest VA in the Midwest, and the main teaching facility for Loyola. Dr. Istanbouly practiced in Southern Illinois and was associated with Southern Illinois Healthcare Hospitals, including Harrisburg, DuQuoin, Marion, and Sparta.

Dr. Istanbouly describes coal worker's pneumoconiosis (CWP) as a tissue reaction in addition to the deposition of coal mine dust in the lungs, commonly called scarring or fibrosis. The macule of CWP or nodule trapped in coal mine dust is surrounded by a fibrosis or scarring with a halo of focal emphysema. That tissue cannot perform the same function as normal healthy lung tissue. He testified that if you have CWP, at the site of each abnormality you would have impairment of the function of the lung, whether it is measurable by pulmonary function testing or not. He testified it is possible to have normal pulmonary function tests but still have injury or disease to the lung. Dr. Istanbouly agreed that it is possible for a person to begin their coal mining career at the top of the range of normal, leave at the bottom of the range of normal, and have a significant loss of lung function but at both times still be within the range of normal. A person can have CWP despite having no complaints of shortness of breath, normal PFTs, normal ABGs, and normal physical examination if it is within the early stages. Dr. Istanbouly testified there is no cure for CWP and it can progress even after the miner leaves the exposure in the

mine. If a miner has CWP that is progressing, there is no medicine or medical treatment to stop the progression. CWP progresses at different rates for different miners and can even progress at different rates at different times for a single miner. Coal mine dust inhalation can result in shortness of breath, chronic cough, emphysema, chronic bronchitis, and chronic asthma. A person can have CWP and still have normal radiographic studies. The gold standard for diagnosing CWP is pathological review rather than radiographic. Petitioner gave a history of coughing off and on for the past few years. The cough is mild to moderate in intensity and it is mostly dry with no significant sputum production of hemoptysis. The cough is aggravated by strenuous activities. He also noticed sometimes postnasal drip may aggravate the cough. Petitioner also gave a history of becoming short of breath by walking a quarter of a mile. Dr. Istanbouly testified that he expects a 62-year-old would be able to walk more than a quarter of a mile before becoming short of breath. The PFT that was performed at Harrisburg Medical Center was within normal range with FEV1-1 2.98 liters, 87% predicted. FVC 3.81 liter, 84% predicted. The ratio of FEV1 to FVC, was 78%. Dr. Istanbouly opined that Petitioner's coal dust inhalation is definitely a significant contributing factor to his chronic respiratory systems.

B-reader, Dr. Henry K. Smith reviewed a PA chest radiograph dated 12/26/18. Dr. Smith found interstitial fibrosis of classification p/p, mid to lower zones involved bilaterally of a profusion 1/0. There is a linear streak density related a small parenchymal band in the lateral left lower lung. Heart size is normal. There is a calcified thoracic aorta. There is an old healed fracture deformity of the lateral right 8th rib. There is a modest mid to lower dorsal spondylosis. Dr. Smith's impression was simple CWP with small opacities, p/p, mid to lower zones involved bilaterally of a profusion 1/0.

Dr. Cristopher Meyer reviewed the PA radiograph dated 12/26/18 at Respondent's request. Dr. Meyer found the test to be diagnostic quality 1. His interpretation was that there was a linear plate atelectasis at the left lung base. The lungs were otherwise clear without small or large opacities. There were atherosclerotic calcifications in the thoracic aorta and a healed posterior right 8th rib facture with some degenerative change of the thoracic spine. His impression was there were no findings of CWP. (RX1) Dr. Meyer agreed that the true gold standard for determining the existence of lung disease is pathologic review rather than radiological review. He agreed the macule of CWP is a permanent abnormality. Dr. Meyer testified that to his knowledge, once there is CWP that is progressing, there is no medicine to stop or reverse the progression. Removing the worker from the exposure is the best response. He testified it is true that CWP can be considered a chronic progressive disease in some coal miners. If a person has CWP at any time in their life, inasmuch as the only thing that causes CWP is coal mining exposure, it would be true that they probably had CWP at some level when they left the coal mine. Dr. Meyer agreed that CWP would appear first radiographically or pathologically and then later as it became more significant it would begin to manifest itself in pulmonary function abnormalities or clinical abnormalities. Dr. Meyer testified that it is probably true that CWP could develop at any time during a coal miner's career, including in the last month or so; in fact, even show up radiographically a month or so after leaving the coal mine. Dr. Meyer testified it is possible for a miner to work 30-40 years in a coal mine, develop radiographically significant CWP but not have it manifest itself until the last year, or even the first year after they leave the coal mine.

Dr. James Lockey performed a records review on 5/6/20 at Respondent's request. (RX2) Dr. Lockey testified that Petitioner does not demonstrate any objective finds of CWP or any objective evidence of pulmonary impairment related to his past coal dust exposure. Dr. Lockey agreed with the American Thoracic Society that stated if someone is already diagnosed with CWP, there is no safe level of exposure. A miner can have category 1 CWP with a normal diffusion capacity. Dr. Lockey agreed with the definition of CWP being a tissue reaction to coal mine dust that is trapped in the lungs, known as scarring or fibrosis. Silica dust exposure can be more damaging to the lungs than pure coal dust. Dr. Lockey agreed that a miner can begin their mining career and have a loss of reduction of lung function but still be within the range of normal when leaving the mine. A person can have category 1 simple CWP and have normal spirometry, normal pulmonary function, normal blood gases, normal physical exam of the chest, and maybe even no complaints.

Medical records of Johnston City Community Health were admitted into evidence. (RX3). An office note dated 1/4/94 indicates chest congestion for two weeks, headaches, and difficulty breathing. (RX3, p. 54) A letter dated 2/3/2003, indicates Petitioner developed sinusitis last week and he was responding well to Levaquin and Allegra D. (RX3, p. 94)

Medical records of Dr. Anad Salem were admitted into evidence. (RX4). An office note dated 1/11/2014 indicates Petitioner complained of cough, congestion, and sinus pressure. (RX4, p. 461) Petitioner was assessed with sinusitis, chest congestion, and cold for one week. It was noted that Petitioner was an examiner in a coal mine and had been examining the entryways. Petitioner reported the wind from the ventilation fan was ferocious. (RX4, p. 465)

CONCLUSIONS OF LAW

Issue (C): Did an occupational disease occur that arose out of and in the course of Petitioner's employment with Respondent?

Issue (F): Is Petitioner's current condition of ill-being casually related to his occupational exposure?

The Arbitrator finds that Petitioner was last exposed to an occupational disease that arose out of and in the course of his employment with Respondent. Section 1(d) of the Illinois Workers' Compensation Diseases Act states, in pertinent part:

> "A disease shall be deemed to arise out of the employment if there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the occupational disease. The disease needs not to have been foreseen or expected but after its contraction it must appear to have had its origin or aggravation in a risk connected with the employment and to have flowed from that source as a rational consequence. An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when, for any length of time however short, he or she is employed in an occupation or process in which the hazard of the disease exists...If a miner who is suffering or suffered from pneumoconiosis was employed for 10 years or more in one or more coal mines there shall,

effective July 1, 1973 be a rebuttable presumption that his or her pneumoconiosis arose out of such employment." 820 ILCS 310/1(d)

The Arbitrator found Petitioner to be a credible witness. Petitioner worked as a coal miner for 35 years, all of which were underground. He was laid off from the coal mines on 8/17/17 which was the date of his last exposure. He is a lifelong never smoker. In addition to coal dust, Petitioner was regularly exposed to silica dust, roof bolting glue fumes, and diesel fumes. Petitioner first noticed his breathing problems in the mine while at Old Ben Coal. He testified he got winded easily and coughed up coal dust mucous daily. His breathing difficulty remained the same while employed and has slightly improved since he left the mine. He no longer coughs up mucous. He has tightness in his chest and gets winded and takes breaks while performing yard and housework. Petitioner testified he can walk a quarter of a mile on level ground or climb about two flights of stairs. He currently uses a prescription inhaler.

The Arbitrator finds the opinions of Dr. Istanbouly to be persuasive. Dr. Istanbouly performed a complete black lung examination. His patient history included a detailed description of Petitioner's occupational history, work requirements, and perceived pulmonary health. Such history is required for a complete pulmonary examination by the AMA Guides, 6th Edition. Dr. Istanbouly is a highly-credentialed pulmonologist with a long history of serving miners from Southern Illinois.

Dr. Istanbouly diagnosed Petitioner with CWP, as did b-reader/radiologist Dr. Smith. Dr. Istanbouly is not a b-reader; however, he testified that b-reading is not taught in medical schools, and is not used in treating patients with CWP. He does not base his diagnoses of CWP solely on the chest x-ray reports or b-readings, but takes all parts of his examination into account, including the patient history, physical examination, and testing.

Dr. Lockey did not examine Petitioner. His knowledge of Petitioner was limited to performing a b-reading and reviewing medical records. He did not believe that Petitioner's x-ray was consistent with CWP; however, Dr. Lockey noted numerous diagnoses of hay fever, sinusitis, rhinitis, allergic rhinitis, chronic rhinitis, bronchitis, and shift work sleep disorder. He also discovered multiple medications used for the treatment of Petitioner's pulmonary diseases, including over-the-counter Robitussin, Sudafed, and Motrin, as well as prescription medications Allegra D, Levaquin, Flonase, Albuterol, Prednisone, and Tamiflu. Earlier records beginning in January 1994 contained only over-the-counter medications. By May 1999, Petitioner began taking prescription medications.

The Arbitrator notes that Petitioner's physicians discussed his coal mining work in relation to his pulmonary problems. On 2/20/08, the records note Petitioner was being seen in follow up for his recent bronchitis. His condition was improved with persistent raspy cough. The doctor noted Petitioner worked in an underground coal mine and was exposed to a good deal of dust. He opined that the dust irritation was making Petitioner's bronchitis last longer. Petitioner was prescribed Prednisone. On 1/29/10, the records include a chief complaint of chest congestion and Albuterol and Prednisone were prescribed. It was noted that Petitioner worked as an examiner in a coal mine and had been examining entryways. Petitioner described the wind from the ventilation fan was ferocious. Dr. Lockey noted that on 8/19/19 Petitioner reported mild to

moderate non-productive cough the past few years that was aggravated by strenuous activities and postnasal drainage. Petitioner reported shortness of breath with walking a quarter mile. Dr. Lockey's opinion that Petitioner has no objective evidence of pulmonary impairment or CWP is true only if the inquiry is limited to findings on pulmonary function testing. However, cough, rales, rhonchi, sinus pressure, prolonged expiratory phase, wheezing, fatigue, difficulty breathing, and chest congestion are not normal states, and they all indicate an impairment in the function of the respiratory system. In addition, the symptoms which define hay fever, sinusitis, rhinitis, allergic rhinitis, chronic rhinitis, and bronchitis are not normal states and represent impairments in the function of the airways and pulmonary system.

Despite Dr. Lockey's opinion there is no evidence of a permanent aggravation of Petitioner's respiratory system, the evidence suggests otherwise. Petitioner first reported symptoms in 1991 due to severe hay fever. His symptomatology remained the same throughout his career. The records show that Petitioner moved from over-the-counter treatment to a number of prescription medications. Petitioner's general diagnosis of hay fever moved to a number of more specific diagnoses, including chronic rhinitis. In 1994, Petitioner reported difficulty breathing and physical examination revealed abnormalities such as rales and rhonchi. In 2003, a CT scan of Petitioners' sinuses revealed a severe infection with polyps or small growths. The records also refer to allergy symptoms and his symptoms were multifactorial to include workplace exposures. Petitioner's pulmonary problems were not limited to inhalational injuries as Dr. Lockey noted Petitioner's shift work sleep disorder.

Based on the above evidence, the Arbitrator concludes that Petitioner was exposed to an occupational disease that arose out of and in the course of his employment with Respondent. The Arbitrator further finds that Petitioner's current condition of ill-being is causally connected to his work exposure.

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

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

(i) **Level of Impairment**: Petitioner's pulmonary function testing was within the range of normal. Pursuant to the medical evidence and testimony, such results do not rule out the diagnoses of CWP or its related symptoms. The Arbitrator gives some weight to this factor.

(ii) **Occupation**: Petitioner retired from the coal mines at the age of 60 when he was laid off due to mine closure. He did not obtain subsequent employment. The Arbitrator places some weight on this factor.

(iii) **Age**: Petitioner was 60 years old at the time of his last exposure. He is currently retired. The Arbitrator places some weight on this factor.

(iv) **Earning Capacity**: Petitioner was laid off by Respondent at the age of 60 and received unemployment benefits. He has not obtained subsequent employment. The Arbitrator places some weight on this factor.

(v) **Disability**: The medical testimony supports there is no cure for coal workers' pneumoconiosis and the condition is chronic. Petitioner's medical records reflect a history of hay fever, sinusitis, rhinitis, allergic rhinitis, chronic rhinitis, bronchitis, and shift work sleep disorder. Petitioner was treated with multiple medications used for the treatment of pulmonary diseases, including over-the-counter Robitussin, Sudafed, and Motrin, as well as prescription medications Allegra D, Levaquin, Flonase, Albuterol, Prednisone, and Tamiflu.

Petitioner testified he first noticed breathing problems not long after he started working at Old Ben. He got winded easy and coughed up mucous with coal dust. From the time he noticed breathing difficulties until the time he left the mine he felt his breathing difficulties stayed about the same. Since leaving the mine until the time of trial, his breathing has gotten better. He does not currently cough up mucous with coal dust. Petitioner uses an inhaler and his breathing affects his everyday living. He has to take breaks with strenuous activities. Petitioner testified he can walk a quarter of a mile on level ground at a normal pace before becoming winded. He can climb two flights of stairs before having to stop and rest. The Arbitrator places greater weight on this factor.

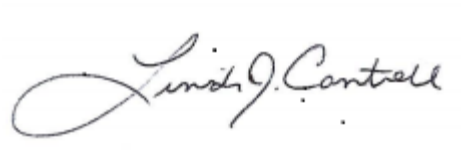
Based upon the foregoing evidence and factors, the Arbitrator orders Respondent to pay Petitioner the sum of $**790.64**/week for a period of **37.5 weeks**, as provided in Section 8(d)2 of the Act, because the injuries sustained caused **7.5% loss of the body as a whole.**

Issue (O): Sections 1(d)-(f) of the Occupational Diseases Act.

Section 1(e) of the Occupational Diseases Act states, in pertinent part, "{d}isablement" means an impairment or partial impairment, temporary or permanent, in the function of the body or any of the members of the body." 820 ILCS 310/1(e). The Arbitrator finds Petitioner has satisfied the requirements of Section (e) of the Act. Petitioner testified to increased respiratory difficulty with activities of daily living, like walking and climbing stairs. Dr. Istanbouly testified that the inhalation of coal dust that causes irritation and inflammation will ultimately end up forming tiny scars. Dr. Lockey agreed with the American Thoracic Society that stated if someone is already diagnosed with CWP, there is no safe level of exposure. A miner can have category 1 CWP with a normal diffusion capacity. He agreed that silica dust exposure can be more damaging to the lungs than pure coal dust. Dr. Lockey agreed that a miner can begin their mining career and have a loss of reduction of lung function but still be within the range of normal when leaving the mine. A person can have category 1 simple CWP and have normal spirometry, normal pulmonary function, normal blood gases, normal physical exam of the chest, and maybe even no complaints.

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 8/17/17. Petitioner has not worked in the coal mines and has not had any other exposure to coal mine dust since that date. The Arbitrator finds that Petitioner has proven his diseases and resultant disablement to be timely. The treatment records note Petitioner had respiratory symptoms while he was still working as a coal miner. The testimony supports the position that if a miner suffers from CWP at any time in his life, it is more likely than not that it would have been in existence at some level when he ended his daily occupational exposure to coal mine dust. In addition, the x-ray read by Dr. Smith and Dr. Istanbouly was taken prior to the expiration of Petitioner's 1(f) period.

Based on the totality of the evidence, and the factual findings above, the Arbitrator finds that Petitioner met the requirements of Sections 1(d)-(f) of the Occupational Diseases Act.



Arbitrator Linda J. Cantrell _____ DATE _____

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC011046
Case Name	Adan Vazquez v. North Pond Restaurant Park Restaurants, LLC
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0034
Number of Pages of Decision	15
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Al Koritsaris
Respondent Attorney	Kevin Luther

DATE FILED: 1/22/2024

/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

ADAN VAZQUEZ,

Petitioner,

vs. NO: 22 WC 11046

NORTH POND RESTAURANT PARK
RESTAURANT, LLC,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, the reasonableness and necessity of the medical treatment and expenses, prospective medical treatment, temporary total disability, permanent partial disability, and whether the Arbitrator abused her discretion in denying Respondent's motion to continue the trial and bifurcate the hearing, 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).

Whether to grant a motion for a continuance lies within the sound discretion of the Arbitrator or the Commission, whose decision will not be reversed absent an abuse of that discretion. *Edward Don Co. v. Industrial Comm'n*, 344 Ill. App. 3d 643, 650, 801 N.E.2d 18, 279 Ill. Dec. 726 (2003). The Respondent obtained a Section 12 examination from Dr. Cole. Dr. Cole found Petitioner sustained a traction injury at work and did not recommend surgery at that time. Dr. Cole recommended an evaluation by a physiatrist, which was scheduled for 3 days after the

arbitration hearing. Dr. Shah, Petitioner's treating physician, stated that Petitioner's condition was causally related to the accident and recommended surgical repair of his left shoulder. The need for surgery is the central issue in this case. Given the conflicting medical opinions offered by the parties as to this issue, the decision to deny the motion to continue and the motion to bifurcate the hearing was within the sound discretion of the Arbitrator, which the Commission affirms.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed May 26, 2023, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall authorize and pay for left shoulder arthroscopy, subacromial decompression, distal clavicle excision and biceps tenodesis, possible SLAP repair, debridement versus repair, possible rotator cuff repair versus debridement as recommended by Dr. Shah.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $8,000.00. 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.

January 22, 2024

CAH/tdm
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	22WC011046
Case Name	Adan Vazquez v. North Pond Restaurant Park Restaurants, LLC
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	Crystal Caison, Arbitrator

Petitioner Attorney	Al Koritsaris
Respondent Attorney	Kevin Luther

DATE FILED: 5/26/2023

/s/Crystal Caison, 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
19(b)

Adan Vazquez
Employee/Petitioner

v.

North Pond Restaurant, Park Restaurant LLC
Employer/Respondent

Case # **22** WC **011046**

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 **Crystal L. Caison**, Arbitrator of the Commission, in the city of **Chicago, Illinois**, on **October 28, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **April 16, 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 $**23,034.96**; the average weekly wage was $**442.98**.

On the date of accident, Petitioner was **54** 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 $**5,729.60** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

ORDER

The Arbitrator finds that the Petitioner has met his burden of proving that his current condition of ill-being is causally related to the work accident of April 16, 2022.

The Arbitrator orders the Respondent to pay reasonable and necessary medical services as set forth in Petitioner's Exhibits 3, 5 and 7 for causally related treatment Petitioner underwent, as provided in Sections 8(a) and 8.2 of the Act and more specifically as follows: $1,790.00 to Parkview Orthopedics, $546.66 to RNS Physical Therapy and $3,850.00 to Premier Healthcare Services.

Petitioner is entitled to prospective medical under Section 8(a) of the Act, and therefore, Respondent is responsible for authorizing and paying for same.

Respondent shall pay Petitioner temporary total disability benefits of $320.00/week for 23 1/7 weeks ($7,404.80), commencing May 19, 2022 through October 28, 2022, as provided in Section 8(b) of the Act.

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

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

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

Crystal L. Caison

Signature of Arbitrator

ICArbDec19(b)

May 26, 2023

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Adan Vazquez Petitioner, v. North Pond Restaurant Park Restaurants, LLC. Respondent.	)	Case No. 22WC011046

PROCEDURAL HISTORY

This matter proceeded to hearing on October 28, 2022 before Arbitrator Crystal L. Caison. Issues in dispute include causal connection, medical bills, prospective medical care and TTD benefits. (AX 1).

Prior to the scheduled trial date, Respondent filed a Motion to Continue trial and said motion was denied by the Arbitrator. (RX. 6) On the date of trial, Respondent presented a Motion to Bifurcate Arbitration and said motion was denied by the Arbitrator. (RX.7)

THE ARBITRATOR MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner's Testimony

Adan Vazquez ("Petitioner") was a 54-year-old single male with no dependent children on April 16, 2022. He alleges that he sustained an accidental injury to his left elbow and left shoulder that arose out of and in the course of his employment by Respondent on April 16, 2022.

Petitioner testified that on April 16, 2022, he was employed full time by Respondent as a dishwasher at North Pond Restaurant. (T. 21-24). Petitioner said his job duties as a dishwasher include washing dishes and silverware by hand, washing dishes and silverware using a dishwasher, drying dishes and silverware, cleaning the floors in the area where he works and also taking the trash out to the dumpster when the trash bins are full. *Id*. He testified that the restaurant has different size receptacles used for garbage that range from 13 gallons up to 45 gallons. *Id*. He

testified that he is able to lift and empty the 13-gallon bin by himself. *Id*. He said that emptying the 45-gallon bin requires two employees due to the size and weight of the bin. *Id.*

Petitioner testified that he was injured while attempting to empty a forty-five (45) gallon garbage bin into a dumpster with a co-worker. (T. 25- 26). Petitioner testified that he and the co-worker were attempting to dump the full garbage bin into the dumpster when the co-worker dropped his end of the bin. (T. 26). Petitioner testified that he had his left hand underneath the bin and his right hand on the top of the bin and the whole weight of the bin pulled down his left arm. *Id.* Petitioner testified that he immediately felt pain in his left shoulder. *Id.* He testified that he was able to finish his shift, as he only had 15 minutes remaining on his shift. (T. 28). He testified that he worked his shift the next day. (T. 28-29).

Petitioner testified that he did not seek any medical treatment until April 21, 2022. On that date, he presented to Concentra (employer referral). Concentra referred him to David Garelick, an orthopedic surgeon. (T. 33). Petitioner testified that he did not feel that Concentra was listening to him, so he decided to take a second opinion and went to another doctor, Dr. Shah of Parkview Orthopaedics. (T. 36).

Petitioner testified that Dr. Shah placed him on work restrictions. (T. 38) Petitioner testified that he was on light-duty restrictions from Concentra. *Id.* Petitioner further testified that he did not return to light duty restrictions work because he was in too much pain and did not feel like going to work "honestly". *Id.* On cross-examination, Petitioner confirmed that he did not contact the employer to return for light duty despite being aware that his employer could accommodate the light duty desk work restriction (T. 46).

Petitioner testified that prior to April 16, 2022, he never injured his left shoulder or his left elbow. Petitioner also testified that he has not re-injured his left shoulder or left elbow at any time after April 16, 2022 (T.47).

Medical

On April 21, 2022, Petitioner presented to Concentra for evaluation of his left shoulder. (PX. 6, 38-41). Petitioner was seen by Sophie Nyambal, P.A. Petitioner provided a consistent

history of the injury, his complaints of left shoulder pain as well as radiating pain from his shoulder to his wrist. *Id.* Further, Petitioner reported that he has been unable to use his left arm since the injury. *Id*. Nyambal noted that Petitioner had a sprain of the left shoulder. Petitioner was prescribed medication, placed on light duty restrictions, "no use of left upper extremity" and follow up visit was requested. (PX. 6, 40-41).

On April 26, 2022, Petitioner presented to Concentra for a follow-up appointment complaining of left shoulder pain rated 8/10 and numbness down his arm. (PX. 6, 20). Petitioner underwent a physical examination by Nyambal and a positive drop arm test was noted. (PX. 6, 39). Following the visit, Petitioner was referred to an orthopedic specialist and for an MRI. *Id.*

On April 27, 2022, Petitioner returned to Concentra for an initial consultation with orthopedic surgeon David Garelick, M.D. (PX. 6, 15-16). Upon presentation, Petitioner complained of left shoulder pain, exacerbated by reaching activities as well as left elbow pain. *Id*. On exam, Dr. Garelick noted reduced active and passive range of motion of the left shoulder as well as diminished rotator cuff strength. *Id*. Dr. Garelick noted that he is concerned about the rotator cuff and recommended a left shoulder MRI. *Id*.

On April 28, 2022, Petitioner was seen by David Kang, M.D. (PX. 6, 6-9). Dr. Kang noted that the Petitioner complained of left shoulder pain and left elbow pain, along with numbness down his arm to his wrist. (PX. 6, 7). Dr. Kang ordered an MRI of the left elbow and kept Petitioner on the same light duty restriction with no use of the left arm. (PX. 6, 8-9).

On May 12, 2022, Petitioner underwent an MRI of the left elbow and the left shoulder at MRI of River North. (PX. 1). The MRI of the left elbow revealed subcutaneous edema about the lateral aspect of the elbow, likely acute as well as smooth thinning of the articular cartilage between the radial head and capitellum. (PX. 1, 2). The MRI of the left shoulder revealed an acute interstitial split tear within the subscapularis tendon proximal to the insertion site, large amount of bone marrow edema about the distal clavicle related to post-traumatic osteolysis of the distal clavicle, injury to the posterior superior half of the glenoid labrum and a sprain of the superior and inferior acromioclavicular ligaments. (PX. 1, 1).

On May 19, 2022, Petitioner presented to Nirav Shah, M.D. at the Parkview Orthopedic Group for an initial consultation. (PX. 2, p. 8-10). Petitioner provided a consistent history of the injury and his complaints. *Id*. On exam, Shah noted global weakness of the entire left upper extremity, including infraspinatus, supraspinatus, deltoid and biceps. *Id*. Also noted was that Petitioner had a positive Neer's exam, positive Hawkin's exam, positive O'Brien signs, and weakness with testing of all rotator cuff muscles. *Id*. Dr. Shah noted suspicion of left arm brachial plexopathy, acute from injury at work, biceps tendonitis, SLAP tear, partial thickness rotator cuff tear and AC joint separation. *Id*

Dr. Shah noted that these injuries are causally related to the work injury. *Id.* Dr. Shah recommended that Petitioner begin physical therapy (PT), prescribed medication and a TENS unit, ordered an EMG study and took Petitioner off work. *Id*.

On June 10, 2022, Petitioner began PT at RNS Physical Therapy and attended nine sessions of PT with no relief. (PX. 4).

On June 28, 2022, Petitioner underwent the EMG study at Parkview Orthopedics. (PX. 2, 12-14).

On June 30, 2022, Petitioner returned to Dr. Shah for follow-up, complaining of worsening left shoulder pain and left elbow pain. (PX. 2, 1). Dr. Shah noted reduced active range of motion with pain and weakness with subscapularis testing. *Id*. The Hawkin's and Neer's tests were positive and the Speed and Yergason's signs were also positive. *Id*. Dr. Shah recommended that Petitioner stop PT and recommended an injection into the left elbow. *Id*.

Dr. Shah recommended left shoulder surgery, in the form of left arthroscopy, subacromial decompression, distal clavicle excision, biceps tenodesis, labrum repair vs. debridement and rotator cuff tear vs. debridement. *Id*. Dr. Shah also kept the petitioner off work at this time. (PX. 1, 2).

On July 25, 2022, the Petitioner presented to Brian Cole, M.D. for a Section 12 exam at the request of Respondent (RX. 5, 1). Dr. Cole reviewed all treatment records and testing of the Petitioner's treating history for this accident, including the last note of Dr. Shah dated June 30,

2022. Dr. Cole conducted a physical examination in which he reviewed X-rays as well as the MRI of the left elbow and shoulder. Dr. Cole believed that all of the findings on the MRIs of the left shoulder and the left elbow were chronic in nature, and none of them appeared to be acute/injury related in nature. Dr. Cole's assessment was left upper extremity myofascial pain after apparent traction injury at work, April 17, 2021[*sic*], unresolved.

Dr. Cole suggested an evaluation by a physiatrist (PM&R specialist). He felt the Petitioner was able to work in a desktop position using his left upper extremity. Dr. Cole could not explain the persistent severity and intractable nature of the Petitioner's reported symptoms. Dr. Cole opined that, "I would not recommend surgery at this time given the severe level of his symptoms and the lack of symptoms consistent with a primary orthopedic condition." Dr. Cole further opined that Petitioner was not at MMI and that he is only capable of desk work at this time. Dr. Cole opined that Petitioner incurred a "work-related injury to his left upper extremity that still remains unsolved."

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 observed Petitioner during the hearing and finds him to be a credible witness. Petitioner's testimony at arbitration was consistent with the medical records regarding history of accident, history of complaints and physical findings. He did not appear to be exaggerating his complaints.

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

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

It is unrebutted that prior to the April 16, 2022 work accident, Petitioner did not have any issues with his left shoulder or left elbow and that he was performing full duty work. Petitioner testified that as of October 28, 2022, there have been no improvements in his symptoms and he takes medication for the pain.

Dr. Shah's medical records show that Petitioner exhausted conservative management for his left shoulder with no relief of symptoms. The MRI of the left shoulder revealed an acute interstitial split tear within the subscapularis tendon proximal to the insertion site, large amount of bone marrow edema about the distal clavicle related to post-traumatic osteolysis of the distal

clavicle, injury to the posterior superior half of the glenoid labrum and a sprain of the superior and inferior acromioclavicular ligaments. The Arbitrator notes that the radiologist that interpreted the MRI and Dr. Shah agreed with the objective pathology revealed on the MRI film. Furthermore, the physical examinations performed by both Dr. Garelick and Dr. Shah showed consistent deficit with respect to range of motion. In fact, all the provocative tests, Neer's, Hawkins', Speed's and Yergason's, performed were positive. Dr. Garelick stated in his medical record from April 27, 2022, that "I explained to Petitioner that I am a little concerned about his rotor cuff, which is an important tendon in the shoulder." Further, the Arbitrator finds it significant that the MRI showed an acute tear in one of the rotator cuff muscles, consistent with Dr. Garelick's suspicion.

Dr. Cole concedes that the Petitioner suffered a traction injury to his left arm and shoulder related to the April 16, 2021 [*sic*]work injury. Dr. Cole also believed that Petitioner still required medical treatment for his injuries and is thus not at MMI for his work injury. Dr. Cole's opinion regarding the objective shoulder pathology seen on the MRI conflicts with that of the treater, Dr. Shah, and the interpreting radiologist.

Dr. Cole does not give any specific opinions as to what the MRI shows, but states there are chronic findings on the MRI consistent with the MRI report. In contrast, the radiologist interpreting the MRI report states that there are several acute findings. Further, Dr. Shah's interpretation of the shoulder pathology following his review of the MRI is consistent with the radiologist's interpretation.

Dr. Cole did not perform the essential provocative tests that are integral to a shoulder exam to test for rotator cuff, labrum, or impingement injury. There is no evidence that Dr. Cole performed the Neer's test, the Hawkins' test, the Speeds test or the Yergason test. Conversely, Dr. Shah performed all these tests, which were positive during both of Dr. Shah's exams.

Based on the above, as well as the credible evidence, the Arbitrator finds the medical records and opinions of Dr. Shah, Dr. Garelick and the radiologist to be more persuasive than those of Dr. Cole. Further, the Arbitrator finds the Petitioner's current condition of ill-being as it relates to his left elbow and left shoulder is causally related to the injuries sustained on April 16, 2022.

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

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

Having found the Petitioner's current condition of ill-being as it relates to his left elbow and left shoulder are causally related the injuries sustained on April 16, 2022, the Arbitrator finds the Petitioner's treatment to be reasonable and necessary and finds that Respondent has not paid for said treatment. As such, the Arbitrator orders the Respondent to pay reasonable and necessary medical services as set forth in Petitioner's Exhibits 3, 5 and 7 for causally related treatment Petitioner underwent, as provided in Sections 8(a) and 8.2 of the Act and more specifically as follows: $1,790.00 to Parkview Orthopedics, $546.66 to RNS Physical Therapy and $3,850.00 to Premier Healthcare Services.

Issue K, whether Petitioner is entitled to any prospective medical care, the Arbitrator finds as follows:

Having found the petitioner's current condition of ill-being as it relates to his left elbow and left shoulder are causally related to the injuries sustained on April 16, 2022, the Arbitrator

finds that Petitioner is entitled to the surgery recommended by Dr. Shah. Respondent shall authorize and pay reasonable and necessary medical services associated with said surgery.

Issue L, whether Petitioner is entitled to temporary total disability benefits, the Arbitrator finds as follows:

A claimant is temporarily totally disabled from the time an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of his injury will permit. Westin Hotel v. Indus. Comm'n, 372 Ill.App.3d 527, 542 (1st Dist. 2007).

In determining whether a claimant remains entitled to receiving TTD benefits, the primary consideration is whether the claimant's condition has stabilized and whether she is capable of a return to the workforce. Interstate Scaffolding, Inc. v. Illinois Workers' Comp. Comm'n, 236 Ill.2d 132, 148 (2010). Once an injured employee's physical condition stabilizes, she is no longer eligible for TTD benefits. Archer Daniels Midland Co. v. Indus. Comm'n, 138 Ill.2d 107, 118 (1990).

Petitioner testified that he was placed on work restrictions due to his April 16, 2022 work accident and remained off work through the date of the hearing. Although there is evidence that Respondent offered a modified duty to Petitioner, there is nothing in the record that suggests that his treater, Dr. Shah released him back to work after Petitioner's last visit on June 30, 2022.

Based on the above, the Arbitrator finds Respondent liable for 23 & 1/7 weeks of TTD benefits (May 19, 2022 through October 28, 2022) at a weekly rate of $320.00, which corresponds to $7,404.80 to be paid directly to Petitioner. Respondent has paid TTD benefits in the amount of $5,729.60.

It is so ordered:

Crystal L. Caison

Arbitrator Crystal L. Caison

May 26, 2023

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC024963
Case Name	Jason Bowden v. Wilbur Wright College
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0035
Number of Pages of Decision	22
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Brian McManus Jr
Respondent Attorney	Heather Boyer

DATE FILED: 1/22/2024

/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

JASON BOWDEN,

Petitioner,

vs. NO: 21 WC 24963

WILBUR WRIGHT COLLEGE,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed March 20, 2023, is hereby affirmed and adopted.

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

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

The 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.

January 22, 2024

CAH/tdm
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	21WC024963
Case Name	Jason Bowden v. Wilbur Wright College
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	19
Decision Issued By	William McLaughlin, Arbitrator

Petitioner Attorney	Brian J McManus Jr
Respondent Attorney	Heather Boyer

DATE FILED: 3/20/2023

THE INTEREST RATE FOR THE WEEK OF MARCH 14, 2023 4.70%

/s/William McLaughlin, Arbitrator

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JASON BOWDEN,
Employee/Petitioner

Case # **21 WC 24963**

v.

Consolidated cases:

WILBUR WRIGHT COLLEGE,
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **WILLIAM MCLAUGHLIN**, Arbitrator of the Commission, in the city of **CHICAGO**, on **January 12, 2023**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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 **8/20/2021**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**43,222.40**; the average weekly wage was $**831.20**.

On the date of accident, Petitioner was **35** years of age, ***single*** with **2** dependent children.

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

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

Respondent shall be given a credit of $0.00 for TTD, $0.00 for TPD, $0.00 for maintenance, and $2,500.00 (PPD advance) for other benefits, for a total credit of $2,500.00.

Respondent is entitled to a credit of $13,805.84 under Section 8(j) of the Act.

ORDER

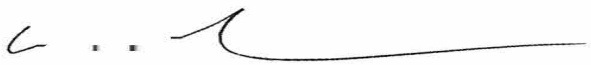
No benefits are awarded.

Credits

Respondent shall be given a credit of $13,805.84 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 also be given credit for $**2,500.00** **PPD** benefits paid under Section **8(d)(2)** of the Act as an advance.

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

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



MARCH 20, 2023

Signature of Arbitrator

Findings of Fact

Petitioner, Jason Bowden testified that he had worked as a project janitor for Wilbur Wright College since February of 2011. (Transcript, Page 10, hereinafter referred to as T. Pg. 10). He testified that he was a project janitor and as such his duties including lifting, sweeping, pushing, mopping, and dusting. Project janitors perform a lot of the heavy workload including moving cabinets, cleaning the pool area, gym room, locker rooms, and removing graffiti outside and inside. They use a pressure washer and stripper when scrubbing, buffing, and waxing. (T. Pgs.11-12).

Petitioner testified his job was affected on a day-to-day basis when COVID-19 went into full force around March 15, 2020. During COVID there was no one at the school except janitorial staff, engineers, and security. Petitioner testified during the COVID time his lifting requirements picked up more intensely. (T. Pgs. 13-14). Petitioner testified during such time he was required to lift furniture more than he normally would have because there was no one else in the building. They could also jump from one job/building to the next, instead of waiting until a time when students were not in session. (T. Pg. 14).

Between March 15, 2020, and August 21, 2021, Petitioner was feeling pain about his low back. He thought it was a simple back spasm, but it turned into something more. (T. Pg. 15-16). Petitioner testified that he never had back problems prior to working at Wilber Wright College. (T. Pg. 16).

Petitioner testified he first saw his primary care physician, Dr. Sundaresan, in May of 2021. He complained of back pain. Dr. Sundaresan recommended physical therapy, which failed to work. (T. Pg. 16-17).

As such Petitioner returned to Dr. Sundaresan on August 20,2021 at which time the Dr. took Petitioner off work. (T. Pg. 17-18).

Dr. Sundaresan told him the work was causing his "pain to become more painful". Petitioner testified that is when he knew it was a work-related injury. (T. Pg.18).

After receiving the off work note from Dr. Sundaresan, Petitioner testified that he physically took the work note to "Allison" in Human Resources. (T. Pg.18). Petitioner stated "as soon as I got the paper from the doctor. (T. Pg.19). Petitioner testified that he told Allison it was a work-related situation. (T. Pg. 20). However on cross Petitioner said he faxed notice to Allison around 2:00 instead of hand delivering it. (T. Pg.58-59).

On August 20, 2021, Dr. Sundaresan ordered a lumbar MRI, and then referred Petitioner to Dr. Boyer based on the results of the MRI. (T. Pg. 21). Dr. Boyer examined him and diagnosed him with an L4-5 injury. Dr. Boyer gave Petitioner the option of a temporary shot which would provide 60% relief, or surgery with a 90% success rate. Petitioner preferred to undergo surgery. (T. Pg. 21).

Petitioner testified he thought lifting, bending, pushing, and carrying stuff at work caused his injury. (T. Pg. 21-22). He would have to move furniture and place it in the hallways. He also had

to move huge heavy desks but did so with the help/assistance of three to four co-workers. (T. Pg. 22).

Petitioner testified Dr. Boyer eventually performed surgery on either September 21 or 24, 2021. (T. Pg. 22). Following surgery Petitioner testified that he secured physical therapy at ATI and returned to work on January 4, 2022. (T. Pg. 23).

Petitioner testified that his back pain had been on and off after returning to work. "Some days were greater than others, but it has its moments." (T. Pg. 24). Petitioner testified that after he returned to work, he performed the same activities that he did prior to his surgery. Petitioner testified that instead of the pain being in his back as much, it shot to the bottom of his foot. He testified Dr. Boyer "warned [him] about that too." (T. Pg. 25)

On cross examination, Petitioner testified he filed an Application for Adjustment of Claim alleging a date of accident of August 20, 2021. Petitioner confirmed that on the same date, he sought treatment at Union Health Service where he reported a work-related injury due to ongoing pain in the right lumbar region with radiation to his buttock. (T. Pg. 26). Petitioner testified his pain did not begin on August 20, 2021; rather it was a lingering pain, and August 20, 2021 was just the first day he was taken off work for back pain. (T. Pg. 28). Petitioner testified that as of August 20, 2021, he had been in physical therapy with little to no improvement and had been taking Ibuprofen, Diazepam, Tramadol and Methylprednioslone. (T. Pg. 27-28). Petitioner testified he was diagnosed with sciatica, prescribed a Medrol Dosepak, and told to secure an MRI of the lumbar spine. He was taken off work until his follow-up visit on August 30, 2021. (T. Pg. 28).

During cross Petitioner testified he returned to Dr. Sundaresan on July 22, 2021, and reported ongoing issues with right-sided sciatica. Dr. Sundaresan gave him a prescription to start physical therapy two times a week for six weeks. (T. Pg. 35).

Petitioner started physical therapy at ATI on August 3, 2021, though Petitioner testified that he did not mention the therapist at ATI that he initially hurt his back lifting an object at work. Petitioner testified that if his medical records indicated that he initially told the therapist he hurt his back lifting an object at work in March of 2020, he would disagree with his records. (T. Pg. 36). However, Petitioner agreed with the portion of the August 3, 2021, record that stated his low back pain had progressively gotten worse over the *last one year and five months* and he was now experiencing radiating pain to the right lower extremity to the foot. (T. Pg. 37).

Petitioner testified at no point between March of 2020 and July 25, 2021, did he report an accident at work occurring in March of 2020. (T. Pg. 37-38). Petitioner testified the first time he reported a possible March 2020 injury to his employer was not until July 26, 2021, right before he started physical therapy at ATI. (T. Pg. 38). Petitioner then testified that between March of 2020 and July 25, 2021, he never told any of his doctors or therapists that he had an accident at work at any time in March of 2020. (T. Pg. 40).

Petitioner indicated that between March of 2020 and July of 2021 he reported to the employer that he had an aggravation of his low back while at work. Petitioner specifically testified, "I was working alongside my supervisor at times, and I let him know that this was the reason for me sitting down so much. Petitioner testified his supervisor's name was Wesley but he did not know his last name. (T. Pg. 41-42).

Petitioner continued therapy through August 17, 2021, and returned to Union Health Service on August 20, 2021, the same day he stopped working. (T. Pg. 41). Petitioner testified there was no mention on August 20, 2021, as to what caused his low back pain. (T. Pg. 42).

Petitioner testified he secured the lumbar MRI at Illinois Masonic Medical Center on August 21, 2021. (T. Pg. 42-43). Petitioner returned to Dr. Sundaresan on August 24, 2021, and she referred him to Dr. Jerrel Boyer. Petitioner testified he saw Dr. Boyer on August 24, 2021, and presented with complaints of severe right lower extremity pain, traveling in an L5 distribution Petitioner testified he told Dr. Boyer the symptoms were precipitated by no particular injury. Petitioner testified he told Dr. Boyer he was beginning to experience mild left leg pain. Dr. Boyer diagnosed lumbar disc herniation and discussed injections versus surgery. Petitioner requested surgical intervention in the form of a minimally invasive right-sided L4-5 discectomy. (T. Pg. 44-45).

Petitioner confirmed that at no point in his August 24, 2021, examination by Dr. Boyer was there any mention of Petitioner's job or job duties. There was also no report as to what caused his complaints of pain on that date. (T. Pg. 45).

Petitioner testified on November 3, 2021, he called Dr. Sundaresan and told her he was not ready to return to work and requested to see her. When asked why he called Dr. Sundaresan instead of Dr. Boyer, Petitioner testified he was taught to report to the primary doctor who would then tell him what to do. (T. Pg. 48). Petitioner testified Dr. Sundaresan told him to instead follow-up with Dr. Boyer on November 9, 2021. (T. Pg. 48).

On November 9, 2021, Petitioner testified he was six weeks status post-surgical intervention, had no complaints, and was doing well. Petitioner testified that on November 9, 2021, Dr. Boyer started to review his work history. When asked why they decided to revisit Petitioner's mechanism of injury on that date, Petitioner testified "because I was going back to work. I didn't want to come back to do another surgery or anything again. So, we talked about that." (T. Pg. 49-50). Petitioner testified that on November 9, 2021, *he reminded* Dr. Boyer that when Dr. Boyer first saw Petitioner, they talked about what Petitioner was doing at work that caused his trauma. However, Petitioner then denied that he ever had an accident. (T. Pg. 50-51). Petitioner testified that at no point between March of 2020 and July 25, 2021, did he ever report a work injury to his employer involving his low back. (T. Pg. 51-52)

Petitioner testified that following his examination with Dr. Boyer on November 9, 2021, he was given new work restrictions and an order for more physical therapy. He attended physical therapy at ATI from December 9, 2021, through December 19, 2021.

Petitioner again saw Dr. Boyer on December 28, 2021, and reported his back pain had flared up with activities over the holidays. Petitioner testified he was not working at that time. (T. Pg.52-53). Petitioner returned to work on January 4, 2022. (T. Pg. 54).

Petitioner was sent at the request of Respondent for an independent medical evaluation with Dr. Carl Graf on February 16, 2022. Petitioner testified he told Dr. Graf he sustained an injury to his low back which started in *March of 2020*. Petitioner told Dr. Graf he was moving furniture and stripping floors given that there were no in-person classes due to COVID-19. He told Dr. Graf it started off as a simple back ache that he did not think too much of but over time it progressed to the low back and right posterior side to the lateral calf. (T. Pg. 54-55). Petitioner told Dr. Graf that initially he did nothing about it until the pain radiated to the right foot.

Petitioner further testified that at no point in his prior medical treatment did he tell any of his medical providers that he did nothing about his pain until it radiated to the right foot. Petitioner testified he told Dr. Graf that the current pain in the low back was only present because he had recently returned to work. However, Petitioner testified that to date he had not reported to Respondent any new or ongoing issues with his low back since returning on January 4, 2022. (T. Pg. 56).

Petitioner last saw Dr. Boyer on March 15, 2022, where he reported intermittent low back pain when performing heavy lifting. (T. Pg. 56-57). Petitioner testified he told Dr. Boyer he returned to work full duty but had occasional nerve pain in the right calf. Despite telling Dr. Boyer the same, Dr. Boyer released Petitioner from care. Further there was no recommendation for future treatment. (T. Pg. 57-58). Petitioner testified that he realized this was a work-related condition when Dr. Sundaresan told him it was. (T. Pg. 58).
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Petitioner testified the duties of a project janitor include moving cabinets, cleaning pools, pressure washing, all sorts of stuff, including locker rooms and gyms. When pressed on whether those were regular duties assigned to a janitor, and not a project janitor, Petitioner testified it was the project janitors' duties if a person was absent or if they were shorthanded. (T. Pg. 59-60).

Petitioner testified his direct supervisor at that time was Wesley, and his direct report was Anna Marie Morales, the director of auxiliary services. (T. Pg. 60). Petitioner testified he was required to report work injuries to Anna Marie Morales. (T. Pg. 60-61)

Respondent called Anna Marie Morales to testify as their witness. Ms. Morales worked at Wilbur Wright College, which was affiliated with City Colleges of Chicago. She had worked for City Colleges of Chicago for 16 years, three and a half of which were at Wilbur Wright College. (T. Pg. 68-69). For the last 3-1/2 years, Ms. Morales worked as the Director of Auxiliary Services at Wilber Wright College, which meant she was in charge of the facility, including reprographics, janitorial, shipping, and receiving. When an individual employee sustained or alleged a work accident, Ms. Morales instructed them to go to security and the security office prepares the report. (T. Pg. 69-70).

Ms. Morales testified that Petitioner was a project janitor for the three and half years she was at City Colleges. She testified a project janitor typically did everything above what a regular janitor does, according to the Collective Bargaining Agreement. They were "a jack of all trades". (T. Pg. 70-71). Ms. Morales was Petitioner's direct supervisor. She was aware of the alleged work accident reported by Mr. Bowden which manifested on August 20, 2021.

Ms. Morales testified to the Department of Safety and Security Incident Report completed by security on July 26, 2021. (Respondent's Exhibit 3, Page 94, hereinafter Rx. 6, Pg. 94). She testified the report was kept in the normal course of business at City Colleges of Chicago and Wilbur Wright College. Ms. Morales was notified on that date that Petitioner reported he had been performing strenuous labor, and intensive work around the campus. (Rx. 6, Pg. 94). Some of the tasks involved carrying furniture, boxes, and other heavy items. In addition, he reported he had been stripping floors, cutting grass and other landscaping activities that required him to kneel down for lengthy periods of time. (Rx. 6, Pg. 94). After months of this type of work, he developed a soreness and shooting pain from the middle of his back down to his right leg to his right foot. (Rx. 6, Pg. 94) (T. Pg. 72-73).

Ms. Morales testified about the alleged activities Petitioner claimed he performed between March 1, 2021, and July 21, 2021. She testified between those dates, Petitioner was never carrying furniture, moving, or carrying boxes nor was he lifting any other various heavy items. She testified he was not stripping floors either. (T. Pg. 75-76).

Ms. Morales testified Petitioner was only cutting grass with an automatic mower. However, he was not performing other landscaping activities that required him to kneel for lengthy periods of time. He also was not performing other strenuous labor-intensive work. Therefore, the only activity Petitioner performed between March 1, 2021, and July 21, 2021, was cutting grass. (T. Pg. 76-77).

Ms. Morales also testified she never received a copy of the medical report from Petitioner's primary care doctor authored on July 26, 2021. (T. Pg. 77).

Ms. Morales testified the date of accident listed on the Department of Safety and Security Incident Report only ranged over four months: between March 1, 2021, to July 21, 2021. However, at no time between March 1, 2021, and July 25, 2021, did Petitioner ever present to her with complaints of back pain, right leg pain, or right foot pain. (T. Pg. 73-74).

Ms. Morales testified that at no point between March 1, 2021, and July 25, 2021, did Petitioner ever report seeing a medical professional for complaints of back pain, right leg pain, or right foot pain, nor did he ask for accommodations, a less strenuous job, lighter work duties, etc. (T. Pg. 74). She testified at no point between March 1, 2021, and July 25, 2021, did Petitioner ever ask for help from another person to perform the essential functions of his job.

Ms. Morales also testified that at no point between July 26, 2021, and August 19, 2021, was Petitioner unable to perform the full functions of his job. (T. Pg. 74-75). Further, Ms. Morales testified between July 26, 2021, and August 19, 2021, Petitioner never asked for accommodations, a less strenuous job, or lighter work duties, nor did he ever ask for help from another person to perform the essential functions of his job.

Ms. Morales testified about the Workers' Compensation Initial Medical Report completed by Petitioner. (Rx 6, Pg. 113). Ms. Morales testified the date of accident was listed on that report as a range of time between March of 2020 to July of 2021. (T. Pg. 77-78). Ms. Morales testified when she compared the Department of Safety Security Incident Report with the Workers' Compensation Initial Medical Report, there was a difference in the date of accident by one whole year. (T. Pg. 78).

However, Ms. Morales testified that at no point between March 1, 2020, and March 31, 2021, did Petitioner ever present to her with complaints of back pain, right leg pain, or right foot pain, nor did he ever advise he was seeing a medical professional for complaints of pain in those areas, ask for accommodations, a less strenuous job, or lighter duties, and/or ask for help from another person to perform the essential functions of his job. (T. Pg. 78-80).

Ms. Morales testified that at no point between March of 2020 and August 20, 2021, did Petitioner's supervisor, Wesley, ever come to her and say that Mr. Bowden reported an injury to him. (T. Pg. 80).

Ms. Morales next testified about the Workers' Compensation Supervisor's Report. (Rx 6, Pg. 114). Ms. Morales completed this report on August 24, 2021. She listed Petitioner's job title as project janitor. In terms of job duties, she indicated his duties included moving furniture, windows, floor rider, outside grounds, floor scrubbing, and waxing. (T. Pg. 81). Ms. Morales testified these were not duties performed on a single day, but duties Petitioner performed over his 10 years of employment with Respondent.

Ms. Morales testified to the Workers' Compensation Demand of Job. (Rx 6, Pg. 117). Ms. Morales testified she completed this report which also listed Petitioner as a project janitor. Under job duties she indicated Petitioner performed mopping, waxing, moving furniture, cleaning windows, floor rider, outside ground duties as assigned. She testified once again these were duties Petitioner performed over the history of his career. (T. Pg. 82-83).

In that same exhibit, Ms. Morales testified to the number of pounds Petitioner was required to lift or carry per day. (Rx 6, Pg. 117). Ms. Morales testified that although the report stated Petitioner was required to lift 50 pounds at least five times every day, that was not something Petitioner ever had to do. Ms. Morales was not a fan of the format of the exhibit as it did not allow room for explanation. One of the qualifications *to be considered* for the project janitor position within the Collective Bargaining Agreement and City College policy was a standard ability to lift 50 pounds. Ms. Morales testified a project janitor had to be "capable" of lifting 50 pounds at any certain point. However, it did not necessarily mean that Petitioner, or any other project janitor, had to perform it for five days out of a given week, or five times a day. (T. Pg. 83-84). Ms. Morales testified these were general requirements pursuant to the Collective Bargaining Agreement to become a project janitor. However, between March of 2020 and August 20, 2021, Ms. Morales testified Petitioner was not required to lift 50 pounds at any time, let alone five times a day. (T. Pg. 84).

Rather, she testified the highest weight Petitioner would have to lift would be 30 pounds, which would be performed in a team lift. If something was heavy, two people were to lift the item so the

weight was distributed. Ms. Morales testified the heaviest furniture item was 30 pounds. (T. Pg. 85-86).

Ms. Morales next testified to the Workers' Compensation Employee Notice of Injury completed by Petitioner on August 24, 2021. (Rx. 6, Pg. 110). Ms. Morales testified Petitioner listed his date of injury on this report as March of 2020. (T. Pg. 86-87). Ms. Morales testified that the duties Petitioner listed at the time of this injury included removing furniture, stripping, and waxing floors all over the campus. Petitioner also reported he was pushing and pulling heavy objects, bending continuously at a pace to finish by a deadline. (T. Pg. 87-88).

Ms. Morales testified that in March of 2020 Petitioner was not removing furniture, stripping, or waxing floors, or pushing and pulling heavy objects nor was he bending continuously. When asked whether he was performing tasks at a fast pace to finish by a deadline in March of 2020 she testified he was not because that was right when the world shutdown with COVID-19. She testified during March of 2020, the building was empty and there were no projects taking place. (T. Pg. 88-89).

Ms. Morales testified that in March of 2020, janitors were assigned once every two weeks and then it increased to twice every two weeks through June of 2020. She testified that between March 19, 2020, and June 2020 Petitioner only worked 12 shifts. Therefore, she testified he was not stripping and waxing floors every day or going from building to building during that time. (T. Pg. 89).

Ms. Morales further testified there was no furniture being removed in March of 2020, no stripping or waxing floors by any janitors, there was no pushing or pulling heavy objects, and *nobody* was asked to finish by a deadline. Ms. Morales testified she *specifically did not assign any deadlines* during COVID for her employees because she was actually trying to have jobs for them that took longer because she wanted to ensure job security for her janitorial staff intact. If anything, she was encouraging a slower work pace to make sure they all had jobs. (T. Pg. 90-91).

On cross examination Ms. Morales further testified that Petitioner never reported to her that he sustained back injury in March of 2020, nor did he ever tell her that he hurt his back lifting an object at work in March of 2020.

Ms. Morales testified she knew Petitioner for 3-1/2 years prior to his alleged accident. Ms. Morales testified she was alerted there was a report by Mr. Bowden of a work accident through security via their standard report on August 20, 2021. (T. Pg. 97).

Ms. Morales testified she interacted with Petitioner every day. (T. Pg. 97-98). Ms. Morales testified there were certain days she worked together with Petitioner and somedays where she gave him assignments and would run into him doing his assignments throughout the day. Every day was different. (T. Pg. 98).

Dr. Sundaresan testified (via deposition). Dr. Sundaresan testified she relied upon a complete set of medical records in formulating her diagnoses and opinions, including pre-accident and post-accident records. Prior to her first examination of Petitioner on August 20, 2021, Dr. Sundaresan testified she did not review any records outside of her own facility. (Rx. 8).)
Dr. Sundaresan testified she initially saw Petitioner on May 24, 2021, and he complained of right-

sided lumbago that had been present for the last six to eight weeks. Dr. Sundaresan testified there was no indication that his low back pain was in any way related to his job. (Rx. 8). She confirmed there was also no report by Petitioner he had back pain which had been present since March of 2020. (Rx. 8).

Dr. Sundaresan testified she next saw him on July 22, 2021, at which time he complained of ongoing issues with right sided sciatica. (Rx. 8). She confirmed that other than asking for a note for his job to take breaks, there was no indication he had any pain related to his job. She testified there was no indication of any acute or repetitive trauma which occurred at work. There was also no indication he had pain since March of 2020. (Rx. 8).

Dr. Sundaresan testified she next saw Petitioner on August 20, 2021. At that time, Petitioner reported ongoing pain in the right lumbar region with radiation to the buttock which she testified was still sciatica. (Rx. 8). Dr. Sundaresan testified there was nothing in Petitioner's medical records up to that date reporting acute or repetitive trauma to his lumbar spine at work or as a result of work. (Rx. 8). Dr. Sundaresan testified at that point the *only thing* she knew was that Petitioner worked in maintenance. (Rx. 8).

Dr. Sundaresan testified she *assumed* his pain was related to his work. (Rx. 8, Pg. 232). When asked whether her testimony was based upon an assumption as opposed to a reasonable degree of medical certainty, she testified, "based upon my experience as a board-certified internist caring for people in that line of work, it was—I guess you can say that it is based upon an assumption of the line of work that he does rather than a specific injury sustained." (Rx. 8, Pg 233). Dr. Sundaresan testified that none of the medical records she reviewed indicated what Petitioner was doing at work that may have caused his pain. (Rx. 8).

When asked about the November 19, 2021, report she generated at the request of Petitioner and his attorney, Dr. Sundaresan testified Petitioner underwent physical therapy and conservative care but failed to improve. However, Dr. Sundaresan confirmed she never reviewed the physical therapy records. (Rx. 8). Dr. Sundaresan opined the nature of Petitioner's work in janitorial services with heavy lifting, pushing, carrying significantly impacted his medical and surgical condition. (Rx. 8). She stated carrying significantly impacted his medical and ultimately surgical condition. However, Dr. Sundaresan confirmed she never reviewed a job description of his position, and she admitted her medical records did not contain any reports by Petitioner of heavy lifting, pushing, or carrying at work. (Rx. 8). Dr. Sundaresan testified Petitioner's medical records from ATI contradicted what Petitioner reported to her in terms of when his low back pain began. (Rx. 8).

Dr. Jerrel Boyer testified on behalf of Petitioner (via deposition) as his treating neurosurgeon. Dr. Boyer testified he did not review any of Dr. Sundaresan's medical records prior to his first examination of Petitioner on August 24, 2021, and he did not review the medical records from ATI Physical Therapy.

Dr. Boyer testified that when he first examined Petitioner on August 24, 2021, Petitioner reported

severe right lower extremity pain traveling in an L5 distribution that had been present for a year. He testified it was his understanding Petitioner had pain since roughly August of 2020. Dr. Boyer testified Petitioner's symptoms were precipitated by no particular injury. Dr. Boyer testified that at no point in his August 24, 2021, report did he relate Petitioner's diagnosis or the need for future medical care to his job, nor did he offer an opinion regarding work status.

Regarding Petitioner's surgery on September 24, 2021, Dr. Boyer testified his operative report stated that most of the compression was from the facet and ligamentum flavum, which were degenerative findings. Dr. Boyer's report did not reference any free fragments or axillary fragments when viewing the disc bulge. He testified this meant Petitioner either had no herniation at all or he had a herniation that absorbed. When pressed on that statement, he agreed it would be unlikely for a free fragmented herniation to absorb in one month's time between the date of the MRI on August 21, 2021, and the date of surgery on September 24, 2021. Dr. Boyer testified the MRI taken on August 20, 2021, was of poor quality and even though he read the MRI as showing a free fragment herniation, it was not present during surgery.

Dr. Boyer next testified to his November 9, 2021, report. When asked why he documented Petitioner's mechanism of injury in that report when it was not discussed in his earlier reports, Dr. Boyer testified that:

"typically, when I take a history initially - - and again, I do recall [Petitioner] telling me, he described multiple things at work. In practicality, if I know that somebody had pursued a workers' compensation claim, I typically do a very detailed history on them and date of accident, all that stuff. You know, my impression when I first saw [Petitioner] for whatever reason is that there was not any sort of litigation involved. And therefore, it's not super important to my treatment plan. But it then became apparent that there was potentially some litigation, and I recalled that about him, so I wanted to record it in there." (Px. 5, Pgs. 36-37)

Dr. Boyer testified, "my first recollection is that, you know, we got close to surgery and, you know, there was a question of - - and I don't know how this is filled out, to be honest with you. I don't know any of this stuff - - is about something workers' compensation and I remember talking the day of surgery. You know, I wasn't aware there was any litigation filed on that. I think that was my first recollection. And so typically what we do from any medical thing, not just workers' comp, is that if there is information that should have been included, then I'll put it somewhere in a note just so it's there for future reference." (Px. 5, Pg. 37).

Despite the statement above, Dr. Boyer testified there was no mention in the surgical report or any reports from September 24, 2021, as to an injury at work or the involvement of workers' compensation.

Dr. Boyer testified that when Petitioner first saw him on August 24, 2021, Petitioner said his pain had been present for a year, which was inconsistent with Dr. Boyer's November 9, 2021, report wherein he stated Petitioner told him the pain had been present since March 2020. Dr. Boyer testified he was unaware that on May 24, 2021, Petitioner told Dr. Sundaresan that his pain had only been present for six to eight weeks. Dr. Boyer agreed that statement was inconsistent with the two different timelines Petitioner reported to Dr. Boyer.

Dr. Boyer testified he recalled at one point Petitioner mentioning to him that he had to lift heavy boxes at work. Dr. Boyer had no knowledge about how heavy the boxes were, what was in them, or how often Petitioner had to lift them. Dr. Boyer testified none of his medical records mentioned Petitioner lifting heavy boxes at work or indicated that he knew what Petitioner did for a living. Dr. Boyer testified he never reviewed a written or video job description.

Dr. Boyer testified his opinions were not based upon a review of a complete set of pre-accident and post-accident medical records; were not based on any review of a written or video job description; and were not based on any knowledge of Petitioner's job, position, or duties.

At the request of Respondent, Petitioner was sent for an IME with Dr. Graf on February 16, 2021. Petitioner presented to Dr. Graf as a 35-year-old male who worked for Wilbur Wright College. His job title was "Project Janitor" and Petitioner's work involved stripping and sealing floors, moving cabinets, tables, cleaning out classrooms, etc. He identified his job as a heavy physical demand level job requiring him to lift around 45 pounds. Petitioner confirmed he had worked there for 11 years.

In terms of his mechanism of injury, Petitioner noted "it started in March of 2020". He was moving furniture and stripping floors because there were no in-person classes due to COVID. Petitioner noted "it started off as a simple backache" which he did not think too much of, but over time it progressed to the low back, and then to the right posterior thigh and lateral calf. Petitioner admitted he initially did nothing about it until the pain radiated to the right foot. That caused him to see his primary care physician who prescribed Motrin and steroids. Petitioner indicated he was ultimately prescribed an MRI and was referred to a surgeon who diagnosed him with a pinched nerve. He underwent surgical intervention in September of 2021. Following surgery his nerve pain resolved but he had some pain in the right posterior ankle described as a "dull" on occasion. He continued with physical therapy. Petitioner denied any prior medical care, injury, or treatment to his low back.

He completed a pain disability questionnaire rating himself at 103 which is the severe disability self-rated category. Following review of his medical records and films, Dr. Graf diagnosed Petitioner with a right-sided disc herniation at L4-5 with lateral recess stenosis now status post lumbar decompression. He did well post-operative and noted resolution of the radiculopathy.

In terms of causation, Dr. Graf noted that Petitioner said his symptoms began in "March of 2020" when he was moving furniture and stripping floors, but he stated he did not pursue treatment at that time. In fact, medical records demonstrated initiation of treatment nearly 17 months thereafter. Further, his operating surgeon noted in the initial consultation "symptoms have been present for about a year. These symptoms were precipitated by no particular injury." Accordingly, to a reasonable degree of medical and surgical certainty, Dr. Graf was unable to causally connect Petitioner's diagnosis with the claimed injury in question. In his opinion, all care and treatment should be considered outside of the claim, and instead, attributed to Petitioner's pre-existing condition. Given the lack of causation, Petitioner had no work-related restrictions and MMI was not applicable.

Dr. Graf then authored an Addendum report on October 7, 2022, after reviewing additional records. (Rx. 4). He opined Petitioner reported an injury in March of 2020 or August of 2021. Dr. Graf confirmed the medical records did not document any specific injury, and in fact Petitioner denied any acute event. (Rx. 4). Therefore, to a reasonable degree of medical and surgical certainty he was still unable to causally connect Petitioner's diagnosis with the claimed injuries in question. He also opined Petitioner's diagnosis was not causally related to repetitive trauma which manifested in either March 2020 or August 2021. (Rx. 4). Dr. Graf further opined the medical care and treatment to date had been reasonable and medically necessary but not causally related to the claimed injury in question. (Rx. 4). He did not feel that any future medical care or treatment was causally related to the accident and felt Petitioner did not require work restrictions (Rx. 4).

Conclusions of Law

With respect to issue (C), whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent?

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law as set forth below. The claimant bears the burden of proving every aspect of his claim by a preponderance of the evidence. *Hutson v. Industrial Commission,* 223 Ill. App. 3d 706, 714 (Ill. App. 5th Dist. 1992). 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. *Land & Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592 (2005).

In a repetitive trauma case, issues of accident and causation are intertwined. Therefore, a review of the evidence allows both issues to be resolved together." *Boettcher v. Spectrum Property Group and First Merit Venture Realty Group,* 97 W.C. 44539, 99 I.I.C. 0961. The date of accident in a repetitive trauma case is the date the injury "manifests itself." *White v. Ill. Workers' Comp. Comm'n*, 374 Ill. App. 3d 907 (2007). The manifestation date is defined as the point when the injury and its causal relationship to a claimant's employment would be plainly apparent to a reasonable person. *Durand v. Indus. Comm'n*, 224 Ill. 2d 53 (2006).

Petitioner testified that he did not sustain a single accident or acute trauma at work; rather his condition occurred over time, thereby pursuing a claim based upon a repetitive trauma theory. Though Arbitrator believes that Petitioner testified to the best of his recollection, Petitioner's medical records, reports of injury and testimony provide an unclear timeline as to when his initial complaints of back pain began, what caused the alleged back pain and when he realized the back pain was caused by his work duties. These inconsistencies make it difficult for the Arbitrator from delineating a discrete point when the injury and its causal relationship to Petitioner's employment would be plainly apparent to a reasonable person. For those reasons Arbitrator finds Petitioner failed to meet his burden in regards to accident.

(E) Whether timely notice of the accident was given to Respondent?

In regards to notice, Petitioner initially testified his job was affected on a day-to-day basis when COVID-19 went into full force around March 15, 2020. Petitioner testified there was no one at the school except janitorial staff, engineers, and security, and as a result, his lifting requirements

became more intense causing him to lift furniture more often and work constantly from building to building, which resulted in back pain. (T. Pgs. 13-14). Despite this statement, Petitioner testified he did not report any injury at work almost a year and half later on July 26, 2021.

In contrast to the above, Petitioner testified he saw Dr. Sundaresan on May 24, 2021, and reported right sided lumbago which was present for only six to eight weeks. Petitioner testified he told Dr. Sundaresan his low back pain was caused by his work activities. (T. Pg. 34). Dr. Sundaresan did not share Petitioner's recollection of that May 24, 2021, visit. She testified Petitioner denied any specific accident and did not mention repetitive trauma to his low back. (Rx. 8). Dr. Sundaresan testified there was no indication by Petitioner that his low back pain was in any way related to his job. (Rx. 8). She testified there was also no indication by Petitioner that his back pain had been present since March of 2020. (Rx. 8).

Further, Petitioner's testimony and timeline were inconsistent with the records. Petitioner was examined Dr. Boyer on August 24, 2021, and presented with complaints of severe right lower extremity pain traveling in an L5 distribution, which had been present for about one year, or since August 2020. Despite the presence of back pain for one year, Petitioner testified on cross examination that he never mentioned his job or job duties nor what caused his complaints of pain during that first visit with Dr. Boyer. (T. Pg. 45).

Again, on August 3, 2021, Petitioner was seen at ATI and reported that he "thinks" he initially hurt his back lifting an object at work in March of 2020. When confronted with this statement on cross examination, Petitioner denied telling the same to therapist and advised he disagreed with that portion of the medical record. (T. Pg. 36).

Petitioner told Dr. Graf, Respondent's IME that his injury "started in March of 2020" from moving furniture and stripping floors. (T. Pg. 54-55). (Rx. 3).

In addition to the above, reports produced at trial created an even more confusing timeline. In the Department of Safety and Security Incident Report completed by security on July 26, 2021, Petitioner listed his injury occurring sometime between March 1, 2021, and July 21, 2021. (Rx. 6, Pg. 94).

Then in the Workers' Compensation Initial Medical Report completed by Petitioner, the date of accident was expanded by a whole year and ranged between March of 2020 to July of 2021. (T. Pg. 77-78). (Rx 6, Pg. 113).

Finally, in the Workers' Compensation Employee Notice of Injury, also completed by Petitioner on August 24, 2021, Petitioner listed his date of injury as March of 2020. (Rx. 6, Pg. 110). (T. Pg. 86-87).

Despite the many dates of accident mentioned above, Petitioner's Application for Adjustment of Claim listed his date of accident/manifestation date as August 20, 2021. (Rx. 1). Petitioner reports this date was chosen because it was the first date, he was taken off work as a result of his work accident. In response, Arbitrator draws attention that while Petitioner may have been taken off work effective August 20, 2021, there is no opinion rendered by a medical professional on that

date relating the need for his time off work to his job or job duties. Therefore, his manifestation date of August 20, 2021, is improper as it does not represent a defined point when the injury and its causal relationship to Petitioner's employment would be plainly apparent to a reasonable person.

Arbitrator concludes the inconsistent testimony and evidence presented by Petitioner prevents him from establishing a discrete point where the connections between his alleged injury and job duties were plainly apparent to him (or his medical providers), he has similarly failed to establish by a preponderance of evidence when that connection would be plainly apparent to a reasonable person. Arbitrator is unclear as to when or where Petitioners began. Because of that uncertainty Arbitrator concludes that Respondent had an impossible task to investigate and defend the claim; therefore Arbitrator find proper notice was not satisfied.

(F) Whether Petitioner's current condition of ill-being is causally related to the injury?

Because Arbitrator finds against Petitioner on accident and proper notice Arbitrator will briefly analyze causation. Petitioner testified his back pain began around March 15, 2020, as his lifting requirements picked up more intensely during the start of COVID-19 causing him to lift furniture more often and work constantly from building to building. (T. Pgs. 13-14). Petitioner completed a Workers' Compensation Employee Notice of Injury on August 24, 2021 and listed his date of injury as March of 2020. (Rx. 6, Pg. 110). (T. Pg. 86-87). Consistent with the notice of injury report. Petitioner informed Dr. Graf that his back injury started in March of 2020 from moving furniture and stripping floors. (Rx. 3).

Petitioner testified between March of 2020 and July 25, 2021, he never told any of his doctors or therapists that he had an accident at work at any time in March of 2020. (T. Pg. 40). Ms. Morales testified Petitioner never reported to her that he sustained any back injury in March of 2020, nor did he ever tell her that he hurt his back lifting an object at work in March of 2020. Further, Petitioner denied telling his physical therapist at ATI on August 3, 2021, that he initially hurt his back lifting an object at work in March of 2020. (T. Pg. 36).

In addition, the Department of Safety and Security Incident Report completed by security on July 26, 2021, Petitioner reported he had been performing strenuous labor, intensive work around the campus, including carrying furniture, boxes, and other various heavy items. In addition, he reported he had been stripping floors, cutting grass and other landscaping activities that required him to kneel down for lengthy periods of time. (Rx. 6, Pg. 94). After months of this type of work, he developed soreness and shooting pain from the middle of his back down to his right leg to his right foot. (Rx. 6, Pg. 94) (T. Pg. 72-73).

In contrast, Ms. Morales testified Petitioner was not carrying furniture, moving, or carrying boxes nor was he lifting any other various heavy items during the dates the alleged injury was manifesting. She testified he was not stripping floors either. (T. Pg. 75-76). She testified petitioner was not performing other landscaping activities that required him to kneel for lengthy periods of time, nor was he performing other strenuous labor-intensive work. Ms. Morales testified the only activity Petitioner performed between March 1, 2021, and July 21, 2021, was cutting grass with an automatic mower. (T. Pg. 76-77).

Arbitrator found Ms. Morales' testimony to be credible as she indicated she interacted with Petitioner every day. (T. Pg. 97-98).

Given Petitioner's unclear, timeline and alleged mechanisms of injury Arbitrator finds that he has not established an accident which manifested at work on August 20, 2021.

The Arbitrator adapts the above reasoning and notes an employee who suffers a repetitive trauma injury still may apply for benefits under the Act but must meet the same *standard of proof* as an employee who suffers a sudden injury. *Durand v. Industrial Comm'n,* 224 Ill. 2d 53, 64, 862 N.E.2d 918, 924, 308 Ill. Dec. 715 (2006). "In cases relying on the repetitive-trauma concept, the claimant generally relies on medical testimony establishing a causal connection between the work performed and claimant's disability." *Williams v. Industrial Comm'n,* 244 Ill. App. 3d 204, 209, 614 N.E.2d 177, 180, 185 Ill. Dec. 43 (1993).

It is the Commission's province to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine what weight to give testimony, and resolve conflicts in the evidence, particularly medical opinion evidence. *Berry v. Industrial Comm'n*, 99 Ill. 2d 401, 406-07, 459 N.E.2d 963, 76 Ill. Dec. 828 (1984); *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675, 928 N.E.2d 474, 340 Ill. Dec. 475 (2009); *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041, 721 N.E.2d 1165, 242 Ill. Dec. 634 (1999). Expert testimony shall be weighed like other evidence with its weight determined by the character, capacity, skill, and opportunities for observation, as well as the state of mind of the expert and the nature of the case and its facts. *Madison Mining Company v. Industrial Commission*, 309 Ill. 91, 138 N.E. 211 (1923). The proponent of expert testimony must lay a foundation sufficient to establish the reliability of the bases for the expert's opinion. *Gross v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100615WC, 960 N.E.2d 587, 355 Ill. Dec. 705. If the basis of an expert's opinion is grounded in guess or surmise, it is too speculative to be reliable. Expert opinions must be supported by facts and are only as valid as the facts underlying them. *In re Joseph S.*, 339 Ill. App. 3d 599, 607, 791 N.E.2d 80, 87, 274 Ill. Dec. 284 (2003). A finder of fact is not bound by an expert opinion on an ultimate issue but may look 'behind' the opinion to examine the underlying facts.

In *Nelson v. County of De Kalb, 363 Ill. App. 3d 206, 211, 840 N.E.2d 795, 298 Ill. Dec. 682 (2005),* the court found that none of the doctors who saw the claimant had sufficient evidence regarding her work activities to form a reliable causation opinion, and the court held that absent credible evidence, the burden of proof, which is on claimant, is dispositive.

The Commission has also found a claimant fails to prove causation from repetitive trauma when the treating physician testified repetitive motions caused the injuries but failed to detail what repetitive motions the petitioner engaged in and the frequency of the motions. *Gambrel v. Mulay Plastics*, 97 IIC 238.

In this case, Petitioner failed to meet his burden of proof regarding causation: the opinions expressed by Dr. Sundaresan and Dr. Boyer were concluded with assumptions, speculation, based on a review of partial-but-incomplete medical records.

In drawing his conclusion Arbitrator refers to the following:

"Expert opinions must be supported by facts and are only as valid as the underlying facts used to support them. As such, the proponent of expert testimony must lay a foundation that is sufficient to establish the reliability of the bases for the expert's opinion. If the basis of an expert's opinion is grounded in guess or surmise, it is too speculative to be reliable." *Gross vs. Illinois Workers Compensation Commission*, 2011 IL. App. (4th) 100615WC, ¶ 22 (internal citations and quotations omitted).

By way of comparison, and in their proposal, Respondent draws attention to *Maroney vs. Illinois Workers' Compensation Commission* (a Rule 23 order decided in 2021), wherein the Appellate Court ruled the Commission correctly determined causation was not established in part because "Dr. Weiss's opinion was supported by reasonable professional explanations and objective medical evidence" while "Dr. Kube's opinion was not based on *all* the available medical evidence." *Maroney*, 2021 IL App (3d) 200213WC, ¶ 35. (Emphasis in original.)

Because Dr. Sundaresan and Dr. Boyer's documented histories were incomplete as far as Petitioner's employment activities were concerned, the Arbitrator gives little weight to their opinions.

As such Arbitrator concludes Petitioner failed to establish his current condition of ill-being is causally related to an injury at work on August 20, 2021.

With respect to issue (J), Whether the medical services provided to Petitioner were reasonable and necessary; Whether Respondent paid all appropriate charges for all reasonable and necessary medical services; (K) Whether temporary total disability benefits are due (L) The nature and extent of the injury and (M) Whether penalties and fees should be imposed upon Respondent: the Arbitrator finds the following:

Based upon the Arbitrator's findings with respect to Accident, Notice and Causal Connection above, the remaining issues of Medical, Temporary Total Disability Benefits, Penalties and Fees and Nature and Extent and are moot.

With respect to issue (N), is Respondent due any credit: the Arbitrator finds the following:

The parties stipulate that Respondent is entitled to a credit for the $2,500.00 PPD advance made during the pendency of the case as well as the group health payments made by Local Union 73 totaling $1,104.88.

The parties also stipulated that if group health made payments for any additional benefits between the date of trial and the time of the decision, that Respondent would be granted an 8(J) credit for those payments/adjustments. (Tx. Pgs.6-7).

Respondent asserts that Local Union 73 falls under the umbrella of Union Local Health 25, SEIU

Health and Welfare Plan. Per the medical records and bills submitted by Petitioner's Attorney, Respondent notes Petitioner's Exhibit 8 documented additional payments and adjustments made by Union Health Local 25 totaling $12,700.96. The Arbitrator finds respondent is entitled to credit for those payments and adjustments as well.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC037030
Case Name	Lican Guerra v. Menards
Consolidated Cases	
Proceeding Type	Petition for Review Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0036
Number of Pages of Decision	19
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Kyle Tulley
Respondent Attorney	Jesse Lanshe

DATE FILED: 1/23/2024

/s/Amylee Simonovich, Commissioner

Signature

24IWCC0036

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

Lican Guerra,

Petitioner,

vs. NO: 19 WC 037030

Menards,

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 prospective medical care, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below, and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission agrees with the Arbitrator's finding in the Conclusions of Law which states that while the parties stipulated to a credit of $2,222.76 for temporary total disability, the credit is not applicable to any of the awards in the case as Petitioner did not claim temporary total disability as an issue in the case. The Commission modifies the second to the last paragraph of the Findings Section of the Arbitrator's Decision form to read, "Respondent shall be given a credit of $0 for TTD, $0 for TPD, $0 for maintenance, and $0 for other benefits, for a total credit of $0."

The Commission modifies the Arbitrator's Decision, correcting the date in the first sentence of the first full paragraph on page 5 of the Decision from 7/17/19 to 7/17/20.

The Commission modifies the Arbitrator's Decision, striking "not" in the fourth line from the bottom of the second full paragraph on page 7 of the Decision. The sentence shall read, "Dr. Shadid opined the treatment Petitioner received was reasonable, but that 85 therapy sessions (61 for the hamstring, 24 for the low back) were excessive, and that Petitioner would have been at the same point she is at today whether she had 24 session or 85 sessions." Decision, p. 7.

Additionally, the Commission modifies the Arbitrator's Decision, striking the last paragraph of Issue (K) pertaining to prospective medical. Decision, p.15.

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 on September 14, 2022, is 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 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.

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.

January 23, 2024
O: 11/21/23
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	19WC037030
Case Name	Lican Guerra v. Menards
Consolidated Cases	
Proceeding Type	19(b)/8(a) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	16
Decision Issued By	Paul Cellini, Arbitrator

Petitioner Attorney	Kyle Tulley
Respondent Attorney	Jesse Lanshe

DATE FILED: 9/14/2022

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

/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)

LICAN GUERRA
Employee/Petitioner

v.

MENARDS
Employer/Respondent

Case # **19** WC **37030**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Cellini**, Arbitrator of the Commission, in the city of **Joliet**, on **June 14, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **September 23, 2019**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**30,680.00**; the average weekly wage was $**590.00**.

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 $**2,222.76** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**2,222.76**.

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

ORDER

The Arbitrator finds that the Petitioner's left hamstring condition is and remains causally related to the September 23, 2019, accident. The causal relationship of Petitioner's lumbar condition ended as of October 29, 2020.

Respondent shall pay reasonable and necessary medical expenses contained in Petitioner's Exhibits 1 through 5, as provided in Sections 8(a) and 8.2 of the Act.

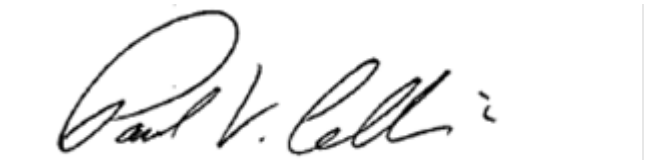
Respondent shall be given a credit towards the awarded medical expenses that have been paid by Respondent prior to the hearing, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall authorize the left hamstring repair surgery recommended by Dr. Nho 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 14, 2022

STATEMENT OF FACTS

The Petitioner in this matter testified at hearing via interpreter Ramsey Bacerott.

Petitioner has worked for Respondent for almost 17 years at Respondent's warehouse. She previously worked as a picker/packer, filling orders, for about two years. She currently works as a forklift driver, where she goes outside to pick up materials to bring back inside to an area where the plastic the materials are wrapped in is cut off. She testified that in addition to using her hands and arms, the job also involves bending, picking up the wrapping with her hands and bringing it to recycling/garbage. She indicated the job is constant because loads of products are always coming in.

Petitioner testified she had no left leg pain before stating work at 4:30 p.m. on 9/23/19. She was able to work her entire shift that day, which ended at 1 a.m., though she typically stays late to make sure everything is cleaned up. After her shift that day, she testified she punched out and was walking down a walkway/sidewalk when she slipped and fell and did the splits. She testified when she tried to stand up, she thought she "broke her spine", because she could no longer feel her leg, which also began to shake. She had severe pain but was able to get up and walk while leaning on a building wall. She then called her boss, Damaso Rosa, and he came over, along with another man. Rosa asked her if she needed to go to the doctor or wait to see how she felt the next day, and Petitioner indicated she would wait. The other man helped her to her car, she drove home, and her mother came out to help her when she got there.

Petitioner first sought treatment at Rush Copley Hospital. The Arbitrator notes that it appears from these records and the records of Physicians Immediate Care that Petitioner went to work at 4:30 p.m. on 9/23/19 with ongoing pain and was taken to Rush Copley by her plant manager. The report from Rush Copley indicates she arrived at approximately 5 p.m. on 9/23/19. The report states that she reported left groin and hamstring pain after slipping and doing the splits at work at 1 a.m. It was noted to be "front splits." Left hip/pelvis x-rays were negative for acute injury and Petitioner was diagnosed with hamstring and groin strains. X-ray did show a suspected congenital partial defect of the left inferior pubic ramus. She was advised to follow up with her primary provider in two or three days. (Px1).

Billing for this visit is indicated to be $2,508.00, with payment by Respondent and adjustments leaving a zero balance. (Px1).

Petitioner testified she next treated at Physicians Immediate Care (PIC). Petitioner saw Dr. Dacanay on 9/24/19, reporting that she fell and did the splits at work the day before. She reported a pain level of 9/10 with the pain beginning at her left glute and radiating down her entire left leg. The note states that she was walking to her car from work on a wet sidewalk, slipped and did the splits with her left leg going forward and her right leg going backwards. Dr. Dacanay diagnosed Petitioner with a thigh strain and advised her to continue her muscle relaxant, cyclobenzaprine, prescribed Prednisone and ibuprofen, and restricted her from driving while taking the muscle relaxer and to using a cushioned seat for support. (Px2).

At her 9/28/19 reevaluation, Petitioner complained of pain in the left hip, left thigh, left knee, and left lower leg with an approximate pain level of 8/10, worse with movement, as well as numbness and tingling in the leg. She was advised to continue her muscle relaxant and pain medication, adding Tramadol, while also being provided with the following updated light duty restrictions: (1) avoid prolonged sitting, standing, and bending, (2) No forklift driving while on tramadol, (3) use cushioned seat for support, and (4) do sit-stand intervals of 10 minutes. On 10/3/19, her pain complaints remained the same and Dr. Dacanay prescribed an MRI of the left thigh and continued the muscle relaxer, pain medication and light duty. (Px2).

The 10/9/19 left thigh MRI revealed a complete tear with retraction of the proximal left hamstring tendons from the ischial tuberosity with a large posterior thigh hematoma. Petitioner returned to Dr. Dacanay on 10/10/19 with complaints of constant left leg pain at a 7/10 level. Her medications and work restrictions were continued, and Petitioner was referred to an orthopedic surgeon (Midwest Orthopedic Institute). (Px2).

Billing from the PIC facility appears to indicate a zero balance, including the MRI. (Px2 & Px3).

Petitioner presented to Midwest Orthopaedic Institute on 10/14/19 and presented a consistent history of injury to orthopedic surgeon Dr. Bodner. She complained of left hamstring pain at a 5/10 to 10/10 level and reported she had to lean to her right side while she sitting to help alleviate pain. The pain increased with pressure to the left hamstring area. Dr. Bodner diagnosed Petitioner with a painful left hamstring avulsion and associated hematoma and prescribed physical therapy, noting "this is going to take a while for the pain from the hematoma to lessen", and that he believed surgery was not a reasonable option three weeks after the injury. Petitioner was held off work pending reevaluation. (Px4).

Petitioner returned to Dr. Bodner 11/25/19, indicating that driving a forklift at work caused increased pain into the length of the left hamstring. Therapy was helping her, but she indicated she still would get some pain and swelling into the lower left leg, as well as lumbar tenderness with her altered gait. Petitioner was walking with a slight limp and favoring her left leg while standing. Dr. Bodner continued physical therapy, indicating Petitioner needed "significantly more (therapy) visits." Light duty was continued, including a 20 pound weight restriction and no bending, lifting, or twisting. (Px4).

On 1/8/20, Dr. Bodner noted therapy had been delayed due to workers' compensation approval and started again only two weeks prior. Petitioner reported her job was demanding and felt the up and down in her forklift could be causing her pain to progress. The pain was mostly at the distal hamstring. Her work restrictions were adjusted to limit her to two hours of forklift driving per shift. On 2/7/20, Petitioner was improving with occasional but bearable pain, though she had an incident the night prior where her pain increased and she felt numbness into the lateral lower leg, and she was continuing to rotate her leg inwards when she walked. Light duty and therapy were continued. On 3/6/20, Petitioner indicated she was driving a forklift and working her full hours with pain at night that was improving. Therapy was continued, with Dr. Bodner noting this treatment should include the low back. He continued light duty and hoped to advance Petitioner in six weeks: "I foresee that this injury will take close to a year to become MMI (maximum medical improvement)." On 4/22/20, Petitioner noted continued distal left hamstring pain that radiated into the calf, and proximal hamstring pain with flexion. She had improved since taking vacation time from work. Dr. Bodner indicated Petitioner was post-severe left hamstring avulsion injury and large hematoma with intermittent residual medial tibial nerve neuropraxia symptoms and pain in the lower leg with localized swelling around the pes anserine area. On 5/26.20, Petitioner notes basically the same leg symptoms but that she no longer had any numbness into the leg and had minimal back pain. She wanted to know when she would be able to run or speed walk. Dr. Bodner stated that, per Petitioner's report, she had basically been working her regular duty as a forklift operator and would have significant pain after work from getting on and off the machine. He believed she would be at MMI

in 2 months. On 6/25/20, Petitioner reported she had started working 10 hour shifts, which increased her pain. With an impression that "very low level activity tolerance has not been able to return to her full job description", Dr. Bodner ordered a repeat left thigh MRI, but still opined that surgery as not indicated. Work restrictions were continued. (Px4).

The 7/17/19 left femur MRI showed a chronic rupture of the hamstring origin with retraction to the mid-thigh area, and with some of the torn fibers likely scarred to the medial aspect of "normal-appearing sciatic nerve." Additionally, there was interval decrease of the previously noted hematoma, but interval increase in now moderate to severe semitendinosus fatty muscle atrophy with some increase in the long head biceps femoris muscles. Other findings included: 1) partial tearing of the adductor magnus tendon at the ischiopubic ramus, 2) mild/moderate left hip osteoarthritis with labral tearing, 3) chronic rupture of the left adductor longus and brevis tendons with associated fatty atrophy, 4) moderate/severe fatty atrophy and mild edema of quadratus femoris muscle likely reflecting chronic impingement, 5) chronic nonunited fracture of the left pubic ramus, and 6) full thickness chondral defects over the patella. On 7/22/20, Dr. Bodner reported that the MRI showed multiple areas of tendinitis and chronic change and mild hip joint degeneration. The main finding was the hamstring avulsion with what appeared to be scarring of the sciatic nerve. Work restrictions were continued, and an EMG was ordered, though Dr. Bodner noted that if there was a sciatic nerve pathology, any surgery performed would not have any guaranteed results. (Px4).

The 9/14/20 left lower extremity EMG/NCV reflected no evidence of lumbar radiculopathy or sciatica, with "either sensory neuropathy in the lower extremities bilaterally or more likely technical difficulty obtaining the sensory nerve responses." At her 9/25/20 follow-up with Dr. Bodner, Petitioner continued to complain of left thigh and low back pain. Therapy was only providing temporary relief. She took occasional Naproxen and was working 10 hour shifts. After reviewing the EMG/NCV results, Dr. Bodner noted Petitioner continued to have tenderness and tightness in her left leg that would cause radiating pain throughout her leg. He recommended Petitioner continue with physical therapy and light duty work. Exploratory surgery to free scarring was discussed, but Dr. Bodner noted there was a significant chance of failure and surgery should be a last resort. He went on to state: "The other options include living with this problem and accepting she has disability from reinjury as I'm not aware of any reconstructive procedure that might help her." (Px4).

Various work notes from Dr. Bodner (Px4, see pp 45 to 55) indicate he restricted Petitioner's work duties in various ways from 11/18/19 through 9/26/20, with the final note failing to indicate how long the restriction was to last. She had been held off work from 10/14/19 to 11/17/19. These records also indicate Dr. Bodner completed FMLA paperwork for Petitioner on 10/30/19, estimating a 2 to 3 month condition/off work status. (Px4). Petitioner testified she returned to light duty work 11/18/19 per Dr. Bodner's restrictions after being off work for about 5 weeks.

Billing from Midwest Orthopaedic Institute appears to show everything was paid by Respondent through the 9/25/20 visit. (Px4).

Petitioner returned to Dr. Bodner on 10/29/20, at which time it appears he was working at a new facility, Northwestern Medicine. Petitioner reported feeling better returning to 8 hour shifts after working 10 hour shifts. Her left thigh pain had improved to a 3 to 4/10 level, but her low back pain had worsened and was constant. Exam noted tenderness at the posterior thigh at the junction of the distal third. Dr. Bodner stated: "I discussed with (Petitioner) that there is no further surgery that I have to offer her that her outcome may be continued pain when she works too hard" He noted that Petitioner indicated she felt fine working 8 hour shifts, 5 days per week. Dr. Bodner opined she had reached MMI and provided a note restricting her to 8 hour days, 5 days per week. Petitioner was advised to return as needed and to follow up outside of workers' compensation for her low back pain. (Px4).

On 1/18/21, Petitioner returned to Dr. Bodner complaining of left leg pain that would increase at the end of her work shifts, mostly medial in the posterior knee and calf. She reported that her leg would not support her when she has tried running, and she had ongoing back pain "due to compensation." She was taking over-the-counter medication for relief. Dr. Bodner recommended additional physical therapy and a second opinion if Petitioner desired, noting her function was too good to consider surgery. When Petitioner last visited Dr. Bodner on 3/8/21 she complained of left leg pain that mainly occurred during her workdays. She also complained of a pinching sensation into her lower back that radiated down into her lower left leg. During physical examination, it was noted Petitioner had tenderness in the anterior thigh and hamstring area with radiation towards her knee. Additionally, it was noted Petitioner had to sit on her right buttock to unload the left upper thigh from pressure. Dr. Bodner diagnosed Petitioner with chronic pain in the left lower extremity, irritation of the sciatic nerve, and a strain of the left hamstring. He referred her to Dr. Domb, an expert arthroscopic surgeon regarding hamstring surgeries, to consider decompression of the area around the sciatic nerve: "Otherwise we are closing our case with her in a semidisabled state and she works with significant pain because she needs money to live on." Petitioner advised she would use the referral as "she is not happy at all with the outcome." (Px4).

On 2/25/21, Dr. Shadid performed a Section 12 examination of Petitioner at Respondent's request. She provided a consistent history of the 9/23/19 injury, with complaints of left hamstring weakness along with pain at the mid to distal hamstring with occasional posterior knee pain. She also complained of low back pain with occasional radiation to the left buttocks. She indicated she tried to run but after not even two minutes she is limping with the feeling the leg will "go in." The noted medical history includes evidence of a dysplasic left interior pubic rami. X-rays taken that day noted the left inferior pubic ramus defect with spurring. After reviewing Petitioner's medical progress notes, including the MRI results but not the films themselves, Dr. Shadid opined that Petitioner had sustained a left hamstring tear on 9/23/19 and that she had plateaued after extensive therapy. He further opined that the pre-existing pubic ramus congenital defect may have increased the risk of hamstring avulsion with the mechanism of injury she had. Dr. Shadid stated that hamstring tears generally heal well without significant loss of strength and Petitioner's prognosis for activities of daily living was good, though she may have some resulting weakness with high acceleration and cutting maneuvers when running. He noted Petitioner had undergone 85 therapy sessions, including 24 lumbar sessions, while a typical amount would have been 24 sessions followed by a home exercise program, and thus he opined this treatment was excessive. Dr. Shadid recommended no further treatment, including any surgery, due to the likelihood of increased scarring likely worsening Petitioner's symptoms. He believed that Petitioner could work full duty and that she had reached MMI as of 3/23/20, noting that supporting medical literature indicated six months recovery for a hamstring tear. (Rx3b).

Petitioner presented to orthopedic surgeon Dr. Nho at the request of her own attorney on 5/24/21. She reported pain in her left proximal hamstring ("she locates the pain in the buttock") dating back to the 9/23/19 injury. She complained of a dull achy pain with an approximate pain level of 8/10 which increased with walking, sitting, and staying in prolonged positions, as well as weakness, numbness and tingling in the left hamstring. Petitioner denied radiating pain or low back pain. During physical examination, the doctor noted a palpable hamstring deformity with about 10 centimeters retraction. She also displayed positive tenderness over both the proximal hamstring and hamstring belly and/or distal insertion. After reviewing Petitioner's medical records, including the report of Dr. Shadid, Dr. Nho diagnosed Petitioner with a left proximal hamstring rupture and believed that her subjective complaints were consistent with his objective findings. He recommended a left open proximal hamstring repair with possible allograft reconstruction followed by post-operative physical therapy. Dr. Nho opined Petitioner's strength and pain would improve following the recommended surgery, but that "total resolution in pain and weakness is less predictable than acute treatment given the lack of surgical intervention for 2.5 years." He believed Petitioner's prognosis would be improved with surgery as her symptoms would likely continue and potentially worsen, though the prognosis was still only "fair" with surgery. Dr. Nho opined

Petitioner's left leg symptoms are causally related to her work accident and that her time off work and medical treatment to date had been reasonable and related to the work injury. Dr. Nho indicated he disagreed with Dr. Shadid, as Petitioner had pain and weakness with prone and walking flexion in addition to sciatic symptoms secondary to scarring from the injury. He did believe Petitioner could continue to work 8 hour shifts pending surgery. (Px6).

Dr. Shadid issued an addendum report on 6/27/21 after reviewing the report of Dr. Nho. He continued to opine surgical intervention to Petitioner's left hamstring was not reasonable given medical literature showing high complication rates with chronic cases such as Petitioner's: "At age 50 improving on strength, resuming running and achieving a change in her subjective complaints with surgical intervention is unlikely." Dr. Shadid also stated: "she was able to return to her regular duties as a forklift driver including 10 hour shifts and the prognosis for her returning to her current level of function and work status following a repair of a chronically healed hamstring tear is not good." He indicated Petitioner had MRI evidence of significant fatty atrophy of the semitendinosus with scarring to the sciatic nerve which can be associated with nerve complications including potential for radicular symptoms in addition to localized pain and weakness. Dr. Shadid opined that Petitioner has permanent weakness in her left hamstring but believed she could work overtime on an as tolerated basis. (Rx3c).

The evidence deposition of Dr. Shadid was obtained on 10/27/21. Petitioner reported left hamstring weakness, pain in the mid-to-distal hamstring with occasional posterior knee pain, and central low back pain with occasional radiation into the left buttock. She denied numbness and tingling. Dr. Shadid identified a likely congenital defect, dysplasic left inferior pubic ramus, which means the bone never really formed correctly. The hamstring is attached to the pubic ramus. Dr. Shadid testified: "Most of the time that tends to be asymptomatic and the patient never knows that they have the issue until they end up with an injury such as (Petitioner's), and then it shows up on an x-ray." He agreed Petitioner would be considered obese, and that it is harder to carry extra weight after an injury like she had, and this could add to her subjective complaints. Petitioner's subjective complaints of weakness in the hamstring were consistent with the objective MRI findings of a torn and retracted hamstring. What the 10 cm reflects is not so much the size of the tear but the degree of retraction. The 2020 MRI showed the injury had completely healed, though in the retracted position. There was significant fatty atrophy from disuse, which contributes to the weakness. There were also other muscle tears of the abductor magnus, abductor longus and brevis tendons, which also contributed to atrophy and weakness. Despite all the scar tissue that had formed around the sciatic nerve per the films, the EMG findings indicated it did not appear to have impacted it to any degree. Diagnosis was chronic left hamstring tear, and Dr. Shadid testified that Petitioner's subjective weakness was supported by the objective findings and her mechanism of injury was an understandable cause of a hamstring tear. He opined that someone at age 50 is more susceptible to a hamstring tear than someone 15 years old. As to Petitioner's treatment. Dr. Shadid opined the treatment Petitioner received was reasonable, but that 85 therapy sessions (61 for the hamstring, 24 for the low back) were excessive, and that Petitioner would not have been at the same point she is at today whether she had 24 sessions or 85 sessions. He opined that no further treatment was indicated, including surgery, and that Petitioner was able to continue working her full work duties as a forklift driver as she had been. His understanding is that Dr. Bodner also found Petitioner to be at MMI on 10/29/20 and did not think surgery was appropriate. (Rx3).

As to the possible surgery, Dr. Shadid testified: "My opinion, and that's my opinion, is that that would not have been worthwhile doing because the surgeries have been well documented to end up with significant complications that make her – at the end of the day could make her worse than she currently is." He further testified: "If you look at the orthopedic literature, the procedure is fraught with complications. And none of us feel good about going in and injuring the sciatic nerve." He further testified that the risk of surgery is "not only failure, but complication of course. But the failure part of it is the fact that you are trying to reattach that muscle to a bone that doesn't exist. And so what are you going to sew it to?" He opined that the muscle itself isn't

going to be able to hold sutures very well, and that the odds of surgical success, while possible, was very low given the degree of retraction, the length of time since the injury and the Petitioner's age. He believed her post-surgical prognosis would be poor, and that: "No doctor worth anything would guarantee anything like this." He testified that medical literature indicates a high complication rate regarding repair of chronic hamstring tears, as the process of excising scar tissue from around the sciatic nerve runs the risk of an injury to the sciatic nerve itself. In his view, the risk of complication is too high given the limited likelihood of improvement and the possibility of ending up worse. Nothing about Dr. Nho's report changed his position, though he acknowledged that Dr. Nho would not be "wrong" in doing the surgery, but that their opinions differ, and that Dr. Nho himself indicated that resolution of pain and/or weakness through surgery would be unpredictable. (Rx3).

On cross examination, Dr. Shadid testified that he sees about one torn hamstring case per month, as it is not a common injury and that he believed he saw more such tears than the average orthopedic surgeon. Treatment is usually conservative, though he has performed an avulsion repair on a younger college football player, though the tear was relatively small. He opined that as people get older, the muscle and tendon tissue is not strong enough to hold such repair. He agreed Petitioner could respond well to Dr. Nho's recommended surgical treatment and that complications involving the sciatic nerve are not certain to occur. Dr. Shadid agreed his opinion is based on the medical literature versus experience performing the procedure himself, but that most other orthopedic surgeons would agree that the reward is not worth the risk in this case. He testified that the goal of the surgery in this case isn't so much to relieve pain as to reduce weakness, opining there is a high probability of increased pain due to scar tissue resulting from the surgery, and a low probability of pain reduction. (Rx3),

Orthopedic surgeon Dr. Nho's deposition took place on 1/12/22. He testified he performs hamstring repair surgeries 20 to 40 times per year, including middle-aged patients between 40 and 60 years old. He testified he also has authored or co-authored over 300 peer-reviewed journal publications, several of which, per his CV, between 2013 and 2019 relate specifically to hamstrings and hamstring repairs. The doctor explained how the hamstring attaches to the pelvic ischium and the proximal tibia and is important to hip extension and knee flexion because it is used often in daily activities. Petitioner reported pain in the buttock area with weakness and numbness and tingling, but no low back pain. She was working regular 8 hour shifts at the time of the exam. She had a palpable deformity about 10 cm from the hamstring's point of origin and tenderness at the distal hamstring insertion. Dr. Nho opined that the injury could impact several activities involved in Petitioner's forklift job. He testified that with a partial hamstring tear, other muscles compensate, such as with a 2 cm tear. He believed he reviewed the 2019 MRI films, though it appeared to the Arbitrator that his report indicated he only reviewed the report. Without the films in front of him, he was unable to say which tendons had been ruptured. The ultimate diagnosis was a left proximal hamstring rupture, and Dr. Nho testified Petitioner's subjective complaints correlated with her objective findings, that all of her medical treatment has been reasonable and related to her work injury, and that Petitioner's current complaints and symptoms are causally related to her work injury. In his opinion, Petitioner had not yet recovered from her injury, and he recommended open proximal hamstring repair with a possibility of using allograft tissue or donor tissue. The surgical procedure recommended consists of using a series of suture anchors into the ischium and weaving them through the hamstring tendon, as well as dissection/neurolysis of the sciatic nerve "because typically the hamstring is scarred down to the nerve," Allograft or donor tissue may be necessary if the hamstring tendon is unable to be pulled up the ischium. Dr. Nho agreed with Dr. Bodnar in that surgery before three weeks post-accident would be ideal but disagreed that surgery would no longer be indicated at all after 3 weeks. (Px7).

Dr. Nho agreed with Dr. Shadid that injuries like Petitioner's can heal without surgery within 6 months, but that in some cases people have a hard time functioning with a chronically torn hamstring. He disagreed with Dr. Shadid's contention that the standard of care for Petitioner would be twenty-four (24) physical therapy visits and then a home program. As to the 2020 MRI indicating tendons scarred to the medial aspect of a normal-

appearing sciatic nerve, Dr. Nho testified: "I mean some patients can have pain. Some can have numbness, tingling in the distribution of the sciatic nerve." He indicated that Petitioner did mention numbness and tingling in her subjective complaints, which sounded to him like it was related to sciatic nerve entrapment. However, Dr. Nho testified he did not think he reviewed the EMG report. The goal of surgery would be to repair the proximal hamstring, possibly with allograft, dissect her, perform sciatic neurolysis in order to improve strength and alleviate some of her nerve pain and symptoms. Suture anchors would go into the ischium and then get woven through the hamstring tendon, with the possibility that donor tissue could be needed. The goal would be to improve hamstring function again, relieve scarring around the sciatic nerve and get the muscle reactivated and increase her activity level. Dr. Nho testified the hamstring would be surgically reattached to the ischial tuberosity as opposed to the inferior pubic ramus and that the hamstring is not connected to the inferior pubic ramus. While he agreed the recommended surgery may be risky, Dr. Nho believed the likelihood of a surgical complication is low if the procedure is done carefully and patients can have a good result from it. He disagreed that Petitioner's prognosis would be poor after surgery, as a chronic torn hamstring can be debilitating, and surgery can improve the function. Without surgery, Petitioner would remain the same at best and otherwise could worsen somewhat. Without surgery, Petitioner would need permanent restrictions. He believed modified duty at 8 hours per shift, which Petitioner was working at the time of the exam, would be reasonable to continue. (Px7).

On cross-exam, Dr. Nho agreed he did not review any records that were not indicated in his report, including Dr. Bodner's 2020 records. He did not ask Petitioner if she was performing a home exercise program, which she was discharged to on 8/21/20 per her therapy note. He testified Petitioner's obesity and age do not contraindicate surgery. Of the 20 to 40 hamstring surgeries he performs per year, Dr. Nho testified that about half are open proximal hamstring repairs, and of those, only "a couple a year, not many" involve allograft reconstruction." He agreed the fatty atrophy shown on MRI was "concerning." The key issue in recommending hamstring repair, in his view, is that if the tear/retraction is greater than 2 cm, it is unlikely to heal properly on its own. As to Dr. Shadid's concerns about the sciatic nerve, Dr. Nho opined that Petitioner has sciatic symptoms now, and the surgery would be meant to address that as well as the weakness and loss of function. Dr. Nho opined that the prognosis after surgery was "fair", meaning about "50/50." While he agreed Petitioner's condition could worsen or stay the same, a worsening of the condition after surgery has not been a common problem in his experience with such surgeries. While Petitioner's strength and pain should improve, it doesn't mean it will completely resolve – it "is less predictable than acute treatment given the lack of surgical intervention for two-and-a-half years." She would have been much better off had she had surgery right after it happened. That doesn't mean the surgery should not be performed. Dr. Nho disagreed with Dr. Shadid that there is no bone or muscle that would hold the sutures. He was not saying that the surgery would not be risky, but it can be done and doesn't mean it shouldn't be performed: "…the risk assessment I think lies also between who's providing it and who is not. (Px7).

On redirect and recross, Dr. Nho indicated he didn't know what Dr. Shadid was talking about in terms of attaching the hamstring to a bone that doesn't exist, as the ischium exists in everyone unless it is surgically removed. The hamstring would be re-attached to the ischial tuberosity, not the inferior pubic ramus. In terms of the "missing bone" referred to by Dr. Shadid, Dr. Nho agreed he was not aware of the pubic rami defect, despite reviewing the x-rays, but testified that the pubic rami and ischial tuberosity are two different areas, with the inferior pubic rami closer to midline and the ischial tuberosity more towards the "sit" bone, towards the outer part. He testified: "while there might be a - - its possible that there could be a defect or deformity in the inferior rami, that doesn't necessarily mean that the tuberosity is involved or affected by it." Thus, in Dr. Nho's opinion, the pubic rami defect is not relevant. (Px7).

Given the discrepancy as to the ischial tuberosity and inferior pubic ramus, Dr. Shadid was asked to review the deposition of Dr. Nho and to issue an addendum, which he did on 2/4/22. Dr. Shadid indicated: "There is a

broad area of bone between the inferior pubic ramus and ischial tuberosity where the hip extensor muscles attach. This broad region is commonly referred to as the Ischiopubic ramus. The medial portion is referred to as the pubic ramus and the lateral portion is referred to as the ischial tuberosity. In this patient's case there is a large defect along the junction between the inferior pubic ramus and ischial tuberosity that was referred to by the radiologist as an inferior pubic ramus defect although it actually extends into the ischial tuberosity where the hamstring tendons attach. The use of the term inferior pubic ramus was intended to highlight the referenced large defect in the ischiopubic ramus that ultimately puts any hamstring repair at high risk. I agree with the site of attachment of the common hamstring which is technically more lateral and posterior on the ischiopubic continuum otherwise referred to as the ischial tuberosity." He opined that the bony defect in the ischiopubic ramus actually extended from the inferior pubic ramus into the ischial tuberosity, and that any attempted hamstring repair to the ischial tuberosity would be tenuous due to marked bony osteopenia (thinning of the bone) in the region of the ischial tuberosity: "Trying to anchor a tightened and atrophied hamstring tendon with or without a graft back to the osteopenic ischial tuberosity can be fraught with complications and potentially making sitting more uncomfortable in the future. With all due respect to Dr. Nho, anchoring a muscle to markedly osteopenic bone is relevant in my opinion." (Rx3d).

While he agreed with Dr. Nho that the origin of the proximal hamstring tendon is the ischial tuberosity, he opined "there is a higher probability for a poor outcome with an attempted repair of a 28 month old retracted hamstring tendon that is likely scarred to the sciatic nerve along with fatty atrophy of all three hamstring muscles in the presence of a bony defect in the ischiopubic bone and marked osteopenia in the ischial tuberosity of a 50 year old patient." Noting Dr. Nho's testimony indicated he might not have recalled the pubic rami defect, Dr. Shadid recommended a CT scan of the pelvis be reviewed by Dr. Nho before proceeding with surgery "as further bony absorption could lead to further complications." He also noted that Petitioner has evidence of multiple other conditions that could be major contributors to her non-specific subjective symptoms of left hip weakness and pain such as her arthritic hip with associated anterior and posterior labral tears and adductor magnus muscle fatty atrophy. Dr. Shadid then referenced multiple medical articles which indicate poor prognosis for hamstring surgery where there are severely retracted tears and/or chronic tears with scarring to the sciatic nerve. (Rx3d).

Petitioner had physical therapy at Athletico between 10/2019 and 8/2020. The 8/21/20 discharge note indicates Petitioner had achieved all goals other than ongoing but much improved left leg weakness. She was discharged to a home exercise program which was noted to be extensive for core and hip strengthening. It also states: "Patient will be having a procedure in September for her hamstring and therapy may be recommended again." (Px5).

Petitioner has not sought further medical treatment since visiting Dr. Nho, noting she cannot afford it. She uses creams, and takes over-the-counter medications twice a day, to calm the pain. She has increased pain with prolonged sitting and walking. She has to alternate sitting and standing often. She doesn't bend over, she squats to the right, as bending causes pain in the back of her left leg below the buttocks. Petitioner is working full duty. To enter her forklift, she grabs a grip handle with the right hand and steps in with the right leg, and she has some hamstring area pain both getting in and out of the forklift. She made a small cushion to use to prevent her left leg from leaning on the seat, which helps relieve her pain a lot. She doesn't currently have any medical appointments scheduled but wants to have the surgery recommended by Dr. Nho as she wants to be able to walk and run again. Petitioner testified that she has constant left leg pain while working because she is always walking and moving when she unwraps the materials, though she does get some relief when she sits in the forklift. It takes her 30 minutes to bring in the materials, and 30 to 40 to unwrap them before she gets back in the forklift.

Petitioner testified that she now works as a "saw sorter", and at her request has reduced her schedule to 4 days per week instead of 5, working 7.5 to 8 hours per day. As a saw sorter, she testified she still deals with materials and unwrapping but has to get in and out of the forklift more often, which she estimated to be 8 to 10 times every 60 to 90 minutes. She has 7/10 to 8/10 pain on an average day. She only misses work at times due to pain, as she needs to work and make money. She does take extra 5 to 8 minute breaks when she can. She can no longer run or take longer walks and has difficulty walking inclines. Her manager Damaso is aware that she can't work at her prior production level, indicating she used to produce 50 material bundles and now only can complete 25 to 30 bundles.

On cross-examination, Petitioner testified the Respondent has accommodated her restrictions. As to the extra breaks she takes, she testified "They don't punish me but they also don't pay me for that." She agreed she probably earned $16.95 per hour when she was injured and has received raises since that time leading to a current wage of $22.75 per hour. She has group health benefits through Respondent, but she has not used that insurance for this workers compensation claim. She testified she used to run three days per week with her sisters prior to the accident, two to three miles at a time. She denied Dr. Bodner telling her that surgery had a significant chance of failure but did not dispute that he may have indicated it in his records. While she agreed that Dr. Bodner released her in October 2020, she testified he told her he couldn't do anything more for her and that he would refer her to another doctor. She denied him telling her in January 2021 that he didn't think surgery would help her. Dr. Nho did agree she could work 8 hour shifts. He did say she would get worse over time and that she would improve with surgery. She has worked some overtime in most pay periods since June 2021, but she again reiterated that she needs to make money. It was her understanding that Dr. Bodner referred her to a specialist because she needed surgery. She has tried to run but her leg gives out. She sometimes performs the exercise program she was advised to continue, indicating that without it she would not be able to maintain her current level of function. The testimony was not entirely clear, but it appears that overtime with Respondent is voluntary, and Petitioner reiterated she needs to make money and that she works maybe an hour of overtime sometimes, with the Arbitrator's understanding being that she meant up to an hour of overtime per day.

Petitioner's wage records from 11/30/19 to 4/29/22 were submitted into evidence by Respondent. In what appear to be biweekly pay periods, Petitioner's overtime hours ranged from 16.54 hours to no hours. She worked overtime in significantly more pay periods than she did not, and in the vast majority worked between 0 and 6 hours of overtime per period, which is significantly consistent with her testimony. (Rx4)

Zack Nagy testified on behalf of the Respondent. He has been the Assistant and Plant Manager for over 20 years for Midwest Manufacturing, who does work as the Menards distribution center. He testified he was familiar with Petitioner following his arrival at Petitioner's location in April 2020 as first shift assistant manager. In January 2022 he became plant manager. He also is familiar with Damaso, the second shift assistant manager, who reports to him. In his position, Mr. Nagy testified he has had an opportunity to observe Petitioner's work and that overall she does an excellent job with above average productivity based on how many pallets are scanned. As a replenisher, her job involves bringing materials in to pulling excess materials and putting them in a primary location with the use of a forklift. He could not say if she took additional breaks over the norm. Mr. Nagy testified that in an hour, a team member like Petitioner would typically get on and off of the forklift four or five times per hour but agreed this varies by Team Member. Team members typically work 8 hour shifts with voluntary overtime. While it was available earlier in 2022, overtime fluctuates with workload and there is no current overtime available. Agreeing that he signs off on all raises, Mr. Nagy testified that the Petitioner has received one raise that was given to all employees since her injury and another that was merit based. On cross-examination, Mr. Nagy acknowledged that he only randomly observes Petitioner, maybe 10 minutes per day, and he could not say whether her production level is greater or less than it was before

9/23/19. On redirect, Mr. Nagy agreed that Petitioner testified she got on and off the forklift seven to nine times every 60 to 90 minutes.

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:

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).

Petitioner had an obvious significant injury on 9/23/19 involving the avulsion of multiple proximal hamstring muscles. No one is disputing that the accident caused the hamstring tear, and the parties have stipulated to a compensable accident. The Respondent's argument centers on two things: that the Petitioner had reached MMI when she was released by Dr. Bodner, and that the surgery being recommended by Dr. Nho is not reasonable and necessary under the Act.

With regard to the specific issue of causation, while it is true that the Petitioner has reached MMI, short of the recommended surgical procedure, it is clear to the Arbitrator that Petitioner's condition remains causally related to the accident. The Petitioner has never fully recovered from this left hamstring injury. She has 10 centimeters of muscle retraction, which all physicians agree on based on the MRI films, and she has significant fatty atrophy, adhesions and scarring that impacts the sciatic nerve, and ongoing symptoms of weakness and pain. Both Dr. Nho and Dr. Shadid have testified that the hamstring tear is causally related to the accident, which is also consistent with the reports of Dr. Bodner. Both Dr. Nho and Dr. Shadid testified that Petitioner's continued subjective symptoms were consistent with their objective findings. Neither examiner opined Petitioner exhibited any signs of malingering. Dr. Nho testified that a chronic hamstring tear like Petitioner's would not heal solely with physical therapy.

The Arbitrator notes that Dr. Shadid testified he has performed only one surgical hamstring tendon repair in his career, approximately 10-15 years ago, involving a college football player. Dr. Nho, on the other hand, testified that over the past 10 years he has performed approximately 20 to 40 hamstring repair surgeries per year and has authored several medical articles specifically on hamstring repair

The Arbitrator finds Petitioner met her burden of proof by a preponderance of the evidence that her condition of ill-being relating to her left hamstring is and remains causally related to her 9/23/19 work accident.

The Arbitrator further finds that the Petitioner's lumbar spine condition was also related to the 9/23/19 work accident through 10/29/20. Dr. Bodner had indicated prior to that date that Petitioner had some compensatory back pain due to her altered gait. However, on 10/29/20 he advised that Petitioner would need to follow up for any low back care outside of workers' compensation. Dr. Nho indicated Petitioner had no low back complaints on 5/24/21. While Dr. Shadid did record complaints of low back pain with occasional radiation into the buttocks on 2/25/21, he did not opine as to causation. The Arbitrator finds that the greater weight of the evidence supports the finding that any causal relationship of Petitioner's low back condition to the work accident ended as of 10/29/20.

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 findings regarding causation, all of the medical expenses contained in the Petitioner's records in evidence are awarded.

There was an issue presented by Respondent based on the opinions of Dr. Shadid that Petitioner's therapy was excessive. Petitioner underwent approximately 85 total therapy sessions. He testified that there was "no evidence that 85 sessions of therapy [are] better than 24 [sessions]. [Petitioner] would be at the same point she is at today whether she had 24 sessions or 85 sessions." Dr. Nho disagreed, opining that the therapy was reasonable and necessary.

The Arbitrator notes initially that the 85 sessions of therapy involve 24 sessions solely related to the lumbar spine, so the Petitioner actually underwent 51 sessions of left hamstring therapy, not 85. The Petitioner credibly testified that she was improved with therapy. As Dr. Bodner ordered the therapy, the obvious assumption is that he felt the treatment was reasonable and necessary, as did Dr. Nho. The Arbitrator finds that the Petitioner is entitled to payment of her physical therapy expenses related to the left thigh, and to payment of physical therapy expenses related to the lumbar spine so long as they were incurred prior to or on 10/29/20.

Respondent shall be given a credit for all medical expenses paid by Respondent per Respondent's Exhibit 2, as well as any additional amounts paid to or received by providers that may not be reflected therein, including expenses paid through a group plan that Respondent paid at least a portion of the premiums pursuant to Section 8(j), so long as Respondent holds the Petitioner harmless with regard to the expenses for which they receive the noted credit.

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

Having found a causal connection between Petitioner's workplace accident and her ongoing chronic pain and symptoms, the Arbitrator further finds Dr. Nho's recommended surgery to be both reasonable and medically necessary.

Respondent claims Petitioner's initial treater, Dr. Bodner, discharged Petitioner from care and stated Petitioner reached MMI (maximum medical improvement) on 10/29/20. However, this essentially was a determination that the Petitioner had reached MMI if she was not having surgery. She had ongoing symptoms at that point that, based on the evidence in the record, were consistent with her injury. Dr. Bodner indicated that without surgery Petitioner may have ongoing pain "when she works too hard" and gave Petitioner a note "suggesting" that she should work no more than 5 days a week, 8 hours per day. Surgery was already not a reasonable option, in his view, just three weeks after the injury. At the same time, Dr. Bodner indicated that while he did not feel comfortable exploring Petitioner's thigh or attempting some type of late reconstruction on her hamstring, he did advise she could seek a second opinion. At her last visit with Dr. Bodner on 3/8/21, Petitioner reported ongoing symptoms, and the doctor reiterated that he had discussed exploratory surgery to dissect around the nerve and "recompress", but improvement would be uncertain and "My only remaining question for care is if an arthroscopic expert in hamstring repairs would be willing to try to decompress the area through minimal and invasive techniques."

While Dr. Bodner specifically referred Petitioner to Dr. Domb as an expert in the field, the Arbitrator notes that Dr. Nho's CV is also impressive with regard to his publications that specifically address hamstring repair, and he performs significantly more hamstring repair surgeries than Dr. Shadid.

Dr. Shadid fairly references multiple articles which discuss the potential pitfalls of hamstring repair surgery for older patients and/or patients with significant hamstring retraction. While this is highly relevant and taken into consideration, Dr. Nho has authored multiple articles specifically on the topic of hamstring repairs. The CV of Dr. Shadid does not indicate such publication on his part.

There is no more difficult case for an Arbitrator than one where a claimant has ongoing symptoms, desires relief and there are physicians involved who disagree on the reasonableness and necessity of a surgery. Virtually any surgery involves an insult to the body by necessity, and the question becomes whether the danger of worsening due to the new insult is significantly greater than the potential for improvement based on the opinions of experts in the field.

Dr. Shadid testified surgical intervention to Petitioner's left hamstring is not reasonable and necessary because multiple articles in the medical literature indicate high complication rates with chronic cases such as Petitioner's. (Rx3c). As noted in his testimony, he felt that the downside risk was too great to overcome the upside chances of improvement and to recommend such surgery. He opined that the scarring of the torn muscle fibers to the sciatic nerve would be very difficult to detach without endangering the nerve itself from further damage, and at the end of the day she could end up worse than she currently is. He also opined that there would not be sufficient muscle tissue to make a repair given the level of retraction. Significantly, he also testified that Petitioner's congenital bone defect in the pubic rami would not be stable enough to support a taut hamstring repair and would likely result in a re-tear. On cross, Dr. Shadid agreed it was possible that Petitioner could get improvement with the surgery recommended by Dr. Nho.

Dr. Nho, on the other hand, testified: "I'm not saying that it's not a risky surgery. It is, but it can be done. And just because there's risks associated with it doesn't mean it's not indicated, not necessary, or shouldn't be performed. But the risk assessment I think lies also between who's providing it and who's not." He also testified that as to the possibility of injury to the sciatic nerve, Petitioner was already complaining of symptoms that could be related to the nerve, and that he in his experience "I just haven't seen that be a common problem."

The unusual and interesting part of this case involves the interaction of the congenital pubic ramus problem and the initial injury as well as any hamstring repair. Dr. Shadid testified the recommended surgery would be a failure because "you are trying to reattach that [hamstring] muscle to a bone that doesn't exist." Dr. Nho countered that he did not know what Dr. Shadid was talking about as the hamstring had been connected to the ischial tuberosity, not the pubic ramus, and that the only way such a bone would not "exist" would be if it had been removed "or traumatized in some way." He went on to testify that the hamstring is proximally attached to the ischial tuberosity, or it should be attached be attached to the ischial tuberosity and thus that the left inferior pubic rami congenital defect is not relevant. He went on to indicate that the inferior pubic ramus is part of the pelvis and closer to midline, while the ischial tuberosity is more towards the outer part, what would be referred to by people as the "sit bone." Dr. Nho also explained while there might be a defect or deformity in the inferior pubic ramus, that does not automatically mean the ischial tuberosity is involved or affected by it.

It is also significant to the Arbitrator that Dr. Shadid had the chance to review the transcript of Dr. Nho's deposition and stated that he agreed the site of attachment of the common hamstring which is technically more lateral and posterior on the ischiopubic continuum, otherwise referred to as the ischial tuberosity.

Importantly, Dr. Nho opined that a 10-centimeter hamstring tear/retraction heal solely via conservative treatment. He believed the recommended surgery would be planned help in improving Petitioner's pain and weakness, better function, and relief of some of the nerve-type symptoms related to the sciatic nerve. Without

having the surgery, Dr. Nho testified Petitioner's symptoms will continue to persist with the risk of further deterioration.

While her complaints of 8/10 level pain appear somewhat excessive given her ability to work, both Dr. Nho and Dr. Shadid have indicated her subjective complaints to them were consistent with their objective findings. Neither doctor indicated concerns of malingering, and Dr. Shadid was specifically asked about this. Petitioner also complains of difficulty with prolonged sitting and standing, bending over, and climbing on and off the forklift at work. She indicated an inability to run like she used to as her left leg will give out. She regularly takes extra short breaks at work to help alleviate her pain. Both Dr. Nho and Dr. Shadid acknowledged Petitioner continued to experience pain in her left hamstring at the time of their evaluations and both doctors noted Petitioner still had tenderness to palpation over the hamstring area.

One of the keys in this case, from the Arbitrator's point of view, as stated earlier, is that the danger of worsening seems relatively speaking worth the risk of surgery given evidentiary support of Dr. Nho as an expert in his field. Dr. Bodner's expertise in and personal experience with hamstring repair is unclear based on the evidence. We have two doctors therefore, Shadid and Nho, both experts, who disagree on whether the surgery is reasonable. Often in cases like this we have claimants who have back injuries, for example, where the basis for subjective complaints is disputed and not always clear. Here we have an obvious injury and an obvious pathology, even if "healed" as indicated by Dr. Shadid, of a 10 cm retraction of a hamstring muscle that was essentially torn off the bone. The Arbitrator finds Dr. Nho's opinion to be persuasive in this case, in particular given his significant personal experience with hamstring repair surgery. Petitioner has exhausted all conservative care but continues to have chronic pain, weakness, numbness, and physical limitations due to the significant hamstring tear and retraction, as well as scarring of the sciatic nerve. Petitioner has had over a year to contemplate surgery and appears to understand that the surgery is not without risks, and it is hoped she is taking the risks into consideration. The Arbitrator finds Dr. Nho's recommended surgery to be both reasonable and necessary pursuant to Section 8(a) of the Act.

While the Arbitrator has awarded the surgery recommended by Dr. Nho, the Respondent's arguments in this case are well taken. If the Petitioner desires the surgery, the surgery will be authorized by Respondent. At the same time, the Arbitrator believes that Dr. Shadid's recommendation for a pelvic CT scan and a review by Dr. Nho prior to confirming a surgical recommendation would be a well-considered step in this case to make certain that the doctor's understanding of the congenital defect is taken into consideration in the best interests of this claimant.

WITH RESPECT TO ISSUE (N), IS THE RESPONDENT DUE ANY CREDIT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator notes for the record that while the parties stipulated that Respondent is entitled to a TTD credit totaling $2,222.76, that credit is not applicable to any of the awards made in this case as Petitioner did not claim TTD as an issue in the case.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC020643
Case Name	Sherry Caraway v. Council for Jewish Elderly DBA CJE SeniorLife
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0037
Number of Pages of Decision	17
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Charles Fanucchi
Respondent Attorney	Kelly Kamstra

DATE FILED: 1/23/2024

/s/Carolyn Doherty, 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

Sherry Caraway,

Petitioner,

vs. No. 17 WC 20643

Council for Jewish Elderly d/b/a CJE SeniorLife,

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 (repetitive trauma), causal connection, medical expenses, prospective medical care, temporary disability, and permanent disability, and being advised of the facts and law, reverses the Decision of the Arbitrator and awards workers' compensation benefits for the reasons stated below.

Petitioner's application for adjustment of claim alleges repetitive trauma to the hands, wrists and arms, with the manifestation date of April 25, 2017. Petitioner, who holds medical certifications in CNA and direct support home health, testified on direct examination that before working for Respondent, she provided home health care to adults and children with special needs "[o]ff and on" from 1995 through 2017. During those years, Petitioner also "ran a few homes" and "didn't have to do anything at all but paperwork."

After passing a physical examination, Petitioner began working for Respondent full duty in January of 2017. Petitioner described her job duties for Respondent as follows: "[T]he consumers that were in there who needed special help because all of them couldn't get up and walk on their own and they were in wheelchairs. ¶ Some of them you had to help get them out of bed and get them into a tub and then take them out of the tub to give them showers and things, and they didn't have any hoists or anything. So you have to use your body and shift them to get them up." Petitioner continued: "You have like five or six people to shower daily who you had to take to the lunchrooms, you have to get out their rooms, the people who had to go to the doctor's appointments, different things." "Some of them could assist [themselves] and the other ones needed more help, and I worked mostly on the part that needed

more help because I could support more." Petitioner testified about the specifics of her job activities, describing gripping and/or lifting activities "all day" without any assistive devices such as a Hoyer lift, power chair, or transfer hoist. "We would use our hands and arms and our legs to do so." Sometimes, Petitioner did the lifting with a coworker, but most of the time she did the lifting alone. Petitioner elaborated: "I would have like ten people plus whatever I was called for. So really it's my ten plus whoever needed assistance. It would be four, five people, you know, extra, but I would go run and help them with theirs and then go back to mine because I'll be putting them in bed already. I could do it by myself." Petitioner's heaviest patient weighed between 300 and 400 pounds.

Petitioner described the manifestation of the repetitive trauma as follows: "My hands and my wrists I used more so. So it started to ache a little bit, and I had mentioned it to a head nurse." Asked about the time frame, Petitioner responded: "I did it I know a lot in February. I did it because it started really hurting then and that's when I started to tell her, you know, all the lifting was beginning to be a lot." Petitioner believed that at the end of February, she saw a physician's assistant named Christine at Aunt Martha's. Over the next several months of working full duty, the symptoms worsened. Electrodiagnostic studies showed carpal tunnel syndrome. When Petitioner tendered her work restrictions to Respondent, Respondent did not accommodate them.

Petitioner further testified that after the diagnosis of carpal tunnel syndrome, she treated with Dr. Kevin Hilton and Dr. Tariq Iftikhar. Dr. Hilton operated on the right wrist. Petitioner did not have a good result from the surgery. Dr. Iftikhar operated on the left wrist. Petitioner again did not have a good result from the surgery. Dr. Iftikhar recommended against further surgery on the right side because of "nerve damage" and referred Petitioner to pain management. At the time, Petitioner was unable to receive pain management because of insurance issues. Petitioner moved to Arizona and consulted a pain management specialist there. Petitioner testified the pain management doctor could not help her because "it's too much nerve damage."

At the arbitration hearing, Petitioner was wearing braces on both wrists. Petitioner testified the braces were prescribed by a doctor in Arizona. Petitioner stated: "I wear these 23 hours out of the day. The only time I take them off is to take a shower because at any given time my nerves may just go blank and I won't be able to hold anything." Petitioner further described her current condition as follows: "If I'm trying to lift anything or if I'm just holding something, it will just fall out of my hand. I mean, I've dropped several things. I never know when it's going to go out. I could just be sitting down and holding anything or trying to use it and it will just give out on me." The hands "burn and they swell really bad." Petitioner also has numbness and tingling. The hands are always symptomatic.

On cross-examination, Petitioner testified that during the two years before her employment with Respondent, she worked as many as 60 hours a week for two employers. However, she denied doing any significant lifting or wheelchair pushing. Describing her job duties for Respondent, Petitioner summarized: "I got people out of the beds; I gave them showers, I gave them baths, whichever preference they wanted; I took them to eat; we took them to activities that were in the same building; I washed their clothes." Petitioner then described collecting and delivering the residents' already laundered clothing, rather than washing the clothes. Petitioner's main job duties centered around getting the residents out of bed, showering or bathing them, taking them to the cafeteria or activity rooms, putting them to bed for a nap, getting them up after a nap, and helping them with toileting. A shower took approximately 40 minutes per resident. The residents "have a shower chair. You lift them out of the wheelchair to put them in the shower chair. Then you have to take them out of the shower chair to put them back in the

wheelchair." Not all residents needed lifting. Petitioner worked 40 hours a week, plus overtime.

Petitioner denied having symptoms before February of 2017. Petitioner did not remember an emergency room visit in May of 2016 for pain, numbness and weakness in both arms or subsequently telling Christy she had numbness in her arm and fingertips for six months. On redirect examination, however, Petitioner acknowledged having pain in her arms in 2016, attributing the pain to a neck injury. Petitioner stated the pain and the neck problems resolved before her employment with Respondent.

Petitioner did not dispute that she never told her medical providers her symptoms were connected to her work activities or asked to bill workers' compensation insurance.

Petitioner last worked for Respondent on April 25, 2017. Petitioner has not worked anywhere since. Petitioner has not looked for work because "[t]here was nothing I could do." In August of 2018, Petitioner was awarded Social Security benefits and Medicare. Also in August of 2018, Petitioner moved to Arizona.

Betsy Bauer, Respondent's human resources manager, testified on direct examination that Petitioner had undergone a pre-employment physical and was cleared to work full duty. Petitioner worked at Respondent's facility "from the end of January through the end of April." Petitioner worked from 3 p.m. to 11:30 p.m., 40 hours a week. She also worked some overtime. She mainly worked in the memory care unit. Ms. Bauer described Petitioner's job duties as follows: "[F]or our memory care unit, there is times that they would be pushing wheelchairs. The residents, since they have dementia, a lot of times they're sitting in activity rooms with their activity workers. So in-between going to different activities, they would be assisting with that. ¶ They're assisting with toiletting, where they would help them in the restrooms. They shouldn't be lifting. It would be more helping with transferring to and from, and then as well as they would be doing showers, if that was in the schedule. ¶ There's 40 rooms at that side of our building, and there was four different resident assistants on shift for that shift. So each one would have a section of about eight to ten residents, depending on if the building was full." "The only time they should really be lifting is if a resident falls, and at that time they are supposed to have at least two people to help assisting with lifting. There's always a nurse on shift as well as maintenance workers and activity workers that could assist with helping with that as well." Taking the residents to activities, "there would maybe be one to two residents per section that had a wheelchair. The rest of them would be walking or have walkers, and they would just be leading them to the next room." "[I]f a resident has to use the restroom and they need assistance, they would be—they might be helping with their clothes and just getting them situated, but they should still be able to stand and sit by themselves. They would just need help transitioning back and forth, especially if they're in a wheelchair." Ms. Bauer acknowledged some lifting could be involved, "but it should be more guiding them and not actually lifting them. If the resident is needing a lot of lifting, then they should be in skilled nursing care." Regarding washing clothes, housekeeping did the laundry; Petitioner had to put clean things in residents' rooms.

Ms. Bauer further testified that Petitioner performed her job duties without complaint until she reported a work injury at the end of April. When Petitioner tendered a restricted work note, Respondent was unable to accommodate the restrictions.

On cross-examination, Ms. Bauer explained that Respondent's facility provided limited services: "There are regulations in assisted living that we can't do what they do in skilled nursing." Ms. Bauer acknowledged that transfers and helping with showering/bathing involved gripping and lifting.

Regarding getting residents out of bed, Ms. Bauer stated some residents "do get transfer assistance, but it's not fully lifting." The only assistive equipment for lifting or transferring was shower chairs. On redirect examination, Ms. Bauer testified that transferring a resident to or from a wheelchair takes a minute or two. Bathing, including assistance with dressing, could take 30 to 40 minutes.

At the close of testimony, Respondent's counsel represented that Petitioner's date of hire was January 23, 2017. This representation is corroborated by a wage statement in evidence showing Petitioner began working for Respondent on January 23, 2017.

Petitioner introduced into evidence an incomplete set of medical records from Aunt Martha's/ Hazel Crest Community Health Center. A pre-accident medical record dated May 10, 2016, states Petitioner followed up after an emergency room visit for "L arm pain/numbness. Reports R arm numbness for one month. Denies injuries or trauma to neck, shoulder or arm. Also has some weakness in her R arm/hand, now starting to have symptoms on the other side." Physical examination focused on the cervical spine, and a work-up was ordered for cervical radiculopathy. The exhibit is missing records between May 10, 2016 and April 25, 2017.

On April 25, 2017, Kristi Hughes, NP, reviewed electrodiagnostic test results for the right upper extremity, noting: "Pt states the gabapentin is not working. Pt states the pain is starting to switch to the left wrist now. Pt stated she cannot even hold her phone she feels like she is going to drop it. Pt also states she no longer drives she has a family member drive her around due to the pain and numbness." The electrodiagnostic studies showed moderate right carpal tunnel syndrome. Petitioner was referred to orthopedics.

Respondent introduced into evidence additional medical records from Aunt Martha's showing that on April 11, 2017, Petitioner complained of numbness down the right side, shortness of breath, and swelling of feet. The following relevant history was noted: "[Patient] complaining of right side numbness in the arm and finger tips for 6 months. Pt has a past medical history of cervical radiculopathy. Pt works as a CNA in a hospital and her right hand is her dominant side." NP Hughes ordered electrodiagnostic studies.

On October 5, 2018, Petitioner was newly diagnosed with type 2 diabetes.

The medical records from Dr. Hilton show that on July 3, 2017, Petitioner presented for evaluation of bilateral hand and arm pain and numbness. "[P]ain in both arms ranging from shoulder to wrists. *** Pain does involve shoulder and area between scapula." Dr. Hilton noted the electrodiagnostic test results relative to the right upper extremity. Nothing was mentioned about Petitioner's job. Dr. Hilton performed diagnostic injections into bilateral carpal tunnels. In assessment/plan, he stated: "I'm unclear whether all her findings at this point can be explained by CTS." Dr. Hilton ordered an MRI of the cervical spine and electrodiagnostic studies of the left upper extremity.

On August 22, 2017, Petitioner reported bilateral wrist pain "since 2/2017." "Pt works with seniors in rehabilitation institute—does a lot of transporting of heavy patients. Lifts and transfers patients 200-300 lb patients. Currently off work b/c of inability to lift." Petitioner reported the injections helped for only two days. Dr. Hilton noted "more classic symptoms related to CTS" and recommended a right carpal tunnel release.

On September 15, 2017, Dr. Hilton performed the right carpal tunnel release. On December 5, 2017, Petitioner followed up. "Pt c/o a sharp pain on the volar aspect of Rt wrist/hand with weight bearing and occasional numbness and tingling that radiates up to the fingers." Dr. Hilton injected the right carpal tunnel. On December 19, 2017, Petitioner was unhappy about worsening symptoms in her right wrist and hand, and stated she could not hold objects. Dr. Hilton considered a possible diagnosis of RSD and ordered electrodiagnostic studies. The electrodiagnostic studies, performed December 21, 2017, showed "bilateral carpal tunnel syndrome, and the left side is worse. There is no electrophysiological evidence of a cervical radiculopathy at the present time." On December 28, 2017, Petitioner complained of persistent symptoms. Dr. Hilton stated: "EMG/NCV suggestive of BL CTS worse L than R with no proximal involvement of the median nerve. *** Unclear whether symptoms are consistent with RSD development, median neuropathy, incomplete release, scarring around the nerve." Dr. Hilton prescribed medication and a splint. On January 18, 2018, Petitioner complained of continued right-sided pain. Dr. Hilton prescribed occupational therapy. The last note is dated February 15, 2018. Petitioner continued to complain of persistent pain and numbness. Dr. Hilton did not think Petitioner had RSD. Rather, he thought it could be an incomplete release or unrecovered nerve. He referred Petitioner to Dr. Iftikhar for a second opinion and possible revision surgery.

The medical records from Dr. Iftikhar show that on February 26, 2018, Petitioner sought a second opinion. Regarding the right hand/wrist, Dr. Iftikhar recommended an evaluation for RSD by a pain management specialist. Regarding the left hand/wrist, Dr. Iftikhar recommended surgery in the future. On April 9, 2018, Dr. Iftikhar noted: "Refused pain clinic appointment. Complains of pain 10/10. States that she is now having pain on the left wrist as well. Taking gabapentin 300 mg and Norco 10mg for pain." Dr. Iftikhar assessed: "Clinically the patient may be having an element of CRPS1. The pain management evaluation of a critical [*sic*] before we undertake a secondary procedure." On July 30, 2018, Dr. Iftikhar noted Petitioner had been unable to schedule a pain management appointment "due to schedule availability" "because of her insurance" (Medicaid). Dr. Iftikhar prescribed new splints and postponed any surgery until the pain situation was addressed. He recommended asking Petitioner's primary care provider for pain management. On February 20, 2019, Petitioner returned, still rating the pain a 10/10. Dr. Iftikhar noted Petitioner's insurance would not cover pain management. Petitioner wished to proceed with surgery on the left side.

On March 11, 2019, Dr. Iftikhar performed a left carpal tunnel release. On March 27, 2019, Petitioner complained of numbness and stiffness after the surgery. She rated the pain a 5/10 with Norco. Dr. Iftikhar assessed Petitioner as doing "extremely well" on the left side. Petitioner also reported persistent symptoms on the right side. Dr. Iftikhar prescribed occupational therapy. On June 12, 2019, Petitioner rated the pain in the left wrist and hand a 10/10. "Patient would like a script for hand braces and Disability Plate form filled out." Dr. Iftikhar assessed: "This patient has suddenly developed a complex regional pain syndrome on the left side as she did on the right side." Dr. Iftikhar prescribed amitriptyline and a Medrol Dosepak, as well as bilateral splints. On September 3, 2019, Petitioner rated the pain an 8/10 with amitriptyline and Tylenol #3 and complained of significant loss of strength and function. Dr. Iftikhar referred Petitioner to the University of Illinois Hospital for a second opinion and again referred Petitioner for pain management. The last medical record from Dr. Iftikhar is dated September 25, 2019. Petitioner rated the pain a 7/10 on the left and a 4/10 on the right side and reported being unable to schedule a pain management appointment. Dr. Iftikhar noted: "At the moment different pain medications and gabapentin are not helping the patient's sensitivity and pain which has been persisting in spite of a very prolonged conservative effort. There are no new symptoms but it is ongoing chronic pain syndrome which is becoming a challenge and is further compounded by the unavailability

of any physician of pain specialty to accept her." Dr. Iftikhar had nothing further to offer Petitioner and reiterated his recommendations for a second opinion and pain management.

Petitioner did not introduce into evidence any pain management records or records of any treating doctors in Arizona.

Dr. Iftikhar, a hand surgeon, testified by evidence deposition on October 28, 2021. Dr. Iftikhar opined on direct examination that Petitioner suffered from "bilateral severe carpal tunnel syndrome." Regarding his and Dr. Hilton's operative findings, Dr. Iftikhar testified Petitioner had an identical bilateral muscle abnormality – "a muscle belly *** which usually is not present over the median nerve area." The abnormal muscle was "an incidental finding. Whether it is a direct relationship to the carpal tunnel is very hard to say." Dr. Iftikhar was told Petitioner's job involved "lifting, positioning, carrying heavy patients" for an unspecified period of time. Dr. Iftikhar opined Petitioner's job could have contributed to her carpal tunnel syndrome, explaining: "[I]f there's constant flexion/extension activities of the wrist over a period of time, it's a cumulative effect." Regarding Petitioner's ability to work, Dr. Iftikhar opined she could do a desk job with a 10-pound lifting restriction and no repetitive use of the wrists. Petitioner might not be able to work when she has flare-ups of CRPS.

On cross, redirect and re-cross examinations, Dr. Iftikhar's understanding of Petitioner's job activities was as follows: "[S]he was handling the patients, according to her, and lifting them sometimes. I think she told me that. And how often that activity was there on a daily basis, I don't know." Dr. Iftikhar did not know when Petitioner's symptoms began or her specific job/employer. Dr. Iftikhar did not know how long Petitioner worked with patients or how long she worked for Respondent. In conclusion, Dr. Iftikhar explained: "I don't think these things happen in very fast fashion. It is a cumulative effect ***. When you do repetitive activities, it takes time. It adds up. It doesn't show carpal tunnel in two or three or four months." If the condition was already present in 2016, a new job could aggravate it.

Respondent's expert, Dr. Prasant Atluri, testified by evidence deposition on February 4, 2022. Dr. Atluri, an upper extremity surgeon, testified on direct examination that he performed a records review at Respondent's request and issued a report on June 18, 2020. Dr. Atluri thought Petitioner's residual symptoms could be due to incomplete healing, scarring/adhesions on the nerve or CRPS. The records did not provide enough information for a clear understanding of the cause of the residual symptoms.

Dr. Atluri did not think Petitioner's bilateral hand and wrist conditions were related to her work for Respondent. Dr. Atluri explained: "My understanding is that there was some exposure to heavy lifting as well as forceful gripping. However, my understanding is that she was not performing forceful gripping or heavy forceful use of her *** hands and wrists associated with awkward positioning on a frequent basis. ¶ Development of carpal tunnel syndrome secondary to activity requires a combination of forceful activity, highly repetitive activity and awkward positioning. Her work duties did not meet that standard based upon my understanding of it." Dr. Atluri was generally familiar with CNA/resident assistant duties, and also relied on Respondent's physical demands analysis.

On cross-examination, Dr. Atluri clarified that he based his causation opinion on Petitioner's employment throughout her entire work life as a CNA. Dr. Atluri noted Petitioner's anomalous muscle condition. Someone with an anomalous muscle condition "could have more progression or an aggravation as a result of that type of exposure." However, "carpal tunnel [syndrome] is not something that occurs quickly when it's associated with activity."

The Arbitrator found that Petitioner failed to prove accident and causation, and denied the claim. While the Commission has concerns about Petitioner's credibility, we find that a preponderance of credible evidence in the record supports a work-related aggravation of a preexisting condition under *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193 (2003). The Commission relies on the nature of Petitioner's job with Respondent and credible testimony of Dr. Iftikhar, who described a preexisting bilateral muscle abnormality over the median nerve area. Dr. Iftikhar opined that even if Petitioner already had carpal tunnel syndrome in 2016, her job with Respondent could aggravate it. Dr. Atluri likewise acknowledged that someone with an anomalous muscle condition "could have more progression or an aggravation as a result of that type of exposure." Furthermore, the chain of events indicates Petitioner's bilateral carpal tunnel syndrome became more symptomatic as a result of Petitioner's job duties with Respondent, necessitating work restrictions and surgeries. The manifestation date Petitioner alleges is correct based on the medical records. The record further shows that Petitioner gave timely notice to Respondent.

Turning to the determination of benefits due to Petitioner, the Commission again relies on credible, objective evidence. The Commission finds that Petitioner was temporarily totally disabled from April 25, 2017 through August 1, 2018, when she removed herself from the workforce and began collecting Social Security benefits. The parties stipulated to an average weekly wage of $524.40 during the time Petitioner worked for Respondent. As for our award of medical benefits, the last medical record from Dr. Iftikhar is dated September 25, 2019. There are no medical records in evidence from any provider after that visit. The Commission therefore finds maximum medical improvement as of September 25, 2019, and awards medical benefits through that date pursuant to sections 8(a) and 8.2 of the Act.

Lastly, the Commission determines the permanency award. The Commission considers the five factors enumerated in section 8.1b(b) of the Workers' Compensation Act (the Act): "(i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b).

Regarding factor (i), the Commission notes no impairment rating has been submitted into evidence. The Commission therefore gives no weight to this factor.

Regarding factor (ii), at the time of the injury Petitioner was a CNA, which is a physically demanding job. The Commission gives lesser weight to this factor, given that Petitioner has removed herself from the workforce.

Regarding factors (iii) and (iv), the parties stipulated Petitioner was 48 years old at the time of the injury. She is now 55 years old. Dr. Iftikhar opined that Petitioner could return to the workforce. However, Petitioner has removed herself from the workforce. The Commission finds no evidence to support impairment of earnings causally connected to the work accident and places more weight to this factor.

Regarding factor (v), the Commission notes that Petitioner underwent bilateral surgeries but was left with residual complaints from both surgeries. The Commission further notes that the record shows

symptom magnification and use of multiple pain medications. Petitioner testified that after moving to Arizona, she consulted a pain management specialist there. However, the doctor could not help her because "it's too much nerve damage." At the arbitration hearing, Petitioner was wearing braces on both wrists. Petitioner testified the braces were prescribed by a doctor in Arizona. However, Petitioner introduced no medical records into evidence from the alleged Arizona providers. The Commission notes that Dr. Atluri was unable to explain of the cause of Petitioner's residual symptoms. The Commission also finds it telling that Dr. Hilton and Dr. Iftikhar recommended that Petitioner seek a second opinion. The Commission places greater weight on this factor. Accordingly, the Commission finds that Petitioner sustained 10% loss of use of the right hand and 10% loss of use of the left hand pursuant to Section 8(e) of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 3, 2023, is hereby reversed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $349.60 per week for a period of 66 2/7 weeks, from April 25, 2017 through August 1, 2018, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay related medical bills in evidence through September 25, 2019, pursuant to §§8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $314.64 per week for a period of 38 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the loss of use of each hand to the extent of 10 percent thereof.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $56,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

January 23, 2024

CMD/sk
O- 12/13/2023
045

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC020643
Case Name	Sherry Caraway v. Council for Jewish Elderly DBA CJE SeniorLife
Consolidated Cases	
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	Michael Glaub, Arbitrator

Petitioner Attorney	Charles Fanucchi
Respondent Attorney	Robert Sabetto

DATE FILED: 1/3/2023

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

/s/Michael Glaub, Arbitrator

Signature

24IWCC0037

STATE OF ILLINOIS)
)SS.
COUNTY OF LAKE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Sherry Caraway Case # **17 WC 020643**

Employee/Petitioner
v.
Council of Jewish Elderly
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 **Michael Glaub**, Arbitrator of the Commission, in the city of **Waukegan**, on **September 20, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **April 25, 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*** 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 $ **27268.89** ; the average weekly wage was $**524.40**.

On the date of accident, Petitioner was **48** years of age, ***married*** with **0** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

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

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

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

ORDER

Petitioner failed to meet her burden of proving an accident that arose out of and in the course of her employment with Respondent. Petitioner failed to prove that her medical condition is causally related to her employment for the respondent.

Accordingly, Petitioner 's claim for compensation is denied. All other issues are moot.

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

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

Michael Glaub
Signature of Arbitrator

January 3, 2023

***Findings of Fact*:**

Petitioner filed an Application for Adjustment of Claim alleging bilateral hand, wrist, and arm injuries – or more accurately, repetitive trauma injuries – that she claims are the result of lifting patients. *Arbitrator's Exhibit 1 (hereafter "AX1").*

Testimony

Petitioner is a 52-year-old female and Respondent is an assisted living facility. *Transcript at page 7, 79 (hereafter "Tr. 7, 79")*. Petitioner worked for Respondent as a residence assistant from January 2017 until April 25, 2017, the date she claims as the manifestation date of her condition. *Tr. 10, 14, 51, 82*.

Petitioner has been a certified nursing assistant ("CNA") and home health care specialist since 1995. *Tr. 8*. This was the only field in which she worked throughout her career. *Tr. 8, 37*. Her work has consisted of assisting adults and special needs children. *Tr. 8-9*. She described her work as involving bathing, laundry, cooking, and cleaning for patients. *Tr. 9*. Every day she worked, she lifted patients in and out of a tub "a few times" a day. *Tr. 9*. She occasionally "ran a few homes," which involved paperwork. *Tr. 9*. Before starting her employment with Respondent, she passed a medical exam and was cleared to work without restrictions on lifting. *Tr. 12-13*.

Petitioner described her duties with Respondent as requiring her to lift patients to get them out of bed and out of their wheelchairs, giving them showers, and feeding them. *Tr. 11*. No transfer hoist or Hoyer lift was available, so she had to use her body to shift them. *Tr. 12, 15-16*. She testified that a job description Respondent gave her told her she would be responsible for five to six patients. *Tr. 13*. She did not have the description to offer into evidence. *Tr. 74*. She worked in an area where patients needed more help. *Tr. 14*. She testified that she used her hands to lift and grip "all day" and that she used her hands and her leg to support patients. *Tr. 14-15, 16*. She estimated that she lifted ten patients of her own plus four or five extras she was asked to assist. *Tr. 17, 53*. She estimated the heaviest patient to be between 300 and 400 pounds. *Tr. 18*. None of her patients were bedridden but some were confined to a wheelchair. *Tr. 18*.

Petitioner noticed "over time" that her hands and wrists ached "a little bit." *Tr. 18*. She first noticed her symptoms in February 2017 and told a head nurse about them. *Tr. 18, 19, 62*. She did not remember the name of the head nurse. *Tr. 18*. Petitioner consulted "Krystie," a physician assistant at Aunt Martha's at the end of February 2017. *Tr. 19-20*. She underwent an EMG in late February that showed she had carpal tunnel syndrome. *Tr. 20-21*. She gave Respondent a note about this in March. *Tr. 21*.

Petitioner testified that she continued working but her wrists got worse. *Tr. 21*. She was diagnosed with carpal tunnel syndrome and given a 15-pound lifting restriction that she gave to Respondent in April. *Tr. 22, 23-24*. Respondent was unable to accommodate her restrictions, so she stopped working. *Tr. 25*.

Krustie referred her to Dr. Kevin Hilton and Dr. Iftikhar. *Tr. 26*. Petitioner underwent an injection that did not help and proceeded to surgery on her right hand. *Tr. 27*. She believed it was in June 2017. *Tr. 27*. Postoperatively, she underwent therapy. *Tr. 28*. She was diagnosed with carpal tunnel syndrome and nerve damage. *Tr. 28*. Dr. Iftikhar performed surgery on her left wrist she believed a year later. *Tr. 29, 32*. Petitioner testified that surgery did not help. *Tr. 29*. Dr. Iftikhar referred her to pain management. *Tr. 30*. Petitioner testified that she consulted a pain management physician after she moved to Arizona in 2018. *Tr. 33, 70*. Petitioner testified that he told her there was nothing he could do. *Tr. 33*. Dr. Iftikhar told her there was nothing he could do but prescribe medication that she does not want to take. *Tr. 32-33*.

On cross exam, Petitioner agreed that she consistently assisted six to 15 patients throughout her career. *Tr. 41*. She worked 60 hours a week at two jobs from 2015 until she started working for Respondent in 2017. *Tr. 47-48*. She denied that she lifted any patients at one job, Individual Advocacy Group. *Tr. 44*. However, she admitted that some of the patients were in wheelchairs, and she did some bathing there. *Tr. 44, 45*. She denied that she lifted anything working as a supervisor for the other company, Chicago Parents & Friends. *Tr. 49*.

Petitioner testified that her duties for Respondent were the same ones she always performed as a CNA. *Tr. 51*. She testified that she moved patients, but she declined to say how long it took to move them. *Tr. 57*. When pressed, she testified it took more than five minutes. *Tr. 58*. She testified that "you never know" how long it takes to move patients out of a wheelchair. *Tr. 59*. She did not know how many patients she showed each night but testified that it took 40 minutes to shower a patient. *Tr. 60-61*.

Petitioner denied ever having similar problems in her wrists before she worked for Respondent. *Tr. 63*. She denied telling Krystie that she had symptoms for six months when she first saw her for her symptoms. *Tr. 66*. She has not worked for Respondent or anyone else since April 25, 2017. *Tr. 69-70*. She was awarded Supplemental Security Income ("SSI") for her upper extremity condition. *Tr. 73.*

Betsy Bauer is Respondent's human resources manager. *Tr. 78*. In 2017, she was a human resources generalist, but she took workers' compensation reports. *Tr. 78-79*. Bauer was involved in hiring Petitioner, which included orientation, some training, and on-boarding. *Tr. 80*. She confirmed that Petitioner passed a fitness for duty exam and was cleared to work full duty. *Tr. 80-81*. Petitioner worked for Respondent from January 2017 through April 2017. *Tr. 81*. Petitioner worked a standard 40-hour shift but worked overtime sometimes. *Tr. 82-83*.

Petitioner worked in the memory care unit, which housed some patients with dementia. *Tr. 84.* As a resident assistant, Petitioner was assigned eight to ten patients. *Tr. 85*. Bauer described Petitioner's job duties as pushing wheelchairs, assisting with "toileting," and giving showers when needed. *Tr. 85*. According to Bauer, patients can stand and sit on their own, so Petitioner would have been doing more guiding than lifting. *Tr. 87*. The only time any resident assistant should be lifting is when a patient falls, and they are supposed to have two people lift them. *Tr. 85*.

Bauer completed the PDA form to outline the job duties of Petitioner's position. This form was provided by Respondent's carrier. Bauer testified that pushing and pulling referred to wheelchairs. *Tr. 91*. Each section has one or two patients in a wheelchair. *Tr. 92*. She did not know the distance that Petitioner would push a patient in a wheelchair but she testified that the rooms are close so "not very far." *Tr. 91-92*. On cross exam, she agreed that a resident assistant uses her hands to grip and lift, but she testified that it was not "repetitive." *Tr. 98*. She defined "repetitive" as "most of the shift." *Tr. 98-99*. On redirect, she testified that it takes a minute or two to transfer a patient to or from a wheelchair. *Tr. 106*. She agreed that showering, changing, and dressing a patient could take a half an hour, but not the shower itself. *Tr. 107*. The resident assistance would have assisted the patient standing for a shower or sitting into the shower seat. *Tr. 107*.

Bauer confirmed that Petitioner reported a workers' compensation claim at the end of April or early May 2017. *Tr. 88, 103*. She confirmed that a head nurse could take a work injury report but that the head nurse never reported it to her. Tr. 90-91.

Medical Evidence

The medical records of Aunt Martha's Health Services ("Aunt Martha's") document treatment for several personal health conditions, including obesity, prediabetes, cardiovascular disease, and an asthmatic condition, dating back to 2014. *PX1, RX7*. On May 10, 2016, Petitioner presented for follow up after she went to the emergency room two days before for left arm pain and numbness. *RX7*. She reported right arm numbness for one month, weakness in her right arm and hand, and symptoms that were starting on her left side. *RX7*. She denied any injuries or trauma to her neck, shoulder, or arm. *RX7*. She was advised on diet and physical activity. *RX7*.

The next record of treatment regarding her upper extremities is nearly a year later. *PX1, RX7*. On April 11, 2017, Petitioner presented to Kristi Hughes complaining of right fingertip and arm numbness that she reported having for six months. *PX1, RX7*. Her occupation as a CNA at a hospital was noted. *PX1, RX7*. An EMG of the right upper extremity on April 14, 2017, was noted as abnormal. *PX1, RX7*.

Petitioner returned to Hughes on April 25, 2017, and reported that her hand numbness and pain was "starting to switch" to the left side. *PX1, RX2*. She had been taking Gabapentin but it was not helping. *RX1, PX2*. Hughes imposed a 10-pound restriction starting the next day. *PX1*.

On July 3, 2017, Petitioner consulted Dr. Kevin Hilton. *PX2*. She reported bilateral wrist pain since February 2017, and that her hands and fingertips were numb. *PX2*. She told the doctor that she worked with seniors in a rehabilitation institute and did a lot of lifting and transporting patients who weighed 200 to 300 pounds. *PX2*. He noted that she was off work due to inability to lift. *PX2*.

An injection did not provide relief, so Dr. Hilton performed a right carpal tunnel release and neurolysis at MacNeal Hospital on September 15, 2017. *PX2*. On February 15, 2018, Dr. Hilton noted that Petitioner continued to complain of numbness beginning in the thumb and spreading over the remainder of her fingers and burning confined to the surgical scar and over the palmaris tendon. *PX2*. Noting that occupational therapy and reinjection did not help and that her "pattern doesn't fit a true RSD type picture," he referred her to Dr. Tariq Iftikhar. *PX2.*

Dr. Iftikhar examined Petitioner for the first time on February 25, 2018. *PX5, RX5*. He did not document anything about her employment in his records. On March 11, 2019, Dr. Iftikar performed a left carpal tunnel surgery, also at MacNeal. Petitioner continued to complain of bilateral symptoms, and Dr. Iftakar recommended ongoing pain management for complex regional pain syndrome ("CRPS").

Dr. Iftikhar testified in an evidence deposition on October 21, 2021. *PX8*. His impression of Petitioner's condition is severe bilateral carpal tunnel syndrome and CRPS. *RX8, 19*. He testified that gender, weight, age, and general health/diseases can cause carpal tunnel syndrome. *PX8, 20, 25, 26*. He testified that it is hard to pinpoint the exact cause. *PX8, 20*. However, he testified that "constant flexion/extension activities of the wrist over a period of time" can be a cause. *PX8, 20-21*.

On cross exam, he stressed that such activities "may cause" carpal tunnel syndrome, "not will cause." *PX8, 28*. He testified that the less frequent the wrist activity is, the less likely it is a cause. *PX8, 29-30*. He did not know what specific activities Petitioner performed or how often, he did not know who she claimed she worked for when she developed symptoms, and he did not know what her job was. *PX8, 30, 31-32, 34*. He testified that it takes time for repetitive activities to result in carpal tunnel syndrome, longer than "two or three or four months." *PX8, 35*.

Dr. Prasant Atluri testified for Respondent in February 2022. *RX8*. Dr. Atluri conducted a records review, not a physical exam. *RX8, 7-8*. He prefaced his opinions at his deposition by stating that they could change if his understanding of Petitioner's job duties was different. His impression is that she has

bilateral carpal tunnel syndrome with subsequent bilateral upper extremity symptoms of unclear origin. One possibility is that the nerve did not heal after surgery. As for causation, he testified that her job as a resident assistant did not cause her conditions because she did not perform forceful gripping or heavy forceful use of her hands or wrists in an awkward position on a frequent basis. In other words, carpal tunnel is caused by a combination of forceful activity, highly repetitive activity, and awkward positioning, none of which her job entailed. He based his opinion on the PDA and his own observations of others in his industry.

Conclusions of Law:

In support of his decision relating to (C), did an accident occur that arose out of and in the course of Petitioner's employment with Respondent; and (F), is Petitioner's present condition of ill being causally related to the injury, the Arbitrator makes the following conclusions of law:

It is Petitioner's burden to establish the elements of her claim by a preponderance of the credible evidence. Ingalls Memorial Hospital v. Industrial Commission, 241 Ill. App. 3d 710 (1993). Her burden includes proving an accident that arose out of and in the course of her employment, Parro v. Industrial Commission, 260 Ill. App. 3d 551 (1995), and a causal connection between the accident and her condition of ill-being, Lee v. Industrial Commission, 167 Ill. 2d 77 (1995). A claimant alleging a repetitive trauma injury must meet the same standard of proof as an employee who alleges a sudden injury from a discrete event. Durand v. Industrial Commission, 224 Ill. 2d 53 (2006). Liability cannot rest on imagination, speculation, or conjecture. Chicago Park District v. Industrial Commission, 263 Ill.App.3d 835 (1994).

Petitioner claims that while working for Respondent she sustained a repetitive trauma injury affecting both hands, wrists, and arms that manifested on April 25, 2017. The Arbitrator finds for several reasons that Petitioner has failed to meet her burden of proof.

The medical evidence does not establish a causal connection between Petitioner's carpal tunnel syndrome and her employment with Respondent. The medical records of Aunt Martha's show that she complained of bilateral arm numbness, weakness in her right arm and hand, and symptoms that were starting on her left side in May 2016. These are essentially the same symptoms she reported when she returned for treatment in April 2017. At that time, Petitioner reported that she had symptoms for six months, which would place onset before she started working for Respondent in January 2017.

Hughes noted Petitioner's occupation as a CNA at a hospital and Dr. Hilton noted that she worked with seniors in a rehabilitation institute and did a lot of lifting to 300 pounds. However, neither of them tied these activities to her condition; indeed, neither even mentioned her job again after the first visit.

Dr. Iftikhar did not appear to have a great knowledge about Petitioner's job duties or the onset of her symptoms. He did not tender an unequivocal causal relation opinion. Specifically, he called Petitioner's condition of carpal tunnel syndrome as "cumulative" and "multifactorial." He would not even say that repetitive activity is a cause – he stressed that it "may" cause it and cited Petitioner's age, gender, and weight. PX8, 19-21. He provides "nothing from which one might conclude his opinion was a truly informed one." Runyon v. Pinckneyville Correctional Center, 15 IWCC 0367 (2015). This is insufficient to prove by a preponderance of the credible evidence that Petitioner's employment activities with Respondent caused her bilateral carpal tunnel syndrome because it fails to explain *how*. See, Barrow at 15-17, Scheppers v. Wal-Mart, 14 IWCC 1036 (2014), page 20.

Nonetheless, Dr. Iftikhar testified consistently with Dr. Atluri about the type of activity – constant and sustained bending and flexing of the wrist – as the cause of carpal tunnel syndrome. Petitioner has not demonstrated that she performed any activities in a manner that would cause or aggravate her carpal tunnel

syndrome. She specifically identified grabbing and lifting patients as the cause of her symptoms. Her testimony does not establish that she performed these activities in a constant, sustained, or forceful manner.

The totality of evidence establishes that Petitioner developed symptoms of carpal tunnel syndrome as early as 2016, and that her condition steadily progressed over time. Indeed, Dr. Atluri identified a cause of her condition: an anomalous muscle in her hand.

In support of his decision relating to (E), was timely notice of the accident given to Respondent, the Arbitrator makes the following conclusions of law:

The record is clear that there was some confusion about Petitioner's alleged manifestation date. She testified that she noticed symptoms and reported them to Respondent's head nurse, whom she did not identify, in February 2017. She also testified that she sought medical attention in February 2017, but no medical records corroborate this. Respondent's wage statement and PDA show an alleged manifestation date of February 28, 2017. *RX3, 4*. Nonetheless, Petitioner alleges April 25, 2017, and Bauer confirmed that she learned of the accident in late April or early May 2017. Petitioner has met the notice requirement under the Act.

In support of his decision relating to (J), were the medical services provided to Petitioner reasonable and necessary; (K), what amount of compensation is due for temporary total disability; and (L), what is the nature and extent of Petitioner's injury; the Arbitrator makes the following conclusions of law:

Because of his findings that Petitioner failed to prove accident and causal connection, the Arbitrator finds that Petitioner is not entitled to any compensation or medical benefits. All other issues are moot.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	14WC015500
Case Name	Jeremy Hagene v. Lee Ann Pim & Justin Pim dba PIMCO, & Treasurer State of Illinois/IWBF
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0038
Number of Pages of Decision	19
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Kevin Boyne
Respondent Attorney	Shannon Rieckenberg

DATE FILED: 1/23/2024

/s/Marc Parker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JEREMY HAGENE,

Petitioner,

vs. NO: 14 WC 15500

LEE ANN PIM & JUSTIN PIM d/b/a PIMCO and
ILLINOIS STATE TREASURER as *ex-officio*
custodian of the INJURED WORKERS' BENEFIT FUND,

Respondents.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent Injured Workers' Benefit Fund and notice given to all parties, the Commission, after considering the issues of whether an employer-employee relationship existed, whether Respondent Pimco was uninsured, whether Petitioner sustained an accidental injury arising out of and occurring in the course of his employment with Pimco on February 12, 2012, whether Petitioner's right wrist condition is causally related to the work accident, average weekly wage calculation, entitlement to temporary disability benefits, entitlement to medical expenses, the date Petitioner reached maximum medical improvement, and the nature and extent of Petitioner's permanent disability, and being advised of the facts and law, amends the Decision of the Arbitrator as stated below, but otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. This case was consolidated for hearing with case 14 WC 15492.

PROLOGUE

The Commission observes Petitioner's personal identity information was unredacted from Petitioner's Exhibit 2, Respondent's Exhibit 1, and Respondent's Exhibit 3. The Commission cautions Counsel to adhere to Supreme Court Rule 138. *Ill. S. Ct. R. 138* (eff. Jan. 1, 2018).

CONCLUSIONS OF LAW

The Decision reflects Petitioner reached maximum medical improvement ("MMI") on December 14, 2012, the date of his "last visit" with Dr. Kraemer. The Commission views the evidence differently. The Commission observes Dr. Kraemer testified he last saw Petitioner for his right wrist on May 6, 2013. PX7, p. 23. As such, consistent with Dr. Kraemer's testimony, the Commission finds Petitioner reached MMI on May 6, 2013.

All else is affirmed.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $533.33 per week for a period of 8 4/7 weeks, representing February 23, 2012 through March 1, 2012 and May 9, 2012 through June 30, 2012, 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 medical expenses detailed in Petitioner's Exhibit 4, as provided in §8(a), subject to §8.2 of the Act, and satisfy the existing lien by the Illinois Department of Healthcare and Family Services, as detailed in Petitioner's Exhibit 5.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $480.00 per week for a period of 102.5 weeks, as provided in §8(e)9 of the Act, for the reason that the injuries sustained caused the 50% loss of use of the right hand.

The Illinois State Treasurer as *ex-officio* custodian of the Injured Workers' Benefit Fund was named as a co-Respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award hereby is entered against the Fund to the extent permitted and allowed under §4(d) of the Act, in the event of the failure of Respondent-Employer to pay the benefits due and owing the Petitioner. Respondent-Employer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent-Employer that are paid to the Petitioner from the Injured Workers' Benefit Fund. The Respondent-Employer's obligation to reimburse the Injured Workers' Benefit Fund, as set forth above, in no way limits or modifies its independent and separate liability for fines and penalties set forth in the Act for its failure to be properly insured.

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.

January 23, 2024

MP/mck

O: 1/10/24

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/s/ *Marc Parker*
Marc Parker

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	14WC015500
Case Name	Jeremy Hagene v. Lee Ann Pim & Justin Pim d/b/a PIMCO, Treasurer State of Illinois/IWBF
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	15
Decision Issued By	Jeanne AuBuchon, Arbitrator

Petitioner Attorney	Kevin Boyne
Respondent Attorney	Shannon Rieckenberg

DATE FILED: 2/1/2023

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

/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

Jeremy Hagene
Employee/Petitioner

Case # **14** WC **15500**

v.

Consolidated cases:

Lee Ann Pim & Justin Pim d/b/a PIMCO, Treasurer State of Illinois/IWBF
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeanne L. AuBuchon** Arbitrator of the Commission, in the city of **Collinsville**, on **August 30, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **2/12/2012**, 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 $**unknown**; the average weekly wage was $**800.00**.

On the date of accident, Petitioner was **32** years of age, ***single*** with **3** dependent children.

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

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

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

Respondent is entitled to a credit ***for all medical bills paid*** under section 8(j) of the Act***.***

Respondent was uninsured on the date of accident. He reached maximum medical improvement on 12/14/12.

ORDER

Respondent shall pay reasonable and necessary medical expenses as identified in Petitioner's Exhibit 4, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Medical expenses shall be paid directly to providers or lienholders. Respondent shall be given credit for all medical benefits that have been paid and hold Petitioner harmless for any claims by insurance carriers for reimbursement due. Respondent shall satisfy the existing lien by the Illinois Department of Health and Family Services, as identified in Petitioner's Exhibit 5.

Respondent shall pay temporary total disability benefits of $**533.33**/week for the periods from 2/23/2012 through 3/1/2012 and from 5/9/2012 through 6/30/2012 representing 8 and 4/7 weeks, pursuant to Section 8(b) of the Act.

Respondent shall pay Petitioner the sum of $**480.00**/week for a period of **102.5** weeks, as provided in Section 8(e)9 of the Act, because the injuries sustained caused **50%** loss of use of the right hand.

The Illinois State Treasurer, ex-officio custodian of the Injured Workers' Benefit Fund, was named as a co-respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under Section 4(d) of this Act. In the event the Respondent/Employer/Owner/Officer fails to pay

the benefits, the Injured Workers' Benefit Fund has the right to recover the benefits paid due and owing the Petitioner pursuant to Section 5(b) and 4(d) of this Act.

Respondent/Employer/Owner/Officer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent/Employer/Owner/Officer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

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

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

Jeanne L. AuBuchon **FEBRUARY 1, 2023**

Signature of Arbitrator

ICArbDec p.2

PROCEDURAL HISTORY

This matter proceeded to trial on August 30, 2022, on all issues. The issues in dispute are: 1) whether the Petitioner and Respondent PIMCO were operating under the Illinois Workers' Compensation Act on February 12, 2012, and their relationship was one of employee and employer; 2) whether the Petitioner sustained accidental injuries that arose out of and in the course of employment; 3) timely notice of the accident; 4) the causal connection between the accident and the Petitioner's right hand condition; 5) the Petitioner's average weekly wage; 6) liability for medical bills; 7) entitlement to TTD benefits from February 23, 2012 through March 1, 2012; 8) the nature and extent of the Petitioner's injury; 9) Respondent PIMCO's non-insured status; and 10) the date of maximum medical improvement. This case was consolidated for purposes of trial with 14WC15492, in which an accident was alleged to have occurred on March 12, 2012. The parties stipulated that any medical bills ordered to be paid would be paid to the provider or lienholder.

The Petitioner filed an Amended Application on January 13, 2015, to add the Injured Workers' Benefit Fund as a Respondent. (AX2) This case was called on July 11, 2022, at which time no one was present for Respondent PIMCO and a pretrial conference was set, which occurred on July 19, 2022. No one was present for Respondent PIMCO at the pretrial conference, and the case was set for hearing on August 30, 2022. No one appeared for Respondent PIMCO, which is hereby found to be in default.

FINDINGS OF FACT

The Petitioner, who is primarily right-handed, testified that beginning two or three months before the accident on February 12, 2012, he worked for Respondents Lee Ann Pim and Justin Pim and their business PIMCO, which did towing, recovery, repossessions and repair of vehicles

from their place of business in Marissa, Illinois. (T. 12-13, 31) The Petitioner said he mainly did tows and worked on vehicles. (T. 13) He said he made a flat $800.00 per week the entire time he worked at PIMCO. (T. 24-25) He said he was paid by check and was given a 1099. (T. 35) In doing his job, he used tow trucks provided by the Respondent but provided his own hand tools. (T. 37-38) He said he worked five or more days per week and was required to report to the shop. (T. 60) He said the customers at the shop were PIMCO's customers, not his, and Mr. and Mrs. Pim told him what jobs to do. (T. 60-61)

On February 12, 2012, the Petitioner was sent to pick up a broken-down U-Haul truck. (T. 17) He said he missed a step when getting out of his tow truck and fell a little more than four feet, landing on his right hand. (T. 17-18) He went back to the shop and informed Mr. Pim of the accident, and Mr. Pim told him to get treatment. (T. 18-19)

The Petitioner testified that prior to the accident, he had issues with his right hand and wrist from a motor vehicle accident in 2009. (T. 13-14) He suffered a tear of the triangular fibrocartilage complex (TFCC – fibrous tissue and cartilage that support the joints between the end of the forearm bones) and a possible tear of the scapholunate ligament (a ligament between two of the small bones of the wrist). (RX1) On May 19, 2010, the Petitioner underwent an arthroscopic debridement (removal of damaged tissue) of the TFCC, synovectomy (removal of the membrane lining the joint) and repair of the scapholunate ligament with pinning. (Id.) He had post-surgical complications that resulted in an infection for which he underwent drainage of a right wrist osteomyelitis (inflammation in the bone) and methicillin-resistant staphylococcus aureus (infection caused by a type of staph bacteria) performed in August 2010 by Dr. Bruce Kraemer, a reconstructive surgery specialist at SLUCare. (RX2) On December 6, 2010, Dr. Kraemer stated that the Petitioner would need a wrist fusion for stability at that point. (Id.) Instead, the Petitioner

had a scaphoid cyst removed and treatment continued that included wearing splints. (Id.) At the Petitioner's last visit to Dr. Kraemer on December 9, 2011, Dr. Kramer stated it was the best healed and looking the Petitioner had been and that he did well pain-wise in the splints. (Id.) The Petitioner's splints were modified. (Id.)

The Petitioner testified that at the time of the work accident, his hand was "doing better" and was able to do his work. (T. 15-16) He said that before the accident, he had discomfort but not necessarily a lot of pain, but after the accident, it was a lot of pain all the time. (T. 20)

Following the accident on February 12, 2012, the Petitioner went to Sparta Community Hospital. (PX1) X-rays showed the surgical changes and sclerotic (increase in bone density) and lucent (creating a gap) cystic (fluid filled) changes in the navicular (scaphoid bone) that appeared to be chronic although underlying fracture and avascular necrosis (death of bone tissue due to lack of blood supply) could not be excluded. (Id.) A CT scan had similar results with fragmentation of the mid-to-proximal navicular. (Id.) The Petitioner was given pain medication and was released. (Id.)

The Petitioner saw Dr. Kraemer on February 17, 2012. (PX2, PX3) X-rays showed chronic changes within the scaphoid, lunate and capitate wrist bones, unchanged. (Id.) On February 23, 2012, underwent a bone graft from the radius to the scaphoid after being diagnosed with a poor union of the scaphoid secondary to a fall and a fracture of the proximal pole (part of the scaphoid that articulates with the radius and lunate bone). (PX2) The Petitioner testified that he continued to work after the accident until the surgery. (T. 20)

The Petitioner testified that he returned to work on March 2, 2012. (T. 21) On March 12, 2012, the Petitioner was changing an alternator on a vehicle at the shop in Marissa when he

dropped it on his right hand and felt immediate pain that was worse than before. (Id.) He said he reported the incident to Lee Ann Pim. (T. 22)

On March 16, 2012, the Petitioner returned to Dr. Kraemer and reported the recent incident. (PX3) Dr. Kraemer noted that the Petitioner's wound was healing well, but there was a light bit more mobility of the pins than he'd expect. (Id.) The Petitioner's splint was modified to accommodate the pins. (Id.) On April 2, 2012, Dr. Kraemer reported X-rays revealed that the bone graft was displaced, and he feared the Petitioner's wrist was heading for a total fusion given the frequent post-op problems he had. (Id.) The Petitioner underwent a right wrist fusion with a bone graft from his hip on May 9, 2012. (PX2) During follow-up visits to Dr. Kraemer, the Petitioner reported improvement with his wrist, but was experiencing pain in his hip from where the bone for the fusion was taken. (PX3) He had injections, which helped. (Id.) The last treatment note for the right wrist on December 14, 2012, stated that the Petitioner's right hand was doing well. (Id.) The Petitioner said he again continued to work after the second accident until the surgery. (T. 22)

Dr. Kraemer testified consistently with his records at a deposition on May 29, 2018. (PX7) He said that when he saw the Petitioner on December 9, 2011, the Petitioner's wrist showed good healing and was doing well except for some tendinitis that was treated with an injection. (Id.) He said there was a change in the condition of the Petitioner's right wrist after the February 12, 2012, accident, in that there was more disruption in the scaphoid area that had been healing well. (Id.) He said there were cracks on both sides of the potentially weakened bone that were not present before the fall. (Id.) He opined that the fractures were the result of the fall, and the surgery was needed to promote further healing. (Id.) He explained that vascularized bone was grafted to the site to start healing into the defective bone. (Id.) He pointed this out on the X-rays. (Id.)

Dr. Kraemer stated that after the March 12, 2012, accident, the pins in the graft were perhaps looser and the fixation had become less stable. (Id.) He pointed out on X-rays that the bone graft had shifted, and said that on examination, the pins were loosened and would pop in and out. (Id.) He said this was consistent with a heavy object falling on the Petitioner's wrist. (Id.) He said ultimately, the Petitioner didn't heal well, so he had to perform more surgery. (Id.) Although his records did not state a return-to-work date, Dr. Kraemer said he would have entertained the Petitioner going back to work in January 2013. (Id.) Dr. Kraemer said he saw the Petitioner in 2017 for carpal tunnel syndrome of the left wrist, and his right wrist was doing quite well. (Id.)

Dr. Kraemer opined that the wrist problems the Petitioner had before the accidents were exacerbated or made worse and required him to need additional care, which gave him a fixed disability of his wrist due to the wrist fusion. (Id.)

On cross-examination, Dr. Kraemer said that he did not give the Petitioner any work restrictions as of September 12, 2011, other than using his splint as needed. (Id.) He said that as of March 2, 2012, he gave no restrictions other than to not do much lifting. (Id.) He acknowledged that the Petitioner's smoking tends to decrease circulation, but the graft failed for mechanical reasons of the bone and pins shifting from the second injury, not for failure of blood supply. (Id.)

The Petitioner testified that he gave his medical bills to Mr. and Mrs. Pim, who said they would get the bills paid, but they were not paid. (T. 42-43) Ruby Bagar, an employee with NCCI Holdings, the parent corporation of the National Council on Compensation Insurance, prepared a certification stating that, based on research, there was no proof that Respondent PIMCO had workers' compensation insurance on February 12, 2012. (PX6)

After the second surgery, the Petitioner never returned to work for Respondent PIMCO. (T. 23-24) He started his own auto repair business in early July 2012. (T. 24, 26, 59) The Petitioner testified that he had a GED and some vocational school. (T. 27) His work history included farming, auto mechanics, heavy equipment and millwright. (T. 28) At the time of arbitration, he was working as a millwright. (T. 50)

The Petitioner testified that he still has discomfort and numbness where the bone was removed from his hip. (T. 29) He said he has no movement in his wrist – he can use his fingers but nothing more past that. (T. 30) He said his grip strength is less than before the accident. (T. 30-31) He said his index finger and thumb are always numb. (T. 31) He said he has to use his left hand for just about everything. (T. 32) He said he can't golf, swing a baseball bat or sledgehammer, drive a four-wheeler or hunt with a bow. (T. 32-33) He said he had his motorcycle modified so that it can be operated with a push button instead of spinning the grip on the handlebar. (T. 47, 48) He said he can't lift anything more than 30-40 pounds unless it is strictly with his left hand. (T. 33) He said weather changes effect his right hand because the plate is close to the skin and gets cold fast, making his whole arm and shoulder hurt. (Id.) He said he wears a brace on his wrist every day when working or doing strenuous activities. (T. 49) He said he took at least three or four Aleve tablets a day. (T. 49-50)

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

CONCLUSIONS OF LAW

ISSUES (A) & (B): Was Respondent operating under and subject to the Illinois Workers' Compensation Act; Was there an employee-employer relationship?

The Arbitrator finds the Petitioner provided unrebutted testimony of the employment relationship between the Respondent PIMCO and himself and in doing so established the Respondent was subject to the Act and an employee-employer relationship existed. The Petitioner testified as to how he reported to Respondent PIMCO's place of business and was instructed to perform his job duties – including towing and repairing vehicles. Although the Petitioner used his own hand tools, the tow trucks and facility from which he worked were owned and operated by the Respondent PIMCO. The customers were PIMCO's and not the Petitioner's.

The Arbitrator finds the Respondent PIMCO retained the right to control the manner in which the work was performed, and the scope of the work performed conformed to the employer's purpose. The Arbitrator finds an employee-employer relationship and finds the Respondent was subject to the Workers' Compensation Act.

ISSUES (C), (D), and (E): Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent? What was the date of the accident? Was timely notice of the accident given to Respondent?

An injury is an accident when it is traceable to a definite time, place and cause and occurs in the course of employment, unexpectedly, and without affirmative act or design of the employee. *Matthiessen and Haegler Zinc Co. v. Industrial Commission,* 284 Ill. 378, 120 N.E.2d 249 (1918).

The Petitioner provided unrebutted testimony that on February 12, 2012, he was injured when he fell from the tow truck and onto his right hand. He notified Mr. Pim immediately. The Arbitrator finds the Petitioner sustained an accident on February 12, 2012, that arose out of and in the course of his employment by the Respondent PIMCO, and timely notice of the accident was given to the Respondent PIMCO.

ISSUE (F): Is Petitioner's current condition of ill-being causally related to the injury?

An accident need not be the sole or primary cause as long as employment is a cause of a claimant's condition. *Sisbro, Inc. v. Indus. Comm'n,* 207 Ill. 2d 193, 205, 797 N.E.2d 665, 278 Ill.Dec. 70 (2003). An employer takes its employees as it finds them. *St. Elizabeth's Hosp. v. Workers' Comp. Comm'n,* 371 Ill.App.3d 882, 888, 864 N.E.2d 266, 309 Ill.Dec. 400 (5th Dist. 2007). A claimant with a preexisting condition may recover where employment aggravates or accelerates that condition. *Caterpillar Tractor Co. v. Industrial Comm.,* 92 Ill. 2d 30, 36, 440 N.E.2d 861, 65 Ill.Dec. 6 (1982). When a preexisting condition is present, a claimant must show that "a work-related accidental injury aggravated or accelerated the preexisting [condition] such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of the preexisting condition." *St. Elizabeth's Hospital*, 371 Ill.App.3d at 888.

The Petitioner had a pre-existing right wrist condition. Dr. Kraemer's testimony established that the work accident exacerbated that condition. He said the Petitioner had been healing well two months before the work accident, and the accident caused more disruption in the scaphoid area and cracks on both sides of the potentially weakened bone.

The Arbitrator also must determine the effect of the Petitioner's second injury on the relationship between the first accident and the Petitioner's current condition. As long as a "but-for" relationship exists between the original event and the subsequent condition, the employer remains liable. *International Harvester Co. v. Industrial Commission,* 46 Ill.2d 238, 263 N.E.2d 49 (1970). *See also Vogel v. Industrial Commission,* 354 Ill.App.3d 780, 821 N.E.2d 807, 290 Ill.Dec. 495 (2d Dist. 2005).

At the time of the March 12, 2012, accident, the Petitioner was still recovering from the bone graft that resulted from the first accident. Dr. Kraemer testified that after the second accident, the pins in the graft were perhaps looser and the fixation had become less stable. He said this was consistent with a heavy object falling on the Petitioner's wrist. He said ultimately, the Petitioner didn't heal well, so he had to perform the second surgery.

Based on this, the Arbitrator finds that the second accident aggravated the Petitioner's condition and did not break the causal connection between the first accident and his current condition. Thus, the Arbitrator finds the Petitioner's current condition of ill-being is causally related to the injury from the February 12, 2012 accident.

ISSUES (G): What were Petitioner's earnings?

Petitioner provided unrebutted testimony that he earned $800.00 per week from his employment with Respondent PIMCO. Therefore, the Arbitrator finds that the that the Petitioner's average weekly wage was $800.00.

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?

Based on the above findings regarding causal connection and the medical records showing the providers' rationale for the services rendered, the Arbitrator finds that the medical expenses incurred were reasonable and necessary in the care and treatment of the Petitioner's injuries. The Arbitrator finds that Petitioner is entitled to medical benefits itemized in Petitioner's Exhibit 4. The Arbitrator finds the Respondent PIMCO has not paid the charges relating to the Petitioner's reasonable and necessary medical care. As a result, Respondent PIMCO shall pay these charges

per to the medical fee schedule as provided in Section 8(a) and Section 8.2 of the Act. Per stipulation of the parties, these charges shall be paid directly to the providers or lienholders.

ISSUE (K): Is Petitioner entitled to receive TTD benefits?

The Petitioner testified that he worked until the dates of both surgeries. After the first surgery on February 23, 2012, the Petitioner returned to work on March 2, 2012. Dr. Kraemer testified that he would have entertained the Petitioner going back to work in January 2013 following the surgery on May 9, 2012. The Petitioner testified that he started his business at the beginning of July 2012. Based on this, the Arbitrator finds the Petitioner is entitled to temporary total disability benefits for the periods of February 23, 2012, through March 1, 2012, and May 9, 2012, through June 30, 2012.

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

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

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

(ii) **Occupation.** The Petitioner works as a millwright and uses his hands extensively. The Arbitrator places significant weight on this factor.

(iii) **Age.** The Petitioner was 32 years old at the time of the injury. He has many work years left during which time he will need to deal with the residual effects of the injury. The Arbitrator places significant weight on this factor.

(iv) **Earning Capacity.** There was no evidence presented of any reduction in the Petitioner's earning capacity. Therefore, the Arbitrator places no weight on this factor.

(v) **Disability.** The Petitioner testified that he has no movement in his wrist, has decreased grip strength, has numbness in his index finger and thumb and has pain and numbness in his hip from the bone graft donation site. He has had to adjust the way he performs tasks to use his left hand and had his motorcycle modified. His hobbies have been affected. He said cold weather causes pain. He wears a wrist brace and takes Aleve.

Therefore, the Arbitrator finds the Petitioner's permanent partial disability to be 50 percent of the Petitioner's right hand.

ISSUE (O): Respondents non-insured status, MMI date

The Petitioner presented a certification from NCCI Holdings, the parent corporation of the National Council on Compensation Insurance, that there was no evidence that Respondent PIMCO had workers' compensation insurance on February 12, 2012.

Per Dr. Kraemer's records, the Arbitrator finds the Petitioner reached maximum medical improvement at his last visit on December 14, 2012.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC004008
Case Name	Melinda Taylor v. State of Illinois - Ann Kiley Developmental Center
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0039
Number of Pages of Decision	8
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Jim Vainikos
Respondent Attorney	Rachel Peter

DATE FILED: 1/23/2024

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Melinda Taylor,

Petitioner,

vs. NO: 19 WC 004008

State of Illinois
Ann Kiley Developmental Center,

Respondent.

DECISION AND OPINION ON REVIEW

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

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

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

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

January 23, 2024
o121223
MEP/yp

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC004008
Case Name	TAYLOR, MELINDA v. STATE OF ILLINOIS ANN KILEY DEVELOPMENTAL CENTER
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	6
Decision Issued By	Michael Glaub, Arbitrator

Petitioner Attorney	Jim Vainikos
Respondent Attorney	Adam McCall

DATE FILED: 6/6/2022

THE INTEREST RATE FOR THE WEEK OF JUNE 1, 2022 1.58%

/s/Michael Glaub, Arbitrator

Signature

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

June 6, 2022

/s/ Michele Kowalski

Michele Kowalski, Secretary

Illinois Workers' Compensation Commission

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

MELINDA TAYLOR
Employee/Petitioner

v.

STATE OF ILLINOIS
ANN KILEY DEVELOPMENTAL CENTER
Employer/Respondent

Case # **19** WC **04008**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Michael Glaub**, Arbitrator of the Commission, in the city of **Waukegan**, on **March 30, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **August 15, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**50,286.08**; the average weekly wage was $**967.04**.

On the date of accident, Petitioner was **32** years of age, ***single*** with **0** dependent children.

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

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

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

Respondent is entitled to a credit of $**254.31** under Section 8(j) of the Act.

ORDER

Medical benefits

Respondent has paid or will pay all reasonable and necessary medical services of **$16,281.55**, as provided in Sections 8(a) and 8.2 of the Act pursuant to the Illinois medical Fee Schedule. Respondent is entitled to a credit of $254.31 for benefits that already have been paid.

Permanent Partial Disability: Schedule injury

Respondent shall pay Petitioner permanent partial disability benefits of **$580.22**/week for **20.5** weeks, because the injuries sustained caused the **10% loss of the right hand**, as provided in Section 8(e) of the Act.

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

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

Michael Glaub **JUNE 6, 2022**
Signature of Arbitrator

STATEMENT OF FACTS

On August 15, 2018, Petitioner was an employee of the State of Illinois. At that point she had been employed approximately 5 years as a Mental Health Technician 2. Her job duties included, but were not limited to, direct care of disabled individuals at Ann Kiley Developmental Center.

On August 15, 2018, Petitioner was injured while trying to prevent an individual/resident from leaving the facility. During the altercation with the resident, the resident struck Petitioner in her head, left index finger, and Petitioner's right hand was hyperextended when she grasped the resident's shoulder. Petitioner testified that she is right hand dominant.

Petitioner sought medical attention at Vista Health System's emergency room. The initial assessment was facial contusions, abrasions of the left finger, and right wrist sprain. She was referred to follow up with her PCP.

On August 22, 2018, Petitioner was treated by her PCP, Dr. Ahmed. Petitioner gave a consistent history of the accident. Dr. Ahmed noted objective findings to her right hand of edema and tenderness with decreased range of motion. He referred Petitioner to an orthopedic doctor.

On August 24, 2018, Petitioner was treated by Dr. Wielgus, the orthopedist. He diagnosed her with gamekeeper's thumb which includes a sprain of the ulnar and radial collateral ligaments in the thumb. He prescribed a thumb spica, icing, ibuprofen, and occupational therapy.

On September 18, 2018, after having a few visits of therapy, Dr. Wielgus saw Petitioner and diagnosed her with strain of the intrinsic muscle, fascia and tendon of the right thumb at wrist level. Not satisfied with her progress, Dr. Wielgus ordered a MRI.

On September 20, 2018, Petitioner's MRI revealed a full thickness tear of the ulnar collateral ligament of the MCP joint of the thumb. Petitioner was referred to an orthopedic surgeon, Dr. Gray.

Dr. Gray saw Petitioner on December 19, 2018. He examined Petitioner, reviewed the MRI and diagnosed Petitioner with full thickness non retracted UCL tear which is consistent with gamekeeper's thumb. He advised Petitioner to continue use of the thumb spica and Voltaren gel. Dr. Gray released Petitioner to full duty work on January 7, 2019. Petitioner was instructed to use her brace as needed.

February 1, 2019 was Petitioner's last date of treatment for her right hand. Petitioner testified that on that date Dr. Gray indicated that he would have performed surgery on her right hand if she had started treatment with him sooner than 4 months after the accident.

Petitioner testified that she continues to have significant residual disability with her right hand. She struggles to carry objects with her right hand. She alternates using her left hand to mitigate the pain. She feels a constant achiness and soreness in her wrist. Her hand tires easily and she does not use her right hand to brush or braid her hair. She notices pain after typing at work and lifting groceries at home. Her grip strength has been reduced. She occasionally takes Aleve for the pain.

CONCLUSIONS OF LAW

"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 Petitioner has proven by a preponderance of the evidence that the medical services provided were reasonable and necessary. The Arbitrator finds that Petitioner and Respondent have stipulated to accident and causation. Petitioner provided credible medical history of the accident and treatment. The Arbitrator finds that Respondent shall pay the related medical bills in the amount of $16,281.55.

The Arbitrator also finds Respondent shall be given a credit of $254.31 for medical benefits that have already been paid. (RX 1).

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

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives **no** weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a mental health technician at the time of the accident and that she **is** able to return to work in her prior capacity as a result of said injury. The petitioner's job duties are not extraordinarily labor intensive. The Arbitrator therefore finds that this factor weighs in favor of decreased permanence.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was **32** years old at the time of the accident. Petitioner is at the near the beginning portion of her expected work life. Therefore, the Arbitrator finds that this factor weighs in favor of increased permanence.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, no evidence of diminished earnings capacity was introduced. Therefore, the Arbitrator finds this factor weighs in favor of decreased permanence.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes Dr. Gray indicated that he would have performed surgery on her right hand if she had started treatment with him sooner than 4 months after the accident. Also, Petitioner testified credibly that she continues to have significant residual disability with her right hand. She struggles to carry objects with her right hand. She alternates using her left hand to mitigate the pain. She feels a constant achiness and soreness in her wrist. Her hand tires easily and she does not use her right hand to brush or braid her hair. She notices pain after typing at work and lifting groceries at home. Her grip strength has been reduced. She occasionally takes Aleve for the pain. The Arbitrator therefore finds that this factor weighs in favor of increased permanence.

Based on all of the above, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of **10% loss of use of the right hand** pursuant to **§8(e)** of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	14WC019076
Case Name	Shenequa Carter v. Chicago Transit Authority
Consolidated Cases	
Proceeding Type	Remand from the Illinois Appellate Court
Decision Type	Commission Decision
Commission Decision Number	24IWCC0040
Number of Pages of Decision	11
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Adam Scholl
Respondent Attorney	Barrett Long

DATE FILED: 1/23/2024

/s/Carolyn Doherty, Commissioner

Signature

24IWCC0040

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)
☐ Modify	☐ PTD/Fatal denied
☒ ON REMAND FROM CIRCUIT COURT	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SHENEQUA CARTER,

Petitioner,

vs. NO: 14 WC 19076
19 IWCC 0455

CHICAGO TRANSIT AUTHORITY,

Respondent.

DECISION AND OPINION ON REMAND

This matter comes before the Commission on remand from the Illinois Appellate Court. In accordance with the opinion of the appellate court filed on August 11, 2023, the Commission considers the issue of permanent partial disability, and being advised of the facts and law, concludes that Petitioner is entitled to benefits pursuant to the Illinois Workers' Compensation Act for the reasons stated below.

I. PROCEDURAL BACKGROUND

Petitioner's claim was the subject of two arbitration hearings, held December 1, 2014, and September 11, 2018. In a decision filed on December 26, 2018, the arbitrator found that Petitioner was no longer physically capable of working as a bus operator and obtained alternative employment as a full-time security guard earning a lower wage. The arbitrator entered a wage differential award, finding that Petitioner earned $12.00 per hour and was able to earn $480.00 per week as a security guard, but could have earned $35.01 per hour or $1,400.40 per week, based on the current rate for full-time bus operators, based on Petitioner's testimony and the stipulation of Respondent's counsel. Accordingly, the arbitrator awarded the claimant a wage differential award of $613.60 per week (($1400.40 - $480.00) x 66-2/3%) from September 11, 2018, until she turned 67 years old. See 820 ILCS 305/8(d)(1) (West 2018).

Respondent sought a review by the Commission, which issued a Decision and Opinion on Review on August 23, 2019, reducing the wage differential award from $613.60 to $344.80 per

week. The Commission reduced Petitioner's current average weekly wage as a security guard by considering that she only worked 33.47 hours per week, resulting in a current average weekly wage of $401.64 (33.47 hours x $12.00 per hour) instead of $480.00 (40 hours x $12.00 per hour). The Commission also found that Petitioner would not be able to earn $35.01 per hour as a bus operator for Respondent, focusing on the fact that Petitioner was terminated in February 2015 for cause. Therefore, the Commission used Petitioner's average weekly wage of $918.83 at the time of the accident. These calculations resulted in a wage differential award of $344.80 per week (($918.83 - $401.64) x 66-2/3%).

Petitioner sought judicial review of the Commission's decision before the Circuit Court of Cook County. The circuit court confirmed the Commission's decision. Petitioner then appealed.

On August 11, 2023, the Illinois Appellate Court filed an opinion reversing the judgment of the circuit court, setting aside the Commission's decision, and remanding this matter to the Commission with directions that the Commission recalculate Petitioner's wage differential in accordance with its opinion. *Carter v. Illinois Workers' Compensation Comm'n*, 2023 IL App (1st) 221290WC.

II. FINDINGS OF FACT

The Commission hereby incorporates by reference the "Statement of Facts" contained in the arbitration decision filed on December 26, 2018, attached hereto and made a part hereof, to the extent it does not conflict with the Illinois Appellate Court opinion filed on August 11, 2023. The Commission also incorporates by reference the August 11, 2023 Illinois Appellate Court opinion, which delineates the relevant facts of the case and the court's analysis of the wage differential award, attached hereto and made a part hereof. Any additional findings of fact in this Decision and Order on Remand will be specifically identified in the discussion below.

III. CONCLUSIONS OF LAW

The Illinois Appellate Court concluded that $35.01 is the proper rate to calculate what Petitioner could have made as a full-time bus operator, based on Petitioner's testimony and the stipulation of Respondent's counsel, ruling that Respondent's objection regarding the stipulation was forfeited. *Id*. ¶¶ 19-22. The Commission now recalculates Petitioner's wage differential accordingly. The appellate opinion does not disturb or call into question the Commission's prior calculation of Petitioner's current average weekly wage as a security guard. Accordingly, the Commission again calculates that Petitioner's current average weekly wage is $401.64 (33.47 hours per week x $12.00 per hour). The Commission also calculates that Petitioner could have earned $1,400.40 per week as a full-time bus operator (40 hours per week x $35.01 per hour), based on Petitioner's testimony and the stipulation of Respondent's counsel. Therefore, the Commission concludes that Petitioner is entitled to a wage differential award of $665.84 per week (($1400.40 - $401.64 = 998.76) x 66-2/3%) from September 11, 2018, until she turned 67 years old.

In all other respects, the Commission affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay permanent partial disability to Petitioner the sum of $665.84 per week commencing September 11, 2018, until Petitioner reaches 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 § 8(d)(1) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $2,367.78 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.

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.

January 23, 2024

d: 1/22/24
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 24IWCC0040
NOTICE OF ARBITRATOR DECISION

CARTER, SHENEQUA Case# **14WC019076**
Employee/Petitioner

CHICAGO TRANSIT AUTHORITY
Employer/Respondent

On 12/27/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.48% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2356 FOHRMAN, DONALD W & ASSOC
ADAM J SCHOLL
101 W GRAND AVE SUITE 500
CHICAGO, IL 60654

0515 CHICAGO TRANSIT AUTHORITY
ANDREW ZASUWA
567 W LAKE ST 6TH FL
CHICAGO, IL 60661

S. Carter v. CTA, 14 WC 019076

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

Shenequa Carter
Employee/Petitioner

v.

Chicago Transit Authority
Employer/Respondent

Case # 14 WC 019076

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 **Jeffrey Huebsch**, Arbitrator of the Commission, in the city of **Chicago**, on **9/11/18**. 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 _____

S. Carter v. CTA, 14 WC 019076

FINDINGS

On **5/30/14**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$47,779.16**; the average weekly wage was **$918.83**.

On the date of accident, Petitioner was **32** years of age, ***single*** with **3** dependent children.

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

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

Respondent shall be given a credit of **$121,626.94** for TTD, **$19,124.59** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$140,751.53**.

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, of $1,742.78 to Metro Anesthesia Consultants, $191.75 to Illinois Orthopedic Network, and $433.25 to South Suburban Physical Therapy, as provided in Sections 8(a) and 8.2 of the Act and as is set forth below.

Respondent shall pay Petitioner permanent partial disability benefits, commencing 9/11/2018, of $613.60/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.

Signature of Arbitrator

December 26, 2018
Date

DEC 27 2018

PROCEDURAL BACKGROUND

This matter was previously tried on December 1, 2014, pursuant to Section 19(b) of the Illinois Workers' Compensation Act. The issues decided were accident, causal connection, temporary total disability and medical bills. A decision was rendered on July 22, 2015 in which it was found that Petitioner did sustain an accident that arose out of the course of employment, that her medical condition at the time of trial was causally related to the claimed work injury, she was entitled to temporary total disability from May 31, 2014 through December 1, 2014 and that medical bills in the amount of $36,980.41 were compensable, as provided by Section 8(a) and 8.2 of the Act. (PX 7) The Arbitrator's Decision was not reviewed by either Party.

The current issues in dispute are medical expenses and the nature and extent of Petitioner's injuries.

FINDINGS OF FACT

Direct Testimony of Petitioner

Petitioner worked as a full-time bus operator for Respondent at the time of her injury. Following the December 1, 2014 hearing, Petitioner continued to treat with Dr. Sharma from Illinois Orthopedic Network. At her visit on December 23, 2014, Petitioner informed Dr. Sharma that the intra-articular shoulder injection performed on November 18, 2014 provided only two days of symptom relief. Dr. Sharma examined Petitioner and reviewed the MRI and recommend that she be seen by an orthopedic specialist. Dr. Sharma also provided a work limitation of 10 lbs. use of the right upper extremity until the patient was evaluated by the orthopedic surgeon. (PX 5)

On January 21, 2015, Petitioner was examined by Christos Giannoulias, M.D. concerning her right shoulder. He reviewed the MRI and performed a clinical examination. It was Dr. Giannoulias' impression that Petitioner had AC joint arthrosis and subacromial impingement. Petitioner's options were discussed and Petitioner opted to undergo surgical intervention. (PX 5)

After the favorable Decision from the Commission was received, Petitioner returned to Dr. Giannoulias on July 29, 2015. Dr. Giannoulias charted that his office would work on obtaining surgical authorization. (PX 5)

Respondent had Petitioner seen by Dr. Charles Carroll, M.D., for a Section 12 examination, on November 2, 2015. Dr. Carroll opined that Petitioner failed conservative treatment for her shoulder impingement and advised her to consider arthroscopy of the left shoulder and subacromial decompression. (PX 5)

On April 6, 2016, Petitioner underwent a right shoulder arthroscopic subacromial decompression and an extensive glenohumeral debridement. The surgery was performed by Dr. Giannoulias. (PX 5)

Petitioner subsequently underwent rehabilitative care for her shoulder with South Suburban Physical Therapy (PX 4) and followed-up with Dr. Giannoulias on a monthly basis through December 13, 2016. On that date, Petitioner continued to report pain of the right shoulder. Dr. Giannoulias examined Petitioner and felt that she had reached maximum medical improvement and prescribed a Functional Capacity Evaluation. (PX 5)

The FCE was performed by ATI on January 9, 2017. The evaluator determined that Petitioner's evaluation was valid and that it demonstrated that she was capable of working at a physical demand level of light to medium, which fell below the occupational demand level of a bus driver established by the DOT. (PX 5)

Petitioner returned to Dr. Giannoulias on January 18, 2017. Dr. Giannoulias reviewed the functional capacity evaluation and stated he did not feel she could return to commercial bus driving, secondary to shoulder and persistent neck symptoms. He further recommended that she avoid lifting, pushing or pulling anything greater than 20 lbs. Petitioner was released from care. (PX 5)

Respondent provided vocational rehabilitation assessment of Petitioner through Blumenthal Associates. Petitioner first met with Steven Blumenthal, MS, CRC, CVE, LCPC, on March 23, 2017. Mr. Blumenthal obtained Petitioner's background and had her undergo various vocational testing. It was his conclusion that she could earn approximately $10.20 -$12.00 per hour. On June 27, 2017, Blumenthal Associates began job placement services for Petitioner. Petitioner first underwent computer training through August 16, 2017. She then participated in job readiness training and job placement with Blumenthal Associates, wherein they assisted here in writing a resume and identifying various employers with which she could apply for work. (PX 3) Through an extensive job search, Petitioner found a position with US Security Associates as a security guard. Her primary duty consists of monitoring employees that enter a warehouse building. Petitioner stated that her job is a full-time position and that she is paid $12.00 per hour. Petitioner further testified that her supervisor at US Security Associates does not always schedule her a 40-hour week. Petitioner introduced sixteen payroll check stubs covering the bi-weekly periods between January 12, 2018 through August 23, 2018. The check stubs reflect that Petitioner worked an average of 66.98 hours biweekly or 33.49 hours per week. (PX 2)

Petitioner testified that she aware that the if she were still employed with respondent as a full-time bus driver, she would be earning $35.01 per hour. Respondent's counsel stipulated that $35.01 is the current wage rate for full time bus operators. (PX 6)

Petitioner stated that she still currently has issues with repetitive motion and that weather and climate changes bother her. She related that she experiences periodic swelling and shooting pain down her arm.

Cross-Examination of Petitioner

Petitioner acknowledged that she was employed with Anchor Staffing from April 17, 2015 through July 2, 2015. Petitioner was asked if she informed Mr. Blumenthal of that information during her initial vocational meeting. Petitioner provided an unclear response to Respondent's counsel, but it was clarified on re-direct that she did tell Mr. Blumenthal of the job, but he did not include it in her work history because she did not work there very long.

Petitioner identified several photo postings taken from her Facebook account between July and August of 2015. (RX 4) Petitioner stated that the photos that she posted were old photos that pre-dated her employment with Respondent.

Petitioner confirmed that she was terminated by Respondent in February of 2015. She was terminated pursuant to a finding of the Inspector General's Office involving falsified FMLA forms. Respondent introduced the Final Report of the Office of Executive Inspector General (OEIG) wherein it found that Petitioner falsified FMLA forms in November of 2012 and February of 2013, concerning her son's chronic asthma condition. (RX 3)

Re-Direct Examination of Petitioner

Petitioner stated that she worked for Anchor Staffing during the period between the date of her 19(b) hearing and the date the decision was received. During that interim, she did not receive workers' compensation benefits from Respondent.

Petitioner restated that the pictures on her Facebook account were not made contemporaneously with the postings on her Facebook account. The photos used were from a period of time when Petitioner worked as a school bus driver between 2003 and 2008. The Arbitrator believes Petitioner's testimony on this issue.

Petitioner's termination in 2015 concerned conduct that happened in 2012 and 2013. Petitioner first heard of the allegation when she was called into the offices of the OEIG in 2014. The OEIG believed the allegation of falsifying FMLA forms was founded. The OEIG also found that Petitioner knowingly lied to OEIG investigators. Respondent conducted its own investigation based upon the OEIG's findings and recommendations. Petitioner's employment was terminated due to several rule violations. (RX 3)

The Parties agreed that all TTD, Maintenance and TPD benefits have been paid through the date of trial.

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 evidence in the record of proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e)

In support of the Arbitrator's Decision relating to *(J) has respondent paid all appropriate charges for all reasonable and necessary medical care?* The Arbitrator finds:

Petitioner introduced into evidence three medical bills that have outstanding medical balances. The first medical bill is from Metro Anesthesia Consultants. That bill is associated with services related to a right intraarticular shoulder joint injection performed by Dr. Sharma on November 18, 2018. (PX 1, PX 5) The Arbitrator has reviewed the bill in the amount of $1,742.78 and the corresponding medical record and finds that the charges of Metro Anesthesia Consultants reasonable and necessary to treat Petitioner's shoulder injury. The Arbitrator awards Petitioner the sum of $1,742.78, subject Section 8.2 of the Act.

The second bill is a balance of $191.75 owed to Illinois Orthopedic Network. (PX 1) The Arbitrator has reviewed the entire medical bill of Illinois Orthopedic Network and the corresponding medical records and notes that the majority of the charges have been paid or adjusted leaving the said $191.75 balance. The Arbitrator finds the medical bill of Illinois Orthopedic Network corresponds to charges for reasonable and necessary medical care and awards Petitioner the sum of $191.75, subject to Section 8.2 of the Act.

The final bill is a balance of $433.25 from South Suburban Physical Therapy. (PX 1) The Arbitrator has reviewed the corresponding medical records (PX 4) and find that the charges of South Suburban Physical Therapy to be reasonable and necessary to treat p\Petitioner's shoulder injury. The Arbitrator awards Petitioner the sum of $433.25, subject to Section 8.2 of the Act.

Respondent is entitled to a credit for any awarded bill that it has satisfied.

In support of the Arbitrator's Decision relating to *(L) what is the nature and extent of the injury?* the Arbitrator finds:

The uncontroverted FCE findings and the final assessment of Dr. Giannoulias support that Petitioner is physically unable to perform the job duties of a commercial bus driver. The Commission and courts have mandated that permanent partial disability benefits be awarded under section 8(d)1 of the Act when the claimant has elected and proved entitlement to such an award. See: Gallianetti v. Industrial Commission, 315 Ill. App. 3d. 721, 734 N.E.2d 482 (2000) In this case, Petitioner stated that she was making a claim under Section 8(d)1 of the Act which states that:

> "If, after the accidental injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing his usual and customary line of employment, he shall, except in cases compensated under the specific schedule set forth in paragraph (e) of this Section, receive compensation for the duration of his disability, subject to the limitations as to maximum amounts fixed in paragraph (b) of this Section, equal to 66-2/3% of the difference between the average amount which he would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident. For accidental injuries that occur on or after September 1, 2011, an award for wage differential under this subsection shall be effective only until the employee reaches the age of 67 or 5 years from the date the award becomes final, whichever is later."

After Petitioner was determined to be at maximum medical improvement on January 18, 2017, Respondent initiated vocational rehabilitation with its chosen vocational counselor. Based on the reports of Blumenthal Associates, it appears that Petitioner worked diligently and cooperated fully in the job search process. Consistent with Steven Blumenthal's initial assessment, Petitioner found a full time job for herself, with US Security Associates, paying $12.00 per hour as of January 13, 2018.

The Parties agreed that if Petitioner was physically able to fully perform the job duties of her occupation as a bus driver for Respondent, she would currently earn the contractual rate of $35.01 per hour or $1,400.40 per week based on a 40-hour work week. The Arbitrator finds that Petitioner is able to earn $480.00 per week ($12.00 per hour for 40 hours) in her security job, which is suitable employment for her based upon the results of her injury. This finding is based upon PX 2 and Petitioner's testimony. The Arbitrator is not persuaded that PX 2 supports a finding that Petitioner's employment as a security guard contemplates a less than 40 hour work week.

Accordingly, the Arbitrator awards Petitioner wage differential benefits of $613.60 per week [($1,400.40 - $480.00 x 66⅔%), pursuant to §8(d)1 of Act, beginning September 11, 2018 and ending when she reaches the age of 67 years.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC033619
Case Name	Billy Bryant v. ABF Freight Systems
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0041
Number of Pages of Decision	28
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Michael Folga
Respondent Attorney	Timothy O'Gorman

DATE FILED: 1/23/2024

/s/Amylee Simonovich, Commissioner

Signature

DISSENT: /s/Amylee Simonovich, Commissioner

Signature

24IWCC0041

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Billy Bryant,

Petitioner,

vs. NO: 21 WC 033619

ABF Freight Systems,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission agrees with the Arbitrator's analysis and assessment of temporary total disability period but corrects a clerical error with regard to the number of weeks. The Commission modifies the last sentence of Issue (K) to read, "For the time period of November 1, 2021 through October 25, 2022, the Arbitrator awards $44,789.35 (51 2/7 weeks x $873.33) in temporary total disability benefits." Decision, p. 18.

Additionally, the Commission modifies the Arbitrator's fourth paragraph of the Order Section on the Arbitrator's Decision Form which references temporary total disability to read, "The Respondent shall pay Petitioner temporary total disability benefits of $873.33 per week for 51 2/7 weeks, commencing 11-01-2021 through 10-25-2022, as provided in Section 8(b) of the Act."

Finally, the Commission agrees with the Arbitrator's findings with regard to the denial of penalties and fees as analyzed in Issue (M) of the Decision. The Commission modifies the Order section of the Arbitrator's Decision to include an additional paragraph which shall read, "Petitioner's request for penalties and fees is denied."

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 on February 7, 2023, is 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 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.

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.

January 23, 2024
O: 11/21/23
AHS/kjj
051

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

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

Dissent

I respectfully dissent from the majority and would modify the Decision of the Arbitrator with respect to penalties pursuant to Section 19(l), 19 (k) and 16. After carefully considering the totality of the evidence, I believe Respondent's denial of temporary total disability benefits and medical expenses related to the left shoulder to be unreasonable and vexatious in nature.

The intent of Sections 16, 19(k), and 19(l) of the Act is to "…implement the Act's purpose to expedite the compensation of industrial workers and to penalize employers who unreasonably, or in bad faith, delay or withhold compensation due an employee." *Avon Products, Inc. v. Indus. Comm'n*, 82 Ill. 2d 297, 301 (1980). Penalties pursuant to Section 19(l) of the Act are applicable when an employer fails to pay benefits without good and just cause. *Id*. Courts have likened Section 19(l) penalties to a late fee. However, an award of penalties pursuant to Sections 16 and 19(k) of the Act requires a claimant meet a much higher burden. Section 19(k) of the Act addresses "…situations where there is not only a delay, but the delay is deliberate or the result of bad faith

or improper purpose. This is apparent in the statute's use of the terms 'vexatious,' 'intentional' and 'merely frivolous.'" *McMahan v. Indus. Comm'n.*, 183 Ill. 2d 499, 515 (1998). Section 16 of the Act uses the same language and applies to the same situations as Section 19(k) penalties.

Petitioner was initially taken off work by his treating physician, Dr. Chandler on November 1, 2021. PX 2, p. 34.

Respondent relies upon Dr. Leonard's Section 12 report in an attempt to justify their non-payment of temporary total disability benefits and medical benefits. RX 3, p. 1, RX 4, p. 2. However, this reliance is misplaced. While it is well established that an employer may rely on an expert opinion to show that a reasonable belief that the claimant is not entitled to benefits, it is not a guaranteed of finding of reasonableness. The critical question is "…whether the employer's conduct in relying on the medical opinion to contest liability is reasonable under all the circumstances presented." *Continental Distributing Co. v. Indus. Comm'n*, 98 Ill. 2d 407, 415-16 (1983). After considering the totality of the evidence, I find Respondent's dependance on the opinions of its Section 12 examiner Dr. Leonard to deny temporary total disability and medical benefits to be unreasonable. Contrary to Respondent's position, Dr. Leonard provided a causal connection for the left shoulder impingement syndrome with partial thickness rotator cuff tear and AC joint arthropathy, in addition to his relation of cervical spine disc disease, spondylitic changes with left-sided radicular symptoms due to the hyperflex injury he suffered to his neck. RX 1, p. 8, 10-11. He also found Petitioner was not at maximum medical improvement and recommended a repeat corticosteroid injection and physical therapy. RX 1, p. 11. Further, he restricted Petitioner's left shoulder with "no work above shoulder level and no pushing, pulling, lifting or carrying greater than ten pounds". RX 1, p. 9. While he may have found it "difficult to link restrictions to the accident", he ultimately opined: "I do believe left shoulder and arm pain is due to an aggravation he sustained when he slipped and fell on ice on 2/21/21." RX 1, p. 10.

Assuming arguendo that Dr. Leonard had provided a basis for denial of left shoulder benefits and temporary total disability, it does not account for the nine months of unpaid temporary total disability between the documented possession of supporting medical records and the Section 12 report of Dr. Leonard. Respondent alleged in their Responses to the 19b and 8a Petition and Petition for Penalties that they did not have complete supporting medical records as a reason for their continued denial of benefits. RX 3, p. 1 and RX 4, p. 2. However, it is apparent that by at least March 25, 2022, Respondent had possession of Dr. Chandler's May 18, 2021 office note relating the conditions to his work accident and the November 1, 20221 office note taking Petitioner off work for the same conditions/injuries. Respondent also had Dr. Campbell's records showing ongoing treatment for these conditions from November 2021 through February 2022. We know they had these records, as the records were provided to Respondent's Section 12 examination with Dr. Zelby and were memorialized in the records reviewed by Dr. Zelby in his March 25, 2022 report. RX 2, p. 4. These records supported Petitioner's incapacitation for work and ongoing medical treatment as a result of his left shoulder injury and would have been more than sufficient to determine that temporary total disability benefits were due and owing. See *Matuszczak v. Illinois Workers' Compensation Commission*, 2014 IL.App.2d 130532WC, citing *Interstate Scaffolding v. Illinois Workers' Compensation Commission*, 236 Ill.2d 132, 923 N.E.2d 266, 337 Ill.Dec. 707 (2010). It is also evident that records continued to be supplied to Respondent after this date. This is demonstrated in the ATI communication logs which showed treatment records

for the cervical and bilateral shoulder injuries were provided to the adjuster in December 2021 and January 2022. PX 4, p. 42-47. Even assuming Respondent did not have the initial supporting medical records until March 25, 2022, Respondent provided no reasonable basis for a denial of temporary total disability after that date, yet no benefits were paid to Petitioner through the date of hearing on October 25, 2022. This is patently intentional and unreasonable.

The unjust denial of benefits was not confined to temporary total disability benefits. Respondent does not provide any evidence of a good and just cause for the denial of physical therapy for the left shoulder. The physical therapy communication logs specifically show a denial of physical therapy on January 12, 2022 due to a lack of medical records. PX 4, p.43. However, as noted above, the communication logs and fax transmission sheets from ATI demonstrate ATI's transmission of medical records to the adjuster prior to the denial of authorization. On December 17, 2021 ATI faxed the adjuster the initial evaluation record. PX 4, p. 45. On December 27, 2021 ATI faxed the adjuster requesting authorization. *Id.* On January 10, 2022 ATI called the adjuster and left a message regarding the authorization request. PX 4, p. 44. On January 11, 2022 ATI faxed the adjuster the updated progress note. PX 4, p. 43-44. On January 12, 2022, ATI was advised the treatment request was denied. PX 4, p. 43. "The standard for determining whether an employer has good and just cause for a delay in payment is defined in terms of reasonableness." *Jacobo v. Ill. Workers' Comp. Comm'n*, 2011 IL App (3d) 100807WC, ¶ 20. A claimed lack of records not a good faith basis for denial, when there is evidence the Respondent had access to initial treatment records and progress reports.

The employer bears the burden of justifying a delay in the payment of compensation. *See McMahan v. Indus. Comm'n (Farmer's Elevator)*, 289 Ill. App. 3d 1090, 1093 (1997). However, I find Respondent's reliance on purportedly missing medical records, that were clearly in their possession by March 25, 2022, and a Section 12 examination on October 5, 2022 to be inadequate to avoid penalties.

The denials of temporary total disability and physical therapy benefits resulted in delays of more than fourteen days. Penalties pursuant to Section 19(l) of the Act are applicable when an employer "…shall without good and just cause fail, neglect, refuse, or unreasonably delay the payment of benefits." Respondent should, at minimum, have to pay penalties pursuant to 19(l), in the amount of $10,000.

The threshold for an award of penalties and fees pursuant to Sections 16 and 19(k) of the Act is not whether the Commission finds Respondent's reasoning persuasive. Instead, Illinois courts have determined the test is whether Respondent's reasoning is objectively reasonable. *See e.g., Zitzka v. Indus. Comm'n,* 328 Ill. App. 3d 844, 849 (2002). The sheer amount of time which passed between Petitioner's medically supported need for benefits and any *potential basis* for denial of benefits was over nine months. I find this to be objectively unreasonable, intentional and in bad faith.

For the foregoing reasons, I would modify the Decision of the Arbitrator and find Respondent's be required to pay Petitioner penalties pursuant to Sections 16, 19(k) and 19(l) of the Act.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC033619
Case Name	Billy Bryant v. ABF Freight Systems
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	23
Decision Issued By	Nina Mariano, Arbitrator

Petitioner Attorney	Michael Folga
Respondent Attorney	Timothy O'Gorman

DATE FILED: 2/7/2023

THE INTEREST RATE FOR THE WEEK OF FEBRUARY 7, 2023 4.75%

/s/Nina Mariano, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(B)

BILLY BRYANT
Employee/Petitioner

v.

ABF FREIGHT SYSTEMS
Employer/Respondent

Case # **21** WC **033619**

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 **OCTOBER 25, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **February 21, 2021**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**68,120.00**; the average weekly wage was $**1,310.00**.

On the date of accident, Petitioner was **70** years of age, ***single*** with **0** dependent children.

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

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

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

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

ORDER

The Respondent shall authorize and pay for prospective medical care and treatment including ongoing physical therapy following the September 16, 2022 right shoulder arthroscopy for Petitioner's bilateral shoulders and neck and further follow-up visits.

The Respondent shall pay reasonable and necessary medical bills from April 29, 2021 through September 29, 2022, including any unpaid bills noted on Petitioner's Exhibit 6.

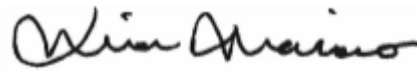
The Respondent shall reimburse the Petitioner's union health insurer, BlueCross BlueShield, for all reasonable, necessary and causally related medical bills from April 29, 2021 through September 29, 2022, including, but not limited to those bills noted on Petitioner's Exhibit 6 amounting to $67,265.47 and which address the Petitioner's left shoulder, neck and right shoulder injuries.

The Respondent shall pay Petitioner temporary total disability benefits of $873.33 per week for 51.14 weeks, commencing 11-01-2021 through 10-25-2022, as provided in Section 8(b) of the Act.

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

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

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



FEBRUARY 7, 2023

Signature of Arbitrator

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

BILLY BRYANT,	)	
	)	
PETITIONER,	)	
	)	
v.	)	No.: 21 WC 033619
	)	
ABF FREIGHT SYSTEMS,	)	
	)	
RESPONDENT.	)	

(I.) FINDINGS OF FACT

The Petitioner, Billy Bryant, was the only witness to deliver testimony. Petitioner worked for ABF Freight ("ABF") on February 21, 2021 (Arbitrator's Exhibit 1). Petitioner has worked as a driver for ABF since January 31, 1999 (TR p8).

Petitioner testified that as a driver for ABF, his day-to-day job duties and responsibilities were driving from terminal to terminal, from rail yard to rail yard in a truck, hooking up, lifting, cranking dollies, breaking trailers apart, and typing in trailer numbers by computer (TR p11-12). Among his duties were frequent lifting, including overhead lifting (TR p12-13). He testified to being required to lift anywhere between 25 and 100 pounds daily, most frequently often lifting 25-50 pounds, and he gave examples of cranking the dolly leg and opening overhead doors (TR p15-16). With overhead doors, he would need to pull them off the ground and over his head (TR p16-17). He also testified that on most days he had to lift the dolly leg and handle up, crank and lift the dolly leg gear, and unhook the fifth wheel at waist height (TR p18). He is right-handed (*Id*.).

On February 21, 2021 shortly after arriving to work at 8:30am, he put his company vest on, clocked in, received his dispatch assignment from Jimmy Gedda, and went on to obtain a tractor in order to connect it with its corresponding trailer. (TR p19-21) He was in the process of conducting his pre-inspection of the trailer when he stepped into snow and slipped upon black ice and fell to the ground. (TR p21) He testified to having fallen backwards and landing on his butt and with both elbows against the ice and pavement. (TR p21-23) He testified to lifting his head up to avoid it hitting the ice and pavement and experiencing a popping sensation in his neck (*Id.*) He also testified to experiencing shooting pain from his neck radiating down his arms, most severely down his left arm to his left hand (TR p24). He also testified to experiencing tingling in mostly his left hand's fingers immediately after the accident (TR p25). After the incident, he promptly called the dispatcher, notified his supervisor, and completed an incident report (TR p25-26).

Petitioner's Exhibit 8 is the Incident Report Petitioner completed with his supervisor (Petitioner's Exhibit 8). Petitioner and his supervisor only completed the handwritten portions on pages 2-4 of Petitioner's Exhibit 8. (TR p27-31) Petitioner's supervisor indicated that Petitioner was performing his regular job at the time of the incident (TRp31). Petitioner described the incident in the report as, "Pretripped trailer, slipped and fell on black ice and back and both arms" (*Id*.) Petitioner also indicated that he had previous treatment to the left shoulder, but that as of the day of the incident he was feeling fine physically before starting work that day (TR p32). He did not write or contribute in any way to the typed portion of Petitioner's Exhibit 8 (*Id*.) He disagrees with the typed portion characterizing his fall as him landing on his back and right hip (TR p33).

Following the February 21, 2021 slip and fall work accident, Petitioner first sought medical care and treatment with his primary care physician, Dr. Rudyard Smith, primarily for his left shoulder and neck, but he testified to having right shoulder complaints as well and numbness and tingling in his hand

and fingers (TR p36-38). This visit occurred on April 29, 2021 and also involved a prescheduled yearly physical (TR p91). Prior to the visit and while still working, he had attempted to self-medicate using conservative treatment measures of rest, ice, Tylenol, soaking in hot water, Epsom salt, creams, and Bengay (TR p37-38). Dr. Smith referred Petitioner to orthopedic surgeon, Dr. Steven Chandler to evaluate his complaints. (TR p39).

Petitioner testified to following ABF's company policy of reporting all incidents regardless of the severity of the same (TR p42-43). Over the course of his 22 years at ABF, he testified to two other slip and fall incidents that were reported and neither involved his bilateral shoulders or neck (TR p43-48). He also testified to having been involved in two work-related motor vehicle accidents which one involved injury to his neck and bilateral shoulders, however, he testified that he did not seek any medical care and treatment for either and he got better (TR p49-53). He also testified to one work related incident involving his left shoulder whereby he hurt the same while cranking a dolly, but that he did not undergo any treatment and he returned to his baseline health within a reasonable time thereafter (TR p53-54). He also testified to another work-related incident involving his right shoulder whereby he also hurt the same while pulling a fifth wheel and pin, but he again did not undergo any treatment and he returned to his baseline within a reasonable time thereafter and kept working (TR p54-56). Lastly, Petitioner testified to not having undergone any regular course of treatment, imaging, nor receiving any recommendations for pain management or surgery for his neck and shoulders before February 21, 2021 (TR p56-57).

On May 18, 2021, Petitioner saw orthopedic surgeon, Dr. Chandler and voiced complaints to him about his left shoulder and neck stemming from the subject work accident (TR p58.). He reported experiencing neck pain shooting down his left arm into his hand as well as his experiencing numbness and tingling in his left hand. (*Id*.). X-rays were performed of his left shoulder and neck and he also reported to Dr. Chandler the prior treatment that he underwent (TR p59). Dr. Chandler ordered MRIs of his left

shoulder and neck, an EMG/NCV of his bilateral upper extremities, continued NSAID use and heavy lifting avoidance, and a follow-up visit (*Id*.)

Petitioner subsequently underwent the imaging that Dr. Chandler had ordered and on November 1, 2021 learned that he had a left shoulder rotator cuff tear and an abnormal EMG/NCV study with abnormalities at the C5-6 nerve roots (TR p60). Dr. Chandler suspected Petitioner's symptoms were due to cervical radiculopathy and he recommended continued NSAID usage as well as referred Petitioner for pain management, consisting of steroid injections, followed by physical therapy if the injections did not help, followed by a spine surgery consult and possible left shoulder arthroscopy (TR p60-61). Dr. Chandler also restricted Petitioner from working at the November 1, 2021 appointment (*Id*.).

Thereafter, Petitioner saw pain management physician, Dr. Campbell on November 3, 2021 and Dr. Campbell administered a steroid injection and ordered physical therapy for his neck and back (TR p61-62). He reported back to Dr. Campbell on November 17, 2021 with bilateral upper extremity radiculopathy with continued radicular pain, and the pain was bilateral but worse in his left shoulder at that time (TR p62-64). At this time, he favored using his right arm because his left arm hurt more (TR p64). He followed up again on December 1, 2021 with Dr. Campbell noting continuing neck pain, joint pain and stiffness and physical therapy was ordered for his neck and bilateral shoulders (*Id*.). He completed a course of physical therapy from December 15, 2021 through January 11, 2022 with improvement, but his right shoulder got worse (TR p64-65). His therapy exercises involved neck exercises and working his arms up and down, and the more usage and movement with his right arm, the worse his right arm pain got (TR p65-66). He testified that his doctors believed he had been overusing his right arm (TR p66-67). On January 17, 2022, Dr. Campbell recommended that he undergo a repeat cervical epidural steroid injection (TR p67-68).

Petitioner followed up with Dr. Chandler on February 21, 2022 reporting his increased right shoulder pain complaints radiating down to his right hand and he indicated that while he was in physical therapy, he was having more shoulder/arm pain and Dr. Campbell thought he may have overdid it (TR p68). Dr. Chandler maintained Petitioner's work restrictions and Petitioner went on to complete cervical epidural steroid injections with Dr. Campbell's partner, Dr. Ebby Jido, on February 28, 2022 and March 28, 2022 (TR p68-69). Despite some relief from the injections, by April 19, 2022, Petitioner reported to Dr. Chandler that his symptoms returned and his activities of daily living were severely impaired and Dr. Chandler referred him for a spine surgery consultation (TR p69). Petitioner saw spine surgeon, Dr. Daniel Troy, on May 27, 2022, and he understood from that appointment that his symptoms were mainly coming from his shoulders (*Id*.).

Petitioner underwent a right shoulder MRI on July 21, 2022 and reviewed the same with Dr. Chandler on August 16, 2022 who recommended that he undergo a right shoulder arthroscopy (TR p69-70). Dr. Chandler performed Petitioner's right shoulder surgery on September 16, 2022 (TR p70). Post-operatively, Petitioner has had some improvement and he is currently in physical therapy attending 2-3 times per week for 6-8 weeks (TR p70-71). He reports back to Dr. Chandler after completing his physical therapy which is scheduled through December 12, 2022 (*Id*.). The physical therapy is for both of his shoulders and neck (TR p71-72). Petitioner still has ongoing complaints and symptoms in his right shoulder, but admits it is much improved since surgery, and his current complaints are more so on the left shoulder and neck, including numbness and tingling, neck stiffness, and pain (TR p72-73). If he had no other choice and the pain does not improve, he would undergo left shoulder surgery (TR p74-75). He would also continue undergoing treatment for his bilateral shoulders and neck as he wants to get better and stop the pain (TR p85-86). He testified that while showering reaching causes numbness in his left shoulder and he cannot do the normal things that he used to do all his life and he normally would prior to

the accident due to pain, such as working in his yard or picking up things (TR p87-88). Petitioner also testified that his doctors told him that his slip and fall on February 21, 2021 was the cause of his shoulder and neck injuries (TR p76-77).

Petitioner attended an independent medical examination with Dr. Andrew Zelby on March 25, 2022 for his neck (TR p77 and Respondent's Exhibit 2). The examination lasted 20 minutes or less (TR p78-79). He also attended an independent medical examination with Dr. James Leonard on October 5, 2022 with an examination that lasted between 5-10 minutes (TR p79-80). Following these examinations, his medical and monetary benefits remained terminated (TR p78-80).

Petitioner has not received temporary total disability benefits or medical benefits from Respondent at any point in time from the date of the accident, February 21, 2021 through the trial date of October 25, 2022 despite being restricted from working since November 1, 2021 (TR p80-81). While off work, Petitioner was never offered any accommodated or light duty positions from ABF (TR p82-83). Petitioner has used his own union health insurance to undergo all his treatment from the date of the accident to the date of trial and he has incurred out of pocket co-pay expenses (TR p81-82). Petitioner also has unpaid bills (TR p82). Petitioner has supported himself with his regular social security monthly income of $2,426 from when he was first off work through May 2022 and $2,622 per month from May 2022 onward (TR p83-84). Petitioner has also received pension benefits in the amount of $1,896 per month from May 2022 onward (TR p84-85).

Petitioner admitted to advising Dr. Campbell that he had years of left arm pain prior to November 3, 2021 (TR p94). He testified that his left shoulder pain increased as a result of the February 21, 2021 slip and fall which prompted him to seek medical care and treatment (TR p95). He stopped working when his physicians restricted him from doing so and prior to being taken off work he worked to support himself (TR p99).

Independent Medical Evaluations

Petitioner was examined by Dr. Andrew Zelby on March 25, 2022. RX2. Petitioner reported he was walking down the side of his trailer and slipped on snow and ice, falling backwards and landed on his upper back and arms. RX2. Petitioner testified he felt a pop in his neck and had neck pain, bilateral shoulder pain and bilateral posterior arm pain to the elbows. RX2. Petitioner continued to work and went to his primary care physician in April 2021. RX2. Petitioner underwent injection therapy to the left shoulder and cervical spine with little improvement. RX2. Petitioner underwent a cervical spine examination which demonstrated a normal examination. RX2. Dr. Zelby opined Petitioner suffered from cervical degenerative spondylosis with chronic radiculopathy. RX2. Dr. Zelby believed Petitioner's cervical complaints were not related to Petitioner's alleged injury, stating specifically that Petitioner's right sided pain complaints would have developed within days of his alleged injury, not months. RX2. Dr. Zelby opined Petitioner would have reached maximum medical improvement for his spinal condition by mid-late June 2021 and that no work restrictions or further directed care was necessary. RX2.

Petitioner was examined by Dr. James Leonard at Midwest Orthopedic Consultants on October 5, 2022. RX1. Petitioner provided a history of walking along the side of his trailer when he slipped on snow and ice, falling backwards and landing on his upper back and bilateral elbows. RX1. Petitioner denied hitting his head but he reported feeling a pop in his neck and reported immediate pain to the neck radiating down to his left arm. RX1. Petitioner described after a couple weeks, he noted pain in the neck and left shoulder getting worse and reported these symptoms to his primary care provider in April 2021. RX1.

Petitioner had undergone surgery on September 16, 2022 to his right shoulder so Petitioner's physical examination was limited. RX1. Petitioner underwent a physical examination which demonstrated slight reduction in range of motion and strength evidenced by testing in both right and left shoulders. RX1. Dr. Leonard explained Petitioner's complaints at the time included complaints of neck pain and stiffness,

radicular symptoms going down into his hand on the left side and bilateral shoulder pain and stiffness. RX1. Dr. Leonard did not observe any weakness that would suggest a cervical radiculopathy. RX1. Dr. Leonard opined Petitioner's right shoulder complaints are not related to Petitioner's February 21, 2021 injury as no treatment was sought and no pain was complained of until 11 months after the alleged accident. RX 1. Dr. Leonard opined "a minority" of Petitioner's left arm pain was related to the alleged injury on February 21, 2021. RX1. Dr. Leonard opined Petitioner likely required a lifting restriction of no lifting over 10lbs however there was no connection between these restrictions and his alleged work injury as Petitioner "continued to work full duty for more than 8 months" subsequent to the alleged injury. RX1.

Dr. Leonard opined Petitioner was not at MMI however that any future treatment recommended was not caused by Petitioner's alleged February 21, 2021 injury. RX1. Dr. Leonard stated he believed the initial February 21, 2021 alleged injury may have aggravated Petitioner's left arm pain however both his right shoulder condition and left shoulder condition pre-dated the alleged injury on February 21, 2021. RX1.

(II.) CONCLUSIONS OF LAW

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

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

It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence and assign weight to witness testimony. O'Dette v. Industrial Commission, 79 Ill.2d 249, 253, 403 N.E.2d 221, 223 (1980); Hosteny v. Workers' Compensation Commission, 397 Ill. App. 3d 665, 674 (2009).

Arbitrator finds that Petitioner testified credibly, honestly and to the best of his ability. The Arbitrator was not presented with any evidence indicating a willingness to lie or deceive on the Petitioner's part. Overall, his testimony was corroborated by the medical records in evidence.

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

"Whether a causal connection exists is a question of fact for the Commission, and a reviewing court will overturn the Commission's decision only if it is against the manifest weight of the evidence... The test is whether the evidence is sufficient to support the Commission's finding, not whether this court or any other tribunal might reach an opposite conclusion. For the Commission's decision to be against the manifest weight of the evidence, the record must disclose that an opposite conclusion clearly was the proper result." *Vogel v. Industrial Commission*, at 786 (2nd Dist. 2005)(citing *Navistar International Transportation Corp. v. Industrial Comm'n,* 331 Ill.App.3d 405, 415 (2002); *Pietrzak v. Industrial Comm'n,* 329 Ill.App.3d 828, 833 (2002); and *Gallianetti v. Industrial Comm'n,* 315 Ill.App.3d 721, 729-30 (2000)).

The Arbitrator initially notes that accident was stipulated to by Respondent. Petitioner was also the only witness to testify. Petitioner testified at trial to having various prior work-related incidents. He testified to not having undergone any regular course of treatment, imaging, receiving any recommendations for pain management or surgery for his neck and bilateral shoulders prior to February 21, 2021. The only mention of alleged symptom exaggeration is found in Respondent's section 12 examiner, Dr. Zelby's report.

In reviewing the evidence, the Arbitrator understands the following to have occurred on February 21, 2021. Shortly after arriving to work, Petitioner received a work assignment to obtain a tractor to connect it to its corresponding trailer. Petitioner while working alone doing his pre-inspection checks on the trailer, stepped into snow, and slipped upon black ice and fell to the ground. Petitioner fell backwards and landed on his butt and struck both elbows against the ice and pavement as well as he felt a pop in his neck when he lifted it to avoid it hitting the ground. Petitioner felt immediate shooting pain from his neck radiating down his arms, most severely down his left arm to his left hand as well as tingling in mostly his left hand's fingers.

After the incident, Petitioner promptly notified his dispatcher and supervisor as well as he wrote out an incident report with his supervisor describing the incident as he testified to at trial. Petitioner's incident report disclosed as he testified to that he had previous treatment to the left shoulder, but that as of the day of the incident he was feeling fine physically before starting work that day. Thereafter, Petitioner attempted to manage his pain complaints and symptoms in his bilateral shoulders and neck conservatively just as he had on prior occasions with rest, ice, Tylenol, soaking in hot water, Epsom salt, creams, and Bengay. Petitioner's home remedies proved ineffective and on April 29, 2021 he formally sought treatment for the reported February 21, 2021 work accident with his primary care provider, Dr. Smith, at the same time that he had previously scheduled a routine physical examination.

If an injured worker has a pre-existing condition that becomes aggravated, exacerbated, or accelerated by a work injury, the employee is still entitled to benefits. *Rock Road Construction Co. v. Industrial Commission*, 37 Ill.2d 123 (Ill. 1967); *Illinois Valley Irrigation, Inc. v. Industrial Commission*, 66 Ill.2d 234 (Ill. 1977); and *St. Elizabeth's Hospital v. Worker's Compensation Commission*, 371 Ill.App.3d 882 (Ill. 2007). A work injury is compensable under the Illinois Worker's Compensation Act where one's employment is 'a' cause and need not be the sole cause or even the

primary cause of one's condition. Furthermore, a pre-existing condition does not bar recovery if the preexisting condition is aggravated or accelerated by the claimant's employment. *Tower Automotive v. Illinois Workers' Compensation Commission*, 407 Ill.App.3d 427 (1st Dist. 2011).

Respondent focuses on the fact that Petitioner's initial treatment with Dr. Smith was for a pre-scheduled appointment. Whether the Petitioner discussed his work injury at a pre-scheduled appointment versus a newly scheduled appointment is irrelevant and in no way invalidates that when Petitioner attended his appointment with Dr. Smith, he described the work-related incident and voiced complaints to his left shoulder. While the Arbitrator appreciates that the Petitioner previously injured his shoulders and neck and reported claims with his work for those injuries, the Petitioner's account of those injuries from much earlier were not the cause of his February 21, 2021 work injury. Respondent introduced no records evidencing any prior treatment; thus, the only evidence of prior treatment to consider is the Petitioner's testimony and his current treating records' references to past injuries. A review of the current treatment records comports with the Petitioner's testimony, namely, that he only completed conservative care for his left shoulder and neck and did not previously undergo any imaging, injections or surgeries. Furthermore, the Arbitrator was presented with no evidence of any intervening or superseding causes for the Petitioner's bilateral shoulder and neck injuries, other than the February 21, 2021 work injury which occurred as a result of the Petitioner slipping and falling on black ice. Lastly, while the Arbitrator believes the Petitioner's testimony that his post-February 21, 2021 complaints were more intense than any prior complaints requiring formal treatment, it is indisputable that the February 21, 2021 work accident at a minimum aggravated or accelerated any alleged potential preexisting conditions.

In further evaluating the evidence, the Arbitrator finds the medical records, specifically those of doctors Smith, Chandler, Campbell and Jido, thoroughly support the Petitioner's testimony that he

suffered bilateral shoulder and neck injuries on February 21, 2021. To begin with, the initial treating records of Dr. Smith from April 29, 2021 unequivocally state that, "Pt states he has left shoulder pain since he fell last month on the job," as well as under the history of present illness section the records reflect that his continuing left shoulder pain is due to trauma from his having fallen at work. (See Petitioner's Exhibit 1, p.9, 12). Dr. Smith's records similarly make no reference to Petitioner complaining of left arm pain for years.

Petitioner next saw orthopedic, Dr. Chandler, on Dr. Smith's referral and Dr. Chandler consistently documents from May 18, 2021 throughout all his visits records up to September 29, 2022, that Petitioner's shoulder and neck conditions of February 21, 2021 are work related. Dr. Chandler first states on May 21, 2021 the following:

> "Patient is a 70-year old male presenting for left shoulder and neck pain. He states he slipped and fell on ice at work in March (sic), injuring his left shoulder and neck. He states he has had pain in his left shoulder which is worse when raising his arm or lifting objects. He notes he also has pain in his neck that shoots down his left arm into his hand. He has numbness and tingling in his left hand. He states he injured his neck previously when he was rear-ended in his truck a couple years ago while also on the job. He works as a truck driver and has reported these incidents, but states he has not filed a worker's compensation claim. He rates the pain as 8/10 and notes it is worst at night." (Petitioner's Exhibit 2, p.9)

Dr. Chandler also as part of his initial work-up of the Petitioner ordered not only an MRI of his left shoulder and cervical spine, but also an EMG/NCV of his bilateral upper extremities. (*Id*. at 11). Dr. Chandler elaborates on his causation opinion in his August 16, 2022 note, when he states:

> "…The patient was also having problems with his insurance. Since he originally injured the neck and shoulders when he fell at work, but his claim of Worker's Compensation was not accepted and it should be for rotator cuff tears to bilateral shoulders and aggravation of cervical degenerative disc disease and radiculopathy."

In addition to Petitioner's first two treating doctors, Petitioner was also referred by Dr. Chandler to pain management physician, Dr. Campbell, whom he first saw on November 3, 2021. While it is true that Petitioner had prior incidents involving his shoulders and neck causing similar pain and symptoms, Dr. Campbell's characterization that Petitioner was referred to him due to years of left arm pain untreated is a mischaracterization of the treatment records from the referring physicians, Dr. Smith and Dr. Chandler, who both clearly discuss his work-related accident and do not attribute his complaints to anything but the subject work accident. Coincidentally, Dr. Jido, a pain management physician within the same practice as Dr. Campbell, also documents in his records on both March 21, 2022 and March 28, 2022 that Petitioner's neck and bilateral shoulder injuries are causally related to the February 21, 2021 accident. (Petitioner's Exhibit 3, p.24-28). As if realizing his earlier mis-documentation, Dr. Campbell later clarifies in his visit notes on September 15, 2022 that, "Pt sts his pain started from an accident at work in February of 2021. Pt fell and landed on his neck and elbows." (*Id*. at 40).

Moreover, aside from each of the previously discussed treaters, Respondent's section 12 examiner, Dr. Leonard, gives causation for Petitioner's left shoulder and neck conditions. With respect to the mechanism of Petitioner's injury, Dr. Leonard states,

> "Petitioner is very clear that the mechanical (sic)of his injury on ice/snow while he was walking along the trailer of his truck. The slip resulted in him falling backwards and landing on his upper back. He makes it a point to state that his neck flexed forward to prevent his head from hitting the ground, which he is sure was prevented, but he did feel a pop in his neck. This mechanism of injury is consistent throughout the medical record and consistent with the history that he gave me today." (Respondent's Exhibit 1, p.7, Opinion 2(c)).

With respect to objective medical evidence of Petitioner's pain complaints, Dr. Leonard states,

> "Objectively, the petitioner has marked stiffness and decreased mobility to his neck and bilateral shoulders. This lack of mobility is directly related to petitioner's complaints of

> pain, as he demonstrated increased pain when he attempted to increase his mobility, and decreased pain when he remained still with less movement." (*Id*. at p.7, Opinion 2(d)).

With respect to whether Dr. Leonard agrees with Dr. Chandler's initial diagnosis on Petitioner's neck, Dr. Leonard states,

> "I agree with Dr. Chandler's diagnosis of cervical spine disc disease, spondylitic changes with left sided radicular symptom as petitioner's primary diagnosis initially, as he suffered a hyperflex injury when he fell, felt a pain in his neck and suffered from neck pain, stiffness, and radicular type symptoms. (*Id*. at p8, Opinion 4(c)).

With respect to whether Dr. Leonard agrees that the subject mechanism of injury caused Petitioner's diagnosis as it relates to his left shoulder, Dr. Leonard states,

> "….In terms of the left shoulder, Dr. Chandler's initial examination on May 18, 2021, described pain to the supraspinatus, decreased range of motion and strength and findings of impingement syndrome and rotator cuff disease, which is corroborated with the MRI of the left shoulder. It is difficult to ascertain how much of his left arm pain was due to the left shoulder and how much was due to left cervical radiculopathy. I do believe that a minority of his arm pain is shoulder related and that shoulder pain is directly related to his fall on February 21, 2021." (*Id*. at p.8-9, Opinion 4(d)).

The Respondent relies on Dr. Leonard's report and opinions to refute Petitioner's right shoulder injury and to negate the work restrictions imposed upon him by his physicians even as they relate to his left shoulder.

With respect to Dr. Leonard's opinions on Petitioner's right shoulder, Dr. Leonard conflates Petitioner's account about how physical therapy affected his right shoulder by simply characterizing it as developing from physical therapy and he mischaracterizes the medical records. The Petitioner testified to always having some right shoulder complaints after the February 21, 2021 work accident, but admitted

that the left shoulder was for many months more severe. The Petitioner also testified to initially using his left arm less and favoring his right arm, which led to an overuse of his right arm. Petitioner's overuse of the right arm coupled with his physical therapy for his left shoulder and neck, which included exercises using both of his upper extremities, further led to his increased severe right shoulder pain and symptoms which he reported to his physicians. Dr. Leonard's characterization of the right shoulder problem starting in late December 2021 or early January 2022 is also contradicted by Dr. Campbell's records themselves which on November 17, 2021 state that, "Pt here for f/u of cervical neck pain associated with b/l UE radiculopathy…" (Petitioner's Exhibit 3, p.40). Furthermore, Dr. Campbell's own characterization of the right shoulder as a 'new' problem contradicts his own records for the same reason.

With respect to Dr. Leonard's opinions negating the work restrictions imposed upon Petitioner by his physicians for his left shoulder and neck, in essence he faults Petitioner for working for 8 months after the accident despite admitting that as of the section 12 examination the Petitioner should still be under work restrictions. This opinion is flawed for several reasons. First, the Petitioner was simply following the course of treatment outlined by his treating doctors who chose not to restrict him from working until November of 2021. Second, Petitioner's treating physicians who regularly saw him were in a better position than Dr. Leonard to clinically evaluate him and set forth his restrictions. Third, Dr. Leonard himself opines that, "All treatments Petitioner has received for both shoulders has been medically reasonable, related, and necessary for his bilateral shoulder pain," so if he is criticizing Petitioner's course of related treatment, then why does he relate it all (Respondent's Exhibit 1, p.10, Opinion 7). Fourth, the Petitioner testified to working in pain following the accident in order to support himself which is a reasonable explanation when coupled with his following his doctors' orders. And fifth, Dr. Leonard purely speculates that Petitioner 'likely would have avoided surgery' if he underwent a different course of treatment, while again relating all the treatment that he did undergo. For these reasons, Dr. Leonard's

opinions negating the work restrictions imposed upon Petitioner by his physicians for his left shoulder and neck are not persuasive.

The Respondent relies on the independent medical examination report and opinions of Dr. Andrew Zelby to refute Petitioner's neck injury. Problematically, Dr. Zelby almost entirely focuses on Petitioner's right sided radicular symptoms and provides no discussion on Petitioner's left sided radicular symptoms. Dr. Zelby ignores the early treatment records discussion pertaining to the left shoulder and neck by omitting any discussion of them. In addition, Dr. Zelby ignored the likelihood of Petitioner's injuries progressing due to the accident from primarily left shoulder and neck complaints to more right shoulder and right sided neck complaints due to overuse and physical therapy.

Additionally, Dr. Zelby does give causation albeit in an incredibly vague and contradictory fashion and again only upon mentioning Petitioner's right sided complaints while ignoring his left sided complaints. Specifically, he states that, "Based on his prior history and the symptoms that he actually had following his reported fall at work on February 21, 2021, at most Mr. Bryant sustained a temporary exacerbation of a pre-existing and already symptomatic degenerative condition that was not aggravated, accelerated or altered as a result of his reported injury at work," while later saying that, "Mr. Bryant was easily at maximum medical improvement for any temporary exacerbation and any infirmity related to his spine and nervous system arising as a consequence of his reported fall at work on February 21, 2021 by mid-late June 2021 at the latest, once he was four months on from his reported injury." (Respondent's Exhibit 2, p.5). In sum, Dr. Zelby does causally relate Petitioner's neck injury to the accident at least for a period of 4 months.

In conclusion, the Arbitrator finds that, overall, the opinions of the treating physicians are more credible with regard to the issue of causation than Respondent's section 12 examiners who only examined Petitioner one time each.

As such, the Arbitrator finds that the Petitioner's current condition of ill being, namely, an injured left shoulder, neck and right shoulder sustained on February 21, 2021 while he was working and slipped and fell upon black ice is causally related to his work injury of that date. Arbitrator finds that the right shoulder injury was not severe at the outset but later became severe as a result of overuse and participation in physical therapy involving use of both arms.

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

The Arbitrator finds that all involved in the Petitioner's care for his left shoulder, neck and right shoulder injuries sustained on February 21, 2021, including those physicians, therapists, and radiologists referred to in Petitioner's Exhibits 1 through 6 provided reasonable and necessary medical care and treatment. The Arbitrator is further persuaded as to the reasonableness and necessity of Petitioner's bilateral shoulder medical treatment given that Respondent's section 12 examiner, Dr. Leonard, expressly states, "All treatments Petitioner has received for both shoulders has been medically reasonable, related, and necessary for his bilateral shoulder pain." (Respondent's Exhibit 1, p.10, Opinion 7). The Arbitrator is also further persuaded as to the reasonableness and necessity of Petitioner's neck medical treatment given that Respondent's section 12 examiner, Dr. Zelby, similarly relates at least the medical for Petitioner's neck up to mid to late June 2021. (Respondent's Exhibit 2, p.5).

For the reasons outlined above regarding causal connection and the testimony of the Petitioner, the Arbitrator finds that the Petitioner's medical care and treatment for his left shoulder, neck and right shoulder from April 29, 2021 throughout all of his visit records up to September 29, 2022, including his

right shoulder surgery that occurred on September 16, 2022, has been reasonable and medically necessary.

As such the Arbitrator awards the Petitioner all the related and outstanding medical bills incurred from April 29, 2021, through the day of trial of October 25, 2022 pursuant to the Illinois Workers' Compensation Fee schedule.

Additionally, the Arbitrator finds that the Respondent is responsible for reimbursing the Petitioner's union health insurer, BlueCross BlueShield, for all reasonable, necessary and causally related medical bills from April 29, 2021, through the day of trial of October 25, 2022, including, but not limited to those bills noted on Petitioner's Exhibit 6 amounting to $67,265.47 and which address the Petitioner's left shoulder, right shoulder and neck injuries.

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

The Arbitrator finds that the Petitioner has been off and unable to work from November 1, 2021, through the day of trial of October 25, 2022 while undergoing reasonable, necessary and causally related treatment at the behest of his physicians. For the time period of November 1, 2021 through October 25, 2022, the Arbitrator awards $44,662.10 (51.14 weeks x $873.33) in temporary total disability benefits.

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

Petitioner alleges Respondent's failure to pay temporary total disability benefits after October 31, 2021 and failure to authorize treatment per Petitioner's treating physicians' requests has caused undue delay and is vexatious and unreasonable.

"It is not enough for workers' compensation claimant to show that the employer simply failed, neglected, or refused to make payment or unreasonably delayed payment without good and just cause in

order to obtain additional compensation and attorney fees under workers' compensation statute, providing that, in case where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation, then Workers' Compensation Commission may award additional compensation, and under statute providing for an award of attorney fees when an award of additional compensation is appropriate; instead, penalties and attorney fees under these statutes are intended to address situations where there is not only delay, but the delay is deliberate or the result of bad faith or improper purpose." *Jacobo v. Illinois Workers' Compensation Com'n*, 355 Ill.Dec. 358, 959 N.E.2d 772 (2011).

Respondent's 19(b) Response and Respondent's Response to Petitioner's Petition for Penalties and fees addresses Petitioner's allegations adequately. Respondent's reliance on its Section 12 examining physicians is made in good faith. The Section 12 examining physicians describe in part why Petitioner's alleged injury did not cause his current condition, although some of those opinions were incomplete.

A failure to pay because of a good faith belief that no payment is due will not warrant a penalty. See generally, *Avon Products, Inc. v. Industrial Commission*, 82 Ill.2d 302, 412 N.E.2d 470 (1980). In the workers' compensation context, generally, when the employer acts in reliance upon reasonable medical opinion or when there are conflicting medical opinions, penalties ordinarily are not imposed; the relevant question is whether the employer's reliance was objectively reasonable under the circumstances. *Global Products v. Workers' Compensation Com'n*, 392 Ill.App.3d 408 (2009). Based upon Petitioner's admission his complaints of pain pre-date the alleged accident date, Petitioner's delay in seeking treatment, further delay in being prescribed off work and the Section 12 IME reports on which Respondent relies, The Arbitrator denies Petitioner's request for penalties and fees.

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

The Arbitrator finds that as a result of the causal connection being established between the Petitioner's current symptoms and the work-related accident, the further bilateral shoulder and neck treatment recommendations of Dr. Chandler, and even Dr. Leonard, namely that he requires ongoing physical therapy of his bilateral shoulders and neck, and further follow-up visits, prospective medical shall be awarded.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC031655
Case Name	Adriana Hernandez v. Blair Bakery, LLC dba Nothing Bundt Cakes
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0042
Number of Pages of Decision	16
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Matthew Jones
Respondent Attorney	Kelly Kamstra

DATE FILED: 1/23/2024

/s/Carolyn Doherty, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ADRIANA HERNANDEZ,

Petitioner,

vs. NO: 20 WC 031655

BLAIR BAKERY, LLC, dba NOTHING BUNDT CAKE,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under Section 19(b) having been filed by Petitioner herein and proper notice given, the Commission, after considering the issues of causal connection, medical expenses, temporary total disability, and prospective medical care, and being advised in the facts and applicable law, modifies 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).

On December 22, 2020, Petitioner filed an application for adjustment of claim alleging that on November 18, 2020, she sustained injuries to her back, right leg, right knee, and right foot, that arose out of and in the course of her employment. Petitioner, who was 35 years old at the time of the accident, testified on direct examination that she worked for Respondent as a baker assistant/dishwasher since September 13, 2020.

A 19(b) hearing was conducted on December 21, 2022. The Arbitrator found that Petitioner sustained a work-related injury on November 18, 2020, that resulted in a neuropraxia that reached maximum medical improvement (MMI) on January 26, 2022. Petitioner was awarded reasonable and necessary medical expenses through January 26, 2022. The Arbitrator denied total temporary

disability benefits after January 26, 2022, based upon the opinion of Dr. Simon Lee, Respondent's Section 12 examiner that Petitioner had reached MMI, and denied prospective medical care.

Petitioner testified in Spanish through a translator. Petitioner described the incident as follows: "I had some cake molds. Somebody had thrown—well water on the floor. When I went to take the molds, I slipped in the water." Petitioner stated that she was carrying multiple baking molds- eight to nine of them and that each individual mold weighed about eight pounds. When she slipped all the baking molds fell on her right foot.

She testified that she was wearing steel toed shoes, but the baking molds fell on the upper part of her right foot, and she experienced immediate pain. Petitioner notified her supervisor of the accident and requested to be sent home. The supervisor denied her request and directed Petitioner to finish her shift.

On November 19, 2020, Petitioner presented to Advocate Medical Group where she was examined, and a radiolucent line was identified on her right foot x-ray suggesting a possible fracture. She was given an orthotic shoe and was restricted to sedentary work. Petitioner testified that she continued working for Respondent until November 25, 2020. Respondent assigned her work as a dishwasher which was outside her sedentary work restrictions. November 25, 2020 was Petitioner's last day of employment with Respondent.

On December 1, 2020, Petitioner presented to Dr. Mandal, an orthopedic specialist. Dr. Mandel noted moderate edema over the dorsum of the right foot, tenderness over the dorsum, and posterior to the medial malleolus as well as the heel, and over the ATFL. Dr. Mandal ordered Petitioner off work and referred her to physical therapy, which she attended through February 26, 2021.

Petitioner next consulted Dr. Poepping at G&T Orthopedics on January 22, 2021. On physical examination he noted tenderness across the plantar facia, anterior aspect of the ankle, and dorsal foot with swelling. Dr. Poepping continued Petitioner off work and ordered a right foot MRI.

On February 22, 2022, Petitioner consulted Dr. Hare, a podiatrist. Dr. Hare charted a positive Tinel's sign to the tibial nerve, painful range of motion, and peak pain at the anterior aspect of the right ankle. He diagnosed right tarsal tunnel syndrome and a right foot contusion. Dr. Hare administered a steroid injection into Petitioner's right foot and ankle. He continued Petitioner's off work restrictions.

Petitioner had an MRI of the right foot and ankle on February 24, 2021. The MRI of the right ankle revealed tibiotalar, subtalar synovial effusion, and intertarsal, tarsometatarsal and metatarsophalangeal synovial effusion and tendinosis of the right flexor hallucis longus and tibialis posterior tendons. The right foot MRI showed tibiotalar, subtalar, intertarsal metatarsophalangeal synovial effusion with degenerative changes at the first metatarsal joint and plantar calcaneal spur.

Dr. Hare continued treating Petitioner, which included steroid injections through August 2, 2021, when she had her last treatment. During treatment Dr. Hare administered the cortisone

injections to the right tarsal tunnel and right ankle which gave limited relief. On May 24,2021 Dr. Hare discussed a tarsal tunnel release for persistent symptoms. Petitioner's physical findings remained constant throughout treatment. Dr. Hare continued Petitioner's off work restrictions.

On August 25, 2021, Petitioner underwent an EMG of the right lower extremity, the scope of which was limited by Petitioner's pain. The study showed the bilateral plantar nerve as abnormal. Petitioner commenced treatment with Dr. Anderson on September 7, 2021, complaining of constant pain on the top of her right foot and lateral ankle which limited her ability to stand to thirty minutes. Dr. Anderson's physical examination yielded a positive Tinel's sign to the tibial nerve and percussion of the superficial and deep peroneal nerves at the anterior and anterolateral ankle. Dr. Anderson diagnosed a contusion of the right foot, traumatic injury to the deep peroneal nerve, closed injury superficial peroneal nerve, right tarsal tunnel syndrome, and arthralgia of the ankle.

Petitioner continued to be symptomatic in her right foot and lower extremity. On physical examination Dr. Anderson also noted a palpable mass/ganglion cyst on the dorsum of Petitioner's right foot which he injected on September 28, 2021. Dr. Anderson recommended a surgical excision of the ganglion cyst and decompression of the deep peroneal nerve on October 28, 2021, noting that a course of conservative treatment had failed to yield any sustained pain relief or improvement in physical findings.

On November 24, 2021, Respondent's utilization review ("UR") declined certification of Dr. Anderson's surgery request. A second UR on December 14, 2021, authorized the surgery as "medically reasonable and appropriate." Citing the ODG, peer review physician Dr. John Shine stated in his report that, "[p]alpable masses about the foot and ankle are most commonly related to trauma or mechanical instability, with non-neoplastic causes such as ganglion cysts and calluses predominating." He agreed that "a reasonable course of conservative treatment including topical and oral medications" failed.

Dr. Anderson kept Petitioner off work until July 12, 2022, when he released her to return to work with permanent restrictions including no lifting over 20 pounds, no prolonged standing or walking and orders to alternate between walking and standing. Dr. Anderson continued his surgical recommendation for decompression of the deep peroneal nerve with anterior tarsal tunnel release. Petitioner testified that she continues to experience pain in her right foot and leg and takes pain medication. She further testified that Dr. Anderson's work restrictions allow her to work six hours per day only.

On January 26, 2022, Dr. Simon Lee performed a Section 12 examination on Petitioner at the request of Respondent. Petitioner's complaints remained consistent as did her history of work injury. Dr. Lee diagnosed a right foot contusion with neuritis. He opined that the injury was causally connected to the work accident. Dr. Lee further opined that Petitioner did not require any further treatment and that she was at MMI. Dr. Lee disagreed with the second UR on the reasonableness and necessity of the surgery recommended by Dr. Anderson. Dr. Lee based his finding that surgery was not indicated on his opinion that Petitioner's "anatomic distribution, symptoms, and complaints are not within a specific distribution of a nerve and there is no ganglion cyst."

Dr. Lee issued an addendum report on April 14, 2022, in which he commented that the pans which fell on Petitioner's foot typically weigh under two pounds each and that the total weight that fell on her foot did not exceed ten to twelve pounds. He further noted that Petitioner was wearing steel- toed shoes. Dr. Lee acknowledged that a ganglion cyst could benefit from a nerve release but failed to note the presence of a ganglion in the charting of Dr. Anderson and on that basis diagnosed Petitioner's condition as neuropraxia. Dr. Lee further commented that Petitioner's symptoms reflected a nerve distribution that was non-specific.

In modifying the arbitrator's decision, the Commission notes that Dr. Lee's opinions are predicated upon significant misapprehensions of the record. Petitioner testified that the baking molds that fell on her foot were made of iron, each weighed seven to eight pounds, and that eight molds fell on her right foot. Dr. Lee was under the impression that the baking pans weighed only two pounds each. As a result, Dr. Lee underestimated the degree of trauma to Petitioner's right foot. Dr. Lee stated that there was no ganglion cyst present. As he had not reviewed Petitioner's prior medical records, he failed to appreciate the objective description of a ganglion cyst by Dr. Anderson that accompanied his surgical recommendation. For the foregoing reasons, the Commission finds the opinion of Dr. Anderson more persuasive than the opinion of Dr. Lee.

Accordingly, the Commission finds that Petitioner did not attain MMI on January 26, 2022, given the pending surgical recommendation of Dr. Anderson as certified by the UR physician, and that Petitioner's current condition of ill-being in her right foot is causally related to her work accident on November 18, 2020.

The Commission further finds that Petitioner is entitled to reasonable and necessary medical expenses incurred from November 18, 2020, through December 21, 2022. The Commission further finds that Petitioner is entitled to prospective medical care in the form of the ganglion excision and deep peroneal nerve release surgery recommended by Dr. Anderson and certified by the UR physician.

The Commission further finds that Petitioner is entitled to TTD benefits commencing November 26, 2020, through October 22, 2022. Petitioner was initially placed on sedentary work restrictions by Advocate Medical Group on November 19, 2020. Respondent assigned Petitioner to a position as a dishwasher which required that she stand in violation of Petitioner's medical work restrictions. As a result, Petitioner's last day of work was November 25, 2020. Thereafter, Petitioner was taken off work completely commencing December 1, 2020, through July 12, 2022, per the orders of her treating physicians. On July 12, 2022, Dr. Anderson placed Petitioner on light duty work restrictions. Petitioner testified that she secured employment with QLS Staffing commencing October 23, 2022, which accommodates her light duty restrictions and she returned to work on that date.

For the foregoing reasons, the Commission hereby modifies the Decision of the Arbitrator.

IT IS HEREBY ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 9, 2023, is hereby modified for the reasons stated above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner TTD benefits from November 26, 2020, through October 22, 2022, in the amount of $268.24 per week for a total of 99 and 3/7 weeks that being the period of temporary total incapacity for work under Section 8(b) of the Act. Respondent shall receive credit for amounts paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner all reasonable and necessary medical bills including Midwest Specialty Pharmacy,$5,818.06; Illinois Orthopedic Network, $464.14; and La Clinica,$206.68 incurred through December 21, 2022, pursuant to the Medical Fee Schedule as provided in Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for all reasonable and necessary prospective medical care and treatment as recommended by Dr. Anderson, including, but not limited to, surgical decompression of the deep peroneal nerve on Petitioner's right lower extremity, and ganglion excision on her right foot, pursuant to the Medical Fee Schedule as provided in Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of the 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 for 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.

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

Bond for removal of this cause to the Circuit Court by Respondent shall be fixed at the sum of $20,000.00. 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.

January 23, 2024

o-12/13/23
CMD/msb
045

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC031655
Case Name	Adriana Hernandez v. Blair Bakery, LLC d/b/a Nothing Bundt Cakes
Consolidated Cases	
Proceeding Type	19(b)/8(A) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	10
Decision Issued By	Michael Glaub, Arbitrator

Petitioner Attorney	Matthew Jones
Respondent Attorney	Robert Sabetto

DATE FILED: 3/9/2023

THE INTEREST RATE FOR THE WEEK OF MARCH 7, 2023 4.97%

/s/Michael Glaub, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF LAKE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)/8(A)

Adriana Hernandez
Employee/Petitioner

v.

Blair Bakery, LLC d/b/a Nothing Bundt Cakes
Employer/Respondent

Case # **20 WC 31655**

Consolidated cases: _____

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

DISPUTED ISSUES

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

FINDINGS

On the date of accident **November 18, 2020**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**2,655.58**; the average weekly wage was $**402.36**.

On the date of accident, Petitioner was **35** years of age, ***single*** with **4** dependent children.

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

Respondent shall be given a credit of $**24,228.57** for TTD, $**0** for TPD, $**0** for maintenance, and $**16,673.08** for ~~other~~ **medical** benefits, for a total credit of $**40,901.65**.

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

ORDER

Petitioner sustained an injury to the top of her right foot on November 18, 2020, that resulted in a neuropraxia that reached MMI by January 26, 2022. Medical treatment through this date was reasonable and necessary. Respondent has paid all appropriate charges for all reasonable and necessary medical services

The Arbitrator denies Petitioner's request for prospective medical, specifically a surgical excision of the ganglion and decompression of the deep peroneal nerve.

Petitioner failed to prove that she is entitled to TTD after January 26, 2022.

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

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 **MARCH 9, 2023**

Signature of Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

Adriana Hernandez Case # **20 WC 031655**

Employee/Petitioner

v. Consolidated cases: _____

Blair Bakery, LLC d/b/a Nothing Bundt Cakes
Employer/Respondent

I. Findings of Fact.

Petitioner's Testimony

Petitioner began working for Respondent, a bakery, on September 13, 2020. *Transcript at page 11 (hereafter "Tr. 11").* She worked from 8:30 a.m. to 12:30 p.m., five days a week. *Tr. 11-12.* She initially frosted cakes and pastries but was reassigned to washing dishes. *Tr. 11.*

On November 18, 2020, she slipped on water that was on the floor while carrying Bundt cake molds. *Tr. 12, 13, 29.* The molds were about 10 inches tall and an inch or two thick, and she was carrying about eight or nine of them. *Tr. 13.* She testified that each mold weighed about eight pounds. *Tr. 13*. Her right foot slipped and she fell backward, dropping the molds onto the top of her right foot. *Tr. 14-15, 30*.

Petitioner testified that her foot began to swell, and she could not walk. *Tr. 15*. Her supervisor came to her because she heard the sound of the molds dropping. *Tr. 15*. She apologized but made petitioner finish her shift. *Tr. 15-16*.

Petitioner sought medical attention at Advocate Medical Group on November 19, 2020, and she was placed on seated work. *Tr. 16, 30*. She testified that Respondent placed her back on washing dishes, which she did for a week. *Tr. 16, 17*. Her foot swelled while she stood washing dishes and she could not tolerate the pain. *Tr. 17*. She did not return after November 25, 2020. *Tr. 18*.

Petitioner then consulted Dr. Ronnie Mandal of Illinois Orthopedic Network ("ION") on December 1, 2020. *Tr. 16-17*. On cross exam, Petitioner testified that she went to ION after her brother told her about it. *Tr. 34*. Dr. Mandal took her off work and prescribed physical therapy. *Tr. 18*. She attended physical therapy at La Clinica from December 4, 2020, through February 26, 2021, and she performed exercises to strengthen her muscles and tendons. *Tr. 18*. Physical therapy helped a little. *Tr. 19.*

Petitioner was referred to a podiatrist, Dr. Hare, of Advanced Foot and Ankle on February 22,2021. *Tr. 19*. Dr. Hare kept petitioner off work, administered a right tarsal tunnel injection, and prescribed an MRI. *Tr. 19*. She continued treating with Dr. Hare throughout 2021, and he kept her off work the entire time. *Tr. 19, 20*. He also ordered an EMG of her right lower extremity, which she underwent on August 25, 2021. *Tr. 20.*

She began seeing another podiatrist, Dr. Anderson, also of Advanced Foot and Ankle, starting on September 7, 2021. *Tr. 20-21.* She treated with Dr. Anderson throughout 2021 and 2022. *Tr. 21.* Her last visit with him was on July 12, 2022. *Tr. 21*. On that date, he released her to work with restrictions until she had surgery. *Tr. 24*.

Presently, petitioner's right foot still hurts. *Tr. 21*. She identified the top middle part of her foot as the source of her pain. *Tr. 21*. She also feels a "pins and needles" sensation in her

right foot. *Tr. 26*. Her symptoms prevent her from exercising, cleaning, and shopping. *Tr. 26-27*.

Petitioner claims that she developed three cysts at the top of her right foot. *Tr. 22*. She denied that she had cysts before the accident. *Tr. 22*. She can wear only open-type shoes now. *Tr. 22*.

Throughout the course of treatment, she underwent seven injections to her right ankle, right foot, and cysts between February 22, 2021, and October 28, 2021. *Tr. 22-23*. According to her testimony, they helped for only about five days. *Tr. 23*. Dr. Anderson recommended surgery to remove the cysts and decompress her peroneal nerve. *Tr. 23-24*. She would like to undergo surgery. *Tr. 24, 27*.

According to Petitioner, Respondent never contacted her about accommodating her permanent restrictions. *Tr. 25*. She started working for QLS Staffing on October 23, 2022. *Tr. 9-10, 25*. QLS placed her in a position in a hotel with a waterpark in it, where she performs "houseman" duties like stripping sheets and taking out garbage in the morning and hands out passes to the waterpark in the afternoon. *Tr. 9, 10, 25-26, 37-38*. The duties she performs are within her restrictions. *Tr. 26*. She admitted that she works "on her feet," though she testified that it is only for a short while. *Tr. 38*.

On cross exam, Petitioner testified that she was wearing steel-toed nonslip shoes on the accident date. *Tr. 28*. The molds were made of iron, and she carried a stack of them. *Tr. 29*. She knew they weighed eight pounds because she had to weigh them on a scale before filling them with cake batter. *Tr. 30*.

She did not remember being asked to return for follow-up in two weeks when she went to Advocate. *Tr. 30-31*. Petitioner initially testified that she last worked for respondent on November 25, 2020. *Tr. 31*. She testified that she sent a text to her supervisor that she was not going to be in that day and then Respondent's owner, Kathy, called her to ask why she was not at work. *Tr. 31-32*. She then testified that Respondent was "shut down" on November 23 and 24, 2020, and she did not go in on November 25, 2020. *Tr. 32*. She then testified that she worked on November 23, 2020 and did not go in on November 24, 2020. *Tr. 32*. Kathy sent her a text asking why she did not go to work on November 25, 2020. *Tr. 32-33*. On redirect exam, she testified that she stopped going to work for Respondent on November 25, 2020, because her ankle was swollen from standing. Tr. 39-40. She denied that Respondent accommodated her seated only restrictions. Tr. 40.

When asked, Petitioner pointed to the top of her right foot to identify where her symptoms were throughout her treatment at ION. *Tr. 34, 41*. Despite not submitting into evidence any prescription bills after May 2022, she testified that she is currently taking pain medication. *Tr., 34-35*.

Petitioner remembered attending Dr. Simon Lee's medical exam, which Respondent scheduled. *Tr. 35-36*. She denied that she told Dr. Lee or Dr. Anderson that she lost 170 pounds after her accident, and instead testified that it was during 2017 to 2020. *Tr. 36*. She was paid TTD until after Dr. Lee's exam. *Tr. 36*.

When asked on cross examination, Petitioner denied that she returned to work folding towels for any other company before QLS. *Tr. 37*. She works from 9:00 a.m. until 3:00 p.m. or 3:30 p.m. *Tr. 38*. She testified that Dr. Anderson's restrictions only allow her to work six hours a day. *Tr. 38, 42, 43*.

Medical Evidence

Petitioner sought medical attention at Advocate Medical Group in Libertyville the day after the accident. *Petitioner's Exhibit 1 (hereafter "PX1")*. She gave a history of trays falling onto her right foot. *PX1, page 6*. She complained of pain on the top of her foot and discomfort with weightbearing. *Id*. X-rays showed a line at the dorsum of the medial cuneiform that the radiologist interpreted as a possible fracture or overlap of the adjacent cuneiform bones. *PX1, page 8*. Petitioner was placed in a postop shoe and released to work sedentary duty. *Id*. She was to return in two weeks. *Id*.

On December 1, 2020, Petitioner consulted Dr. Ronnie Mandal of Illinois Orthopedic Network ("ION"). *PX2, page 4*. The doctor documented that on November 17, 2020, Petitioner slipped and fell on a puddle while she carried a "dirty cupcake tray to the dishwasher," twisted her left leg behind her and her right leg in front of her and dropped the tray onto the top of her right foot. *Id*. Dr. Mandal referred to Advocate as "the company clinic" and alleged that Respondent did not honor restrictions. *Id*. On exam, the doctor noted that Petitioner's right foot exhibited edema with diffuse tenderness over the dorsum, under the medial malleolus, and the heel. *PX2, page 5*. He prescribed Celebrex, Lidocaine ointment, and cyclobenzaprine, ordered physical therapy, and took her off work. *PX2, page 5, 6*.

Petitioner underwent chiropractic care at La Clinica. *PX3*. Dr. Fernando Perez documented Petitioner's complaints of right foot and ankle, right lower extremity, and low back pain. *PX3, page 6*. The notes show that therapy consisted of exercises, manual therapy, ultrasound, and hot packs through February 2021. *PX3, page 24, 26*.

On January 22, 2021, Dr. Thomas Poepping of G&T Orthopedics and Sports Medicine examined Petitioner for right foot and ankle pain. *PX2, page 8*. She told him that a steel mold fell onto her foot at work. *Id*. He noted that she walked on her toes and forefoot, avoiding any pressure on her heel. *PX2, page 8*. He noted that on exam, she exhibited diffuse tenderness along the plantar fascia and mild swelling at the anterior ankle joint and dorsal foot. *Id*. His impression was a crush injury and traumatic plantar fasciitis of the left foot, for which he ordered an MRI. *PX2, page 8*.

On February 22, 2021, Dr. Daniel Hare, also of ION, examined Petitioner. *PX2, page 11*. She reported carrying wet pans to a sink, slipping on a wet floor, and dropping a dish onto her right foot at work on November 16, 2020. *Id*. Dr. Hare documented that she was unable to work for three days and "was told" to see a doctor. *Id*. Petitioner related that she went to Advocate, but she indicated that x-rays were not taken. *Id*. Dr. Hare noted her symptoms of numbness and tingling up the right leg, and his impression was tarsal tunnel syndrome. *PX2, page 12*. He administered a cortisone injection into the right tarsal tunnel. *Id*.

An MRI on February 24, 2021, showed "mild" tibiotalar and subtalar synovial effusion and tendinosis of the right flexor hallucis longus and posterior tibialis tendons. *PX2, page 14-15*. A second MRI on the same date showed "mild" tibiotalar, subtalar, intertarsal tarsometatarsal, and metatarsophalangeal synovial effusion with degenerative changes at the first metatarsophalangeal joint. *PX2, page 16-17*. A plantar calcaneal spur was also noted. *PX2, page 17*.

Dr. Hare administered another cortisone injection into the tarsal tunnel on March 8, 2021, and yet another one on May 3, 2021. *PX2, page 18-19, 25*. Petitioner reported "great relief" when she followed up with Dr. Hare on May 24, 2021. *RX2, page 27*. He noted new complaints at the lateral gutter of the right ankle, and he administered a Kenalog/dexamethasone injection. *PX2, page 27-28*. On June 14, 2021, he ordered an EMG/NCV and orthotics. *PX2, page 31*. He kept Petitioner off work the entire time. *PX2, page 12, 19, 22, 24, 29, 31*.

An EMG/NCV of the lower extremity was performed on August 25, 2021. *PX2, page 37-39*. The study, which was "limited by patient pain," was abnormal for bilateral plantar nerve conduction. *PX2, page 39*. The interpreting physician stated that the study "must be interpreted with caution, as the left lower extremity is asymptomatic." *Id*. The study showed no electrodiagnostic evidence of a distal right peroneal, tibial, or sural nerve injury. *Id*.

On September 7, 2021, Dr. Joel Anderson of ION appears to have assumed care. *RX2, page 40-42*. He noted a history of a slip and fall and Petitioner dropping cake molds weighing about 60 pounds on her right foot. *RX2, page 40*. He added that she was wearing steel-toed shoes. *Id*. By now, she denied doing any home exercise and taking "only Gabapentin for pain." *RX2, page 41*.

On September 28, 2021, Dr. Anderson noted a "palpable mass/ganglion" at the dorsum of the right foot at the midfoot and over the extensor hallucis longus ("EHL") and extensor hallucis brevis ("EHB") tendons. *PX2, page 44*. He administered cortisone injections at that visit and on October 12, 2021. *PX2, page 44, 47*. His impression was a right foot contusion, ganglion, superficial injury to the peroneal nerve, right tarsal tunnel syndrome, tenosynovitis of the right foot, and ankle joint effusion. *PX2, page 44, 47*. Dr. Anderson noted that "no clear ganglion at the anteromedial ankle or along the tibialis anterior tendon" was found during an ultrasound. *PX2, page 48*. Nonetheless, he recommended excision of the ganglion and decompression of the deep peroneal nerve. *Id*. He administered another cortisone injection on October 28, 2021. *PX2, page 51*.

On November 16, 2021, Petitioner reported that the injection provided a week of relief. *PX2, page 55*. Dr. Anderson deemed her to have failed conservative care and ordered surgery. *PX2, page 56*.

On November 24, 2021, Respondent's utilization review ("UR") declined to certify the surgery request. *Respondent's Exhibit 3 (hereafter "RX3")*. However, a second UR on December 14, 2021, authorized it as "medically necessary and appropriate." *RX4, page 5 of 6*. Citing the ODG, peer review physician Dr. John Shine stated in the body of his report that, "[p]alpable masses about the foot and ankle are most commonly related to trauma or mechanical instability, with non-neoplastic causes such as ganglion cysts and calluses predominating." *RX3, page 5 of 6*. He agreed that "a reasonable course of conservative treatment including topical and oral medications" failed. *RX3, page 4 of 6*.

On February 26, 2022, Dr. Simon Lee examined Petitioner for an IME. *RX1*. Petitioner told him that she worked for Respondent for three months as a dishwasher but also performed other tasks associated with baking. *RX1, page 1*. Before that, she was a housewife. *Id*. She reported carrying five Bundt cake molds when her right foot slipped and caused her to drop them onto the top of her right foot and ankle. *Id*. Noting her treatment, he stated that she had localized care but no therapy or rehabilitation. *Id*. His impression was a right foot contusion with neuritis that he connected to her work

accident. *RX1, page 3*. However, he opined that she had reached a plateau. *Id*. He did not recommend surgery because "her anatomic distribution, symptoms, and complaints are not within a specific distribution of a nerve and there is no ganglion cyst." *Id*. He opined that she reached MMI and recommended accommodative shoe wear.

Regarding causation, Dr. Lee noted that Petitioner was wearing steel-toed nonslip shoes with thick dorsal leather covering at the time of her accident and that Bundt cake pans "should not be significantly heavy objects." *RX1, page 3*. He conceded that it was possible that she may have developed a nerve contusion, but he saw no diagnostic studies that confirmed "any significant nerve injury that would require additional treatment." *Id*. He called Dr. Anderson's surgical recommendation "questionable," citing a lack of evidence of a ganglion cyst on any objective studies like an MRI and the "diffuse distribution" of Petitioner's symptoms. *Id*. For some reason, Petitioner told him she weighed 400 pounds over the preceding year and lost 170 pounds, which Dr. Lee found inconsistent with disability. *RX1, page 3*. He saw no contraindication for returning to full duty other than accommodative shoe wear as tolerated. *Id*.

On March 1, 2022, Petitioner complained to Dr. Anderson that she was unable to wear shoes that place pressure at the top of her foot and said she was getting shooting pain and an "antsy" feeling at the top of the foot from the front of the ankle to the first and second toes. *PX2, page 70*. She had not been taking medication. *Id*. She reported going to "an event" and standing for about six hours, after which her foot "blew up" and "got very swollen at the top of the foot and ankle." *Id*. Dr. Anderson responded to Dr. Lee's opinion: "Per the patient, each pan weighed nine to ten pounds and she was carrying a stack of six. He estimated the weight to be from 45 to 60 pounds." *PX2, page 71*.

Dr. Anderson conceded that the EMG did not show a distal deep peroneal nerve injury, but he opined that a lack of such a finding "is not inconsistent with the limitations of that test." *RX2, page 71*. According to him, a negative finding of a proximal nerve injury is suspect for a distal nerve injury. *Id*.

He also discussed Petitioner's comments to Dr. Lee that she lost 170 pounds since her accident. *RX2, page 71*. According to him, Petitioner lost weight through intermittent fasting and "upper body type" and sitting exercises. *Id*. He explained that she copied these exercises from *My Six Hundred Pound Life*, a reality television show. *Id*.

Dr. Anderson reiterated his recommendation for surgery. *RX2, page 71*. He also prescribed Lidopro ointment and patches, Gabapentin, and Celebrex. *Id*. He released Petitioner to return to work with a 20-pound limit and no prolonged standing or walking with alternate standing and sitting a maximum of two hours sitting and one hour standing. *Id*.

After this, Dr. Anderson resubmitted his surgery request. On March 30, 2022, Respondent's UR again declined to certify the request because no EMG or imaging reports were provided for review. *RX5, page 7 of 9*. On April 5, 2022, however, Respondent's UR again authorized the surgery. *RX6*. In the body of his report, peer review physician Dr. Junaid Makda agreed that "the EMG confirmed the concerns of a deep distal peroneal neuritis by being negative for a proximal injury." RX6, page 6 of 7. He concluded that Dr. Anderson's surgery was medically necessary. *Id*.

In an addendum dated April 14, 2022, Dr. Lee disagreed with the peer review physician. *RX2*. Citing no indication of a ganglion cyst in any of the objective studies, he opined

that Petitioner's injury was a neuropraxia. *RX2, page 1*. Reiterating that Petitioner's symptoms of nerve distribution were nonspecific and not anatomically related to "just the peroneal nerve," he concluded that her symptoms would actually worsen after Dr. Anderson's procedure. *Id*. He found significant Waddell signs on physical exam and minimal evidence of any atrophy in the calves and lower extremities to corroborate Petitioner's demonstrated lack of range of motion. *RX2, page 1-2*. Dr. Lee further found no evidence of any mass, noting that radiographs, MRI, and EMG were all normal. *RX2, page 2*. He concluded that a deep peroneal nerve compression is unlikely to improve Petitioner's symptoms. *Id*.

On July 12, 2022, Dr. Anderson examined Petitioner one last time. *PX2, page 72-74*. She was wearing lace-up canvas shoes, and she told him she had returned to work folding towels part-time. *PX2, page 73*. He deemed her to be at MMI unless she underwent surgery. *Id*. He released her to work with a 20-pound limit and no prolonged standing or walking, alternating both with a maximum of two hours intermittent standing. *Id*. He released her to work eight hours a day. *Id*. He discharged her from care. *Id*.

II. Conclusions of Law.

In support of his conclusions on Issue F., Is Petitioner's current condition of ill-being causally related to the injury?, and Issue K., Is Petitioner entitled to any prospective medical care?, the Arbitrator finds the following:

It is Petitioner's burden to establish all the elements of her claim by a preponderance of the credible evidence. Ingalls Memorial Hospital v. Industrial Commission, 241 Ill. App. 3d 710 (1993). Her burden includes proving a causal connection between the accident and her condition of ill-being. Lee v. Industrial Commission, 167 Ill. 2d 77 (1995). Liability cannot rest on imagination, speculation, or conjecture. Chicago Park District v. Industrial Commission, 263 Ill.App.3d 835 (1994).

It is undisputed that Petitioner injured her right foot when she slipped, fell, and dropped a stack of Bundt pans onto it while working for Respondent on November 18, 2020. Respondent paid TTD compensation through January 26, 2022, *Arbitrator's Exhibit 1 ("AX1")*, and medical bills through date of service January 25, 2022. *RX7*. The primary dispute here is over the injury, specifically the physical condition that the accident caused.

Petitioner testified repeatedly that her injury was to the top of her foot. *Tr. 21, 22, 34, 41*. The records of Advocate Medical Group, *PX1*, corroborate her testimony. The x-ray taken there the day after the accident showed a translucent line at the dorsum of the medial cuneiform that the radiologist interpreted as a possible fracture or overlap of the adjacent cuneiform bones.

The records of ION reflect that Petitioner told Dr. Mandal at her initial visit on December 4, 2020, that she injured the top of her right foot. Dr. Mandal noted edema with diffuse tenderness not just over the dorsum under the medial malleolus but also, curiously, at the heel. His note does not reflect that she complained of heel pain.

By the time Petitioner saw Dr. Poepping in January 2021, he documented plantar fasciitis symptoms and shifted treatment to her tarsal tunnel. The MRI in February 2021 confirmed "mild" effusion and a plantar calcaneal spur, the latter of which no doctor connected to her work injury or her symptoms. The EMG/NCV in August 2021 showed no electrodiagnostic evidence of a distal right peroneal, tibial, or sural nerve injury.

Dr. Anderson opined that Petitioner developed a ganglion and peroneal nerve injury as a result of her work accident, and he recommends an excision of the ganglion and decompression of the deep

peroneal nerve. The evidence taken as a whole contradicts his opinions on both the condition and surgery. No mention of a ganglion is documented in any medical records until October 12, 2021, and Dr. Anderson is the only physician who documented it. He indicated that there was no clear evidence of a ganglion on the right foot when he used ultrasound to perform an injection on the same day. He also conceded that the EMG did not show a distal deep peroneal nerve injury.

Dr. Shine opined that a ganglion cyst can be the result of trauma. However, Dr. Lee, who physically examined her, opined that Petitioner does not have a ganglion cyst. He pointed to the normal results of radiographs, MRI, and EMG in support of his conclusion. Citing no existence of a ganglion cyst in any of the objective studies, he opined that Petitioner's injury was a neuropraxia. Dr. Lee's opinion comports with the evidence, and thus the Arbitrator finds it persuasive and adopts it.

Dr. Lee also opined that a deep peroneal nerve decompression is unlikely to improve Petitioner's symptoms, and in fact will make them worse. He found that her symptoms of nerve distribution to be nonspecific and not anatomically related to "just the peroneal nerve." He found that Petitioner exhibited significant Waddell signs on physical exam and only "minimal" atrophy in the calves and lower extremities to corroborate her demonstrated lack of range of motion when he examined her. The Arbitrator finds that Petitioner's testimony supports Dr. Lee's opinions. The Arbitrator observed Petitioner's demeanor as she testified. She is not a reliable witness, and the medical records refute her testimony on a number of collateral facts. Her testimony was at times self-contradictory and confused.

Based on the above, the Arbitrator finds that Petitioner sustained an injury to the top of her right foot on November 18, 2020, and that her injury resulted in a neuropraxia that reached MMI by the time of Dr. Lee's exam on January 26, 2022. The Arbitrator denies Petitioner's request for prospective medical, specifically a surgical excision of the ganglion and decompression of the deep peroneal nerve.

In support of his conclusions on Issue J., Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?, the Arbitrator finds the following:

Having found that Petitioner's neuropraxia reached MMI by January 26, 2022, the Arbitrator finds that medical treatment through this date was reasonable and necessary, and that respondent has paid all appropriate charges for all reasonable and necessary medical services.

In support of his conclusions on Issue L., What temporary benefits are in dispute?***, the Arbitrator finds the following:***

Petitioner claims that she is entitled to TTD through October 2, 2022. Having found that her neuropraxia reached MMI by January 26, 2022, and finding no contraindication for returning to full duty other than accommodative shoe wear as of that date, the Arbitrator denies Petitioner's request for further TTD. The Arbitrator notes that although she denied it, Petitioner had already returned to work folding towels by the time Dr. Anderson released her to do so on July 12, 2022.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC007665
Case Name	Vincent Secor v. Concrete Structures of the Midwest
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0043
Number of Pages of Decision	19
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Tyler Berberich
Respondent Attorney	Lindsay Vanderford

DATE FILED: 1/24/2024

/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

VINCENT SECOR,

Petitioner,

vs. NO: 17 WC 7665

CONCRETE STRUCTURES OF THE MIDWEST,

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, maintenance, permanent disability, and penalties and fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part thereof.

With regard to the Arbitrator's award of medical expenses, the Commission acknowledges Respondent's assertion that medical marijuana expenses are not properly included in an award of medical expenses. The Commission confirms that, in fact, such expenses were not included in the medical expense award made in this matter based on a correct reading of AX1, the Request for Hearing form.

The Commission writes additionally on the issue of medical expenses. The Commission notes that the Arbitrator's award of $145,606.37 in reasonable and necessary medical expenses, as provided in Sections 8(a) and 8.2 of the Act, does not include $14,987.00 in bills from Windy City Cannabis, which the record indicates were paid by Petitioner, as reflected in the exhibit attached to the Request for Hearing. Accordingly, the Commission affirms the award of medical expenses in this case.

The Commission modifies the Decision of the Arbitrator on the issues of temporary total disability (TTD) and maintenance. The Commission observes that the time periods specified for

these benefits in the Arbitrator's Conclusions of Law do not match those in the Arbitrator's Order. Based on the hearing record, the Commission concludes that Petitioner is entitled to TTD benefits from January 13, 2017 (the date after Petitioner was taken off work by Dr. Edward Goldberg), through March 5, 2018 (the date Dr. Goldberg cleared Petitioner to return to work within the limits established by the functional capacity evaluation. The Commission also concludes that Petitioner is entitled to TTD benefits for the period from July 31, 2018 (the date after Petitioner was taken off work by Dr. Mark Farag), through August 2, 2020 (the date before Dr. Armita Bijari opined that Petitioner had a permanent total disability). The Commission further concludes that Petitioner is entitled to maintenance benefits for the period from April 13, 2018 (the date Petitioner commenced a diligent self-directed job search), through July 30, 2018 (the date Dr. Farag took Petitioner off work based on the inability to continue vocational rehabilitation with Vocamotive).

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 August 16, 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 Petitioner for reasonable and necessary medical services in the amount of $145,606.37, pursuant to the fee schedule and as provided in Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner temporary total disability benefits of $1,028.56 per week for 164 and 3/7ths weeks, commencing January 13, 2017, through March 5, 2018, and from July 31, 2018, through August 2, 2020, that being the period of temporary total incapacity for work under Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner maintenance benefits of $1,028.56 per week for 15 and 4/7ths weeks, commencing April 13, 2018, through July 30, 2018, as provided in Section 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner permanent and total disability benefits of $1,028.56 per week for life, commencing August 3, 2020, 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.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner penalties of $97,225.60, as provided in Section 19(k) of the Act; and $10,000.00, as provided in Section 19(l) of the Act. Respondent also shall pay $38,890.24 in attorney fees, as provided in Section 16 of the Act.

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

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

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

January 24, 2024

o: 1/18/24
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	17WC007665
Case Name	Vincent Secor v. Concrete Structures of the Midwest
Consolidated Cases	
Proceeding Type	
Decision Type	***Corrected Decision***
Commission Decision Number	
Number of Pages of Decision	15
Decision Issued By	Elaine Llerena, Arbitrator

Petitioner Attorney	Tyler Berberich
Respondent Attorney	Lindsay Vanderford

DATE FILED: 8/16/2023

/s/Elaine Llerena, Arbitrator

Signature

THE INTEREST RATE FOR THE WEEK OF AUGUST 15, 2023 5.29%

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

CORRECTED
ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Vincent Secor
Employee/Petitioner
v.
Concrete Structures of the Midwest
Employer/Respondent

Case # **17** WC **007665**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Elaine Llerena**, Arbitrator of the Commission, in the city of **Chicago**, on **September 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 **January 12, 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 $**84,294.60**; the average weekly wage was $**1,542.84**.

On the date of accident, Petitioner was **35** years of age, ***single*** with **3** dependent children.

Respondent shall be given a credit of $**97,267.92** for TTD, $**144,186.46** for TPD, $**0** for maintenance, $**21,619.93** in child support, and $**18,000.00** for other benefits, for a total credit of $**281,074.31**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $1,028.56 per week for 164 & 4/7 weeks, commencing January 13, 2017, through March 5, 2018, and from July 30, 2018, through August 3, 2020, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner maintenance benefits of $1,028.56 per week for 20 & 6/7 weeks, commencing March 6, 2018, through July 29, 2018, as provided in Section 8(a) of the Act.

Respondent shall pay reasonable and necessary medical services of $145,606.37, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent and total disability benefits of $1,028.56 per week for life, commencing August 3, 2020, 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 to Petitioner penalties of $38,890.24, as provided in Section 16 of the Act; $97,225.60, as provided in Section 19(k) of the Act; and $10,000.00, as provided in Section 19(l) of the Act.

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

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

Elaine Llerena
Signature of Arbitrator

ICArbDec p. 2 **August 16, 2023**

FINDINGS OF FACTS

Petitioner worked for Respondent as a concrete carpenter on January 12, 2017 (T. 7) Petitioner was a journeyman carpenter who had been a member of the Local 13 carpenters' union for over 20 years, dating back to when he was in his early 20's. (T. 7-8) As a carpenter, Petitioner's job duties included carrying a safety belt, safety hooks, harness, carpenter pouches, construction pouches, hammers, nails, tape measurer, framing square, and other tools. (T. 8) These tools combined to weigh around 15 pounds. (T. 8-9) Petitioner's work as a concrete carpenter required him to deal with materials such as concrete framework, consisting of plywood and then the poured in concrete. (T. 9-10) The material itself would weigh over 100 pounds. (T. 10) Petitioner's work also required him to kneel or squat for about half of his day; the other half of his day he would spend on his feet, walking. (Tr. 11-12)

Prior to becoming a carpenter, Petitioner had experience working in a meat factory with his uncle and various construction jobs, all before he turned eighteen years old. (T. 12) After his eighteenth birthday, his first job was with a T.G.I Fridays and only lasted for about six months before he joined the carpenters' union. (T. 12-13) Petitioner attended De LaSalle Academy in Chicago until approximately the 10th grade, and finished high school at Heritage Center in Provo, Utah where he earned a specialized high school diploma with a combination of study and GED. (PX24) Though Petitioner did not pass the GED test, the specialized diploma was approved through the Utah State Board of Education. (PX26) Petitioner struggles to use computers outside of streaming media. (T. 13)

On January 12, 2017, Petitioner was working on a rainy day on the subbasin of a newly constructed building, where he was tasked with going into a manhole with a helper to take air quality levels. (T. 15-17) Petitioner and his co-worker had to perform a two-man lift of the manhole cover where they would boost it with hooks and then slide it up onto a brick. (T. 17) There was no issue in moving the manhole cover up, but when Petitioner and his helper began to slide it, Petitioner felt something in his back tear. (T. 17-18) He tried to wait out the pain until lunchtime but when he went to the bathroom, he felt something was very wrong. (T. 18) After this, Petitioner told his foreman, Sal, about the accident and pain he was experiencing. (T. 18) Sal eventually sent Petitioner home because his pain was not subsiding. (T. 18-19)

Over the course of the next four days, Petitioner did not have work due to rain and the weekend; however, his symptoms worsened even without additional work. (T. 20) Petitioner called Sal on Monday and told him that he thought something was very wrong with him. (T. 20) Sal told him to come down to talk to Laurie, who managed safety for Respondent, who then she referred Petitioner for medical treatment. (T. 20-21)

Petitioner went to Southern Medical Center on January 17, 2017, and saw Dr. Smain Sadok where he complained of lower back pain radiating into his left buttock (PX3, pg. 9) Dr. Sadok ordered an MRI and referred Petitioner to follow up with Dr. Goldberg at Midwest Orthopaedics at Rush. (PX3)

The MRI showed L4-5 left posterolateral broad protrusion extending in the left foramen with associated probable small annular tear, and moderate left foraminal stenosis, as well as L5-S1 left paramedian/near lateral slightly broad protrusion causing slight mass effect upon the left S1 nerve root and left anterolateral thecal sac, and mild proximal left foraminal narrowing. (PX1, pg. 334)

Petitioner saw Dr. Goldberg on February 17, 2017, who diagnosed Petitioner as having an L4-5 annular tear and left L5-S1 herniation with left radiculopathy. (PX2, pgs. 1179-1180) Dr. Goldberg ordered physical therapy and took Petitioner off work from January 12, 2017. (PX2, pg. 1180)

On March 10, 2017, Dr. Goldberg a left L4-5 and L5-S1 hemilaminotomy and discectomy. (PX2, pg. 1175) Dr. Goldberg performed the surgery on March 17, 2017. (PX2, pg. 1181; PX9)

On March 20, 2017, Petitioner called Dr. Goldberg's office to report difficulty urinating. (PX2, pg.1173) Petitioner reported to Rush University Medical Center and complained of urinary retention issues. (PX12, pgs. 815-816) An MRI taken showed well defined fluid collection in the left posterior epidural space at L4-L5, resulting in moderate spinal canal narrowing as well as mildly indenting and displaced adjacent cauda equina nerve roots in addition to moderate right and left foraminal narrowing at L5-S1. (PX12, pg. 818) Due to his post-surgical cauda equina syndrome, Petitioner underwent an emergency irrigation and debridement of the spine at L4-5 by Dr. Goldberg. (PX12, pgs. 825-828)

On April 7, 2017, Dr. Goldberg re-examined Petitioner, kept him off work and told him to start physical therapy in one week. (PX2, pg. 72) Petitioner followed up again on May 19, 2017, with Dr. Goldberg, who placed Petitioner on a 20-pound lifting restriction. (PX2, pg. 103) On June 30, 2017, Petitioner began to experience numbness and tingling in his bilateral lower extremities; Dr. Goldberg requested a new MRI and stopped physical therapy. (PX2, pgs. 67-68)

On August 24, 2017, Petitioner sought a second opinion with Dr. Mekhail. (PX5, pg. 9) Dr. Mekhail recommended seeing a urologist and obtaining an EMG study to see if there was any recovery in the nerves after Petitioner's cauda equina. (PX5, pg. 10) He indicated that if no other treatment worked that he would recommend pain management and a potential spinal cord stimulator. (PX5, pg. 10) Dr. Goldberg reviewed the record from Dr. Mekhail on September 9, 2017, and noted nerve compression, continued to recommend an additional MRI, and agreed with a referral to obtain studies for Petitioner's bladder. (PX2, pg. 58)

Petitioner went to Rush University Urology on September 29, 2017, reporting trouble voiding. (PX12, pg. 786) Petitioner underwent a bladder ultrasound and urodynamics uroflow and was diagnosed with lower urinary tract symptoms, or LUTS, and impotence. (PX12, pgs. 790, 803)

On October 20, 2017, Dr. Goldberg reviewed the EMG, which showed S2-6 and T11-L1 deficits, and the MRI, which did not show cord compression, and referred Petitioner to neurology. (PX2, pgs. 50-51)

Petitioner began neurology treatment with Dr. Bijari on November 16, 2017. (PX7, pg. 10) Dr. Bijari diagnosed Petitioner with low back pain, saddle anesthesia, and conus medullaris syndrome. (PX7, pg. 13) Dr. Bijari noted disc herniations on the MRI that did not require surgery.

On January 10, 2018, Petitioner was evaluated by Dr. Jesse Butler at Respondent's request. (RX3) Dr. Butler performed a physical examination of Petitioner and diagnosed him with degenerative disc disease, lumbar disc displacement, and cauda equina syndrome with neurogenic bladder. Dr. Butler believed that Petitioner's condition was related to the January 12, 2017, work accident.

On January 17, 2018, Dr. Goldberg noted that Petitioner had completed physical therapy and recommended a functional capacity evaluation (FCE). (PX2,pg. 44)

Petitioner underwent the FCE with ATI Physical Therapy on February 1, 2018. (PX13, pg. 73) Petitioner was found to be capable of occasionally lifting 45.6 pounds above the shoulder, occasionally lifting 36.8 pounds from desk to chair, occasionally lifting 30.2 pounds from chair to floor, occasionally carrying 47 pounds on the right or left, working a 7 hour day, sitting for 3 to 4 hours during the day in 30 minute durations, standing for 3 to 4 hours during the day in 35 minute durations, and walking 4 to 5 hours per day frequently and in moderate distances.

On March 5, 2018, Dr. Goldberg assigned Petitioner permanent work restrictions of occasionally lifting 45 pounds, occasionally lifting 30 pounds from floor to waist, occasionally lifting 21 pounds overhead, and frequently lifting 10 pounds from floor to waist. (PX2, pgs. 39-40) Respondent did not offer Petitioner a position that would accommodate his restrictions. (T. 30)

After being released by Dr. Goldberg with permanent restrictions, Petitioner began formal vocational rehabilitation services with Vocamotive. On May 7, 2018, Joseph Belmonte from Vocamotive authored a report and submitted an Illinois Workers' Compensation Commission Rehabilitation Plan which recommended Petitioner undergo job training, beginning with computer and keyboard training. (PX24; T. 32)

After about two months of keyboard training, Petitioner's keyboarding skills were at 25 words per minute. (PX26, pg. 16; T. 33) Petitioner explained that trying to complete his sessions of vocational rehabilitation was hell. (T. 33) Petitioner testified that after sitting at the computer he would develop great pain in his lower half. (T. 34) Petitioner was often observed shifting in his seat due to the pain. (PX26, pg. 5) Belmonte noted that Petitioner had lost time from his vocational rehabilitation process as a result of trying to deal with his significant pain. (PX26, pg. 14) He was asked to begin alternating sitting and standing due to his pain. (PX26, pg. 16) His groin area nerves would become overwhelmed, his legs would become numb, and his rectum, pelvic area, and testicles would always cause him pain. (T. 34). He missed several sessions because he could not sleep due to pain. (T. 34; PX26, pgs. 11, 17) As of the date of trial, Petitioner testified that he still routinely only slept for two to three hours at night. (T. 35)

On July 26, 2018, Dr. Bijari recommended that Petitioner begin treatment with a pain management specialist (PX11, pg. 15; T. 35)

Petitioner began treatment with Dr. Farag at Midwest Anesthesia and Pain specialists on July 30, 2018, who recommended that Petitioner be totally off of work. (PX1, pgs. 24-25; T. 35-36) Dr. Farag opined that Petitioner's condition was causally related to the work accident. (PX1, pg. 283) Petitioner gave this off work note to Vocamotive and his vocational program with them ceased at that time. (PX28; T. 36)

On August 27, 2018, Dr. Farag recommended that Petitioner undergo a psychological evaluation in order to begin the process of having a trial spinal cord stimulator installed. (PX1, pgs. 28-29) Petitioner underwent the psychological evaluation and was approved by Dr. Peter Ross Brown. (PX1, pgs. 33-39, 48-50)

Petitioner was evaluated by Dr. Nancy Landre, at Respondent's request, on September 5, 2018. (RX5) Dr. Landre reported that Petitioner was willing to undergo talk therapy, but not take any medications. Petitioner reported symptoms of emotional distress at not being able to return to work as a carpenter, feeling lost, feeling depressed, and feeling anxious, which affected his sleep. Dr. Landre diagnosed Petitioner with adjustment disorder with mixed anxiety and depression, as well as evidence of a somatoform disorder. Dr. Landre opined that he would likely have an improved potential outcome from a spinal cord stimulator and that the adjustment and somatoform disorders are likely contributing factors to his failure to return to work. Dr. Landre recommended pain treatment and continued vocational rehabilitation, and opined that with treatment Petitioner's prognosis was good.

Petitioner was evaluated by Dr. Zelby on September 24, 2018, at Respondent's request. (RX1) Dr. Zelby performed a physical examination and found that, with the exception of a report of numbness that was inconsistent with any neurologic condition related to the spine, Petitioner had a normal neurologic exam and spine exam. Dr. Zelby diagnosed Petitioner with resolved herniated lumbar discectomy, resolved herniated lumbosacral disc, and a history of lumbar microdiscectomy and mild lumbar spondylosis without radiculopathy.

Dr. Zelby did not believe that Petitioner had cauda equina syndrome or conus medullaris syndrome. Dr. Zelby believed that Petitioner had a satisfactory postoperative condition and that Petitioner's objective medical findings and his reported symptoms did not match up. Dr. Zelby disagreed with the FCE and opined that Petitioner could return to full duty work. Dr. Zelby placed Petitioner at maximum medical improvement (MMI) and felt that Petitioner did not require further treatment.

Petitioner continued to follow up with Dr. Adelstein at Rush Urology due to incomplete and troublesome voiding. (PX12) On February 28, 2019, Petitioner was instructed to use straight catheterization to urinate. (PX12, pg. 597)

On March 25, 2019, Dr. Goldberg's evidence deposition was taken. (PX21) Dr. Goldberg authored a narrative report (PX20) at Respondent's request. In his narrative report, Dr. Goldberg diagnosed Petitioner as status-post left L5-S1 discectomy, status-post left L4-5 foraminotomy for his foraminal stenosis with ongoing subjective abdominal numbness, perineal numbness and intermittent radicular symptoms. Dr. Goldberg opined that Petitioner's condition of ill-being was causally related to the work accident which occurred on January 12, 2017, based on the fact that he had no prior lumbar problems. Dr. Goldberg saw no medical records which showed that Petitioner had a of any prior problems in his lumbar spine. Dr. Goldberg felt that Petitioner was a candidate for evaluation to place a spinal cord stimulator to try to alleviate the nerve-type of pain that he experienced. According to Dr. Goldberg, Petitioner had multiple MRIs performed after his surgeries and there was no evidence of ongoing nerve compression.

At the evidence deposition, Dr. Goldberg explained that a stimulator is meant to block the pain fibers within the nerves to reduce pain and hopefully increase function. (PX21) Dr. Goldberg opined that placing the spinal cord stimulator was reasonable and necessary for Petitioner to treat his injury which was related to the work accident. Dr. Goldberg disagreed with Dr. Zelby's opinion that Petitioner could return to work full duty.

Dr. Zelby testified via evidence deposition on April 4, 2019. (RX1) His testimony was consistent with his Section 12 examination report.

On May 15, 2019, Dr. Farag's evidence deposition was taken. (PX23) Dr. Farag drafted a narrative report in which he diagnosed Petitioner as having low back pain, lumbar radiculopathy, and post laminectomy syndrome, all of which he causally related this condition to the January 12, 2017, accident. (PX22) At the evidence deposition, Dr. Farag disagreed with Dr. Zelby's opinions regarding causation and Petitioner's ability to return to work.

Dr. Butler's evidence deposition was taken on July 9, 2019. (RX3) Dr. Butler's testimony was consistent with his Section 12 examination report.

Petitioner was evaluated by Dr. Noren, at Respondent's request, on July 10, 2019. (RX2) Dr. Noren noted that though Petitioner reported that his legs were pained by touch, he did not have pain during the physical examination when Dr. Noren touched his legs. Dr. Noren also did not find hyperalgesia during the physical examination. Dr. Noren believed that Petitioner was not being honest about his symptoms and inconsistently reporting them. Dr. Noren diagnosed Petitioner with subjective residual pain exacerbated by symptom magnification. Dr. Noren did not believe that current complaints correlated with objective testing. Dr. Noren thought that Petitioner had reached MMI and that he could do light duty work. Dr. Noren opined that no medical reason existed for Petitioner to stop vocational rehabilitation. Dr. Noren believed that Petitioner could benefit from Lyrica or a related medication. Dr. Noren was not under the impression that Petitioner was a candidate for a spinal cord stimulator, but that all of his treatment up to the date of his report had been reasonable and necessary.

Dr. Noren testified via evidence deposition on September 3, 2019. (RX2) His testimony was consistent with his Section 12 examination report.

On September 13, 2019, Dr. Adelstein referred Petitioner for pelvic floor therapy. (PX12, pg. 572)

On September 16, 2019, Petitioner reported to Dr. Farag that he obtained 30% relief of his sharp pain with use of an H-wave unit, but that it did not help him with his stiffness. (PX1, pg. 259) Dr. Farag recommended H-Wave usage on a permanent basis. (PX1, pg. 262) This, combined with medical marijuana, continued to help Petitioner attempt to control his pain. (PX1, pg. 282)

Laura and Joseph Belmonte conducted a labor market survey, dated September 25, 2019. (RX12) The survey did not outline which records were reviewed and determined that Petitioner's work restrictions from the February 1, 2018, FCE were appropriate to use when looking for potential employment. The survey concluded that jobs were available for an individual with Petitioner's restrictions and that the pay would likely be between $12.00 and $16.00 per hour. The jobs outlined were delivery, clerking, and attendant positions. The survey noted that Petitioner had no experience with supervision, management, clerical and administrative work, or any form of estimating. The only positions that Petitioner had previously held are as a carpenter and, briefly, a cook. The survey notes that the file was closed due to Petitioner's inability to work but reopened for a labor market survey.

Due to ongoing bowel issues, Petitioner began treatment with a gastrointestinal specialist on December 4, 2019; where presented with variable bowel habits and foul-smelling stool. (PX12, pg. 489) He was recommended for a stool study and empiric treatment for his fissure. Petitioner began physical therapy for urinary straining on December 11, 2019. (PX12, pg. 481)

On June 2, 2020, during his treatment with Rush Urology, Petitioner was scheduled to have a transurethral incision of the prostate, which he did not undergo, and the need for a long-term catheter was discussed. (PX12, pg. 425)

Petitioner went to the emergency room on June 24, 2020, with symptoms of straining during urination. (PX12, pgs. 319-320) Petitioner decided to proceed with the transurethral incision of the prostate for a high riding bladder neck, which was successfully performed. On July 28, 2020, Petitioner began use of an intermittent catheter, per the recommendation of Dr. Adelstein (PX12, pg. 295)

Petitioner returned to Dr. Bijari on August 3, 2020. (PX11, pg. 26) Petitioner reported that he could not stand for more than 15 minutes and that after his prostate surgery he had to self-catheterize twice per day. Dr. Bijari did not believe Petitioner would improve further and that his prognosis was poor. (PX11, pg. 28) Dr. Bijari opined that Petitioner would always have these neurological deficits since the nerve injury was permanent and that Petitioner could not work in any capacity in the future due to his limited ability to stand, walk, or sit for any length of time and bowel and bladder issues. Petitioner began pelvis floor therapy on September 1, 2020. (PX12, pg. 257)

On October 12, 2020, Dr. Lev Elterman finalized a report based on his Section 12 examination of Petitioner. (PX39) Dr. Elterman evaluated Petitioner and diagnosed him with urgency of urination with filled bladder due to decreased bladder sensation and erectile dysfunction. Dr. Elterman also noted pain in the genitalia and pelvis but clarified that this is an extension of his lower back pain and not an isolated urological issue. Dr. Elterman causally related the urological complaints to Petitioner's cauda equina syndrome and placed him at MMI for his urological complaints. Dr. Elterman found that Petitioner was not prevented from working

due to his specific urology complaints, but that his pain complaints stemmed from his back pain, which he could not opine on. Dr. Elterman was extremely careful to note that Petitioner's issues with sitting, standing, and walking were outside of his ability to opine on. Dr. Elterman agreed with Dr. Bijari that Petitioner was unlikely to improve and that the nerve damage was unlikely to improve.

On December 2, 2020, Dr. Bijari reiterated her opinion that Petitioner is a great candidate for a spinal cord stimulator trial and related all of his symptoms to his post-surgical cauda equina syndrome. (PX11, pg. 43-44) Petitioner began his spinal cord stimulator trial on February 17, 2021. (PX1, pg. 742) On March 2, 2021, Petitioner reported that he felt between 60% and 70% relief during the trial.

On March 16, 2021, Dr. Bijari reiterated that Petitioner can never work in any capacity in the future due to his limited ability to stand, walk, or sit for any length of time in addition to his bladder and bowel issues. (PX11, pg. 41) Petitioner continued to have pain, dysesthesia, and the sensation of being on fire in his legs, perineal area, and hips. (PX11, pg. 39) His cauda equina syndrome led to significant and persistent pain in his legs, poor stamina, incontinence, and an abnormal gait. (PX11, pg. 40) Petitioner complained of pain and spasms in his body, notably in the rectal and pelvic area. (PX11, pg. 41)

Petitioner was provided a permanent spinal cord stimulator on June 8, 2021, by Dr. Yousuf Sayeed. (PX7, pg. 91) During his June 22, 2021, visit with Dr. Farag, Petitioner reported that the stimulator helped with the pain but that it did not assist him in walking or other daily activities. (PX1, pg. 800). On August 3, 2021, the records reflect that Dr. Farag prescribed Petitioner a wheelchair due to his ingoing pain and issues with standing and walking. (PX1, pg. 806)

On September 21, 2021, Petitioner reported that his spinal cord stimulator was failing; an appointment to place a new one was scheduled for October 6, 2021. (PX1, pg. 816) Dr. Sayeed performed a successful revision on October 6, 2021. (PX7, pg. 116) The revision continued to provide similar relief to the original stimulator. (PX1, pg. 834)

On February 4, 2021, Petitioner began psychological treatment with Dr. Ghaffari of Chicago Behavioral Clinic after a referral by his pain management specialist. (PX42, pg. 5) Dr. Ghaffari found that Petitioner presented with moderate depressive symptoms and severe symptoms of generalized anxiety. It was noted that his pain contributed to these symptoms and Dr. Ghaffari recommended psychotherapy with a focus on depression and anxiety symptom management (PX42, pg. 8)

On July 8, 2022, Petitioner went to Rush Urology with symptoms of straining to void and a high tone pelvic floor. (PX12, pg. 2) Dr. Adelstein diagnosed pelvic floor dysfunction and referred Petitioner to Dr. Dugan for pelvic floor dysfunction. (PX12, pg. 5)

Petitioner began in-person treatment with Premier Psychiatry on May 23, 2022. (PX41, pg. 5) This change in treaters was made because Petitioner desired in-person treatment. Petitioner described a low mood, low motivation, a loss of interest, and poor sleep. He described uncontrollable worry, restlessness, increased heart rate, and a sense of panic that all occurred multiple times per day. Petitioner was diagnosed with post-traumatic stress disorder. (PX41, pg. 6) As he continued treatment, Petitioner presented with depression, anxiety, and anger and reported that he could not sleep for more than 4 hours at a time. (PX41, pgs. 11-12) Petitioner's last therapy note showed a continued need for psychotherapy. (PX41, pgs. 18-20).

At trial, Petitioner testified that he still experiences nerve issues and inflammation every day in his lower regions. (T. 44-45) His rectum routinely spasms due to the nerve endings around it. (T. 45) Petitioner uses a catheter daily for urination and uses a pelvic floor tool in order to stretch the walls in his rectum to give himself

an easy bowel movement. (T. 45) The swelling in his lower body affects his ability to walk. (T. 45) Because of Petitioner's high pelvic floor on the left side and the damage with his sciatica, sitting down gives him pain, making it impossible to sit still. (T. 46) After about five minutes of sitting still, Petitioner starts to shift and move around to try to alleviate his symptoms. (T. 46) After about fifteen minutes of standing Petitioner begins to get "Jell-O" legs because his nerves give out; his legs begin to shake, and he can't hold himself up. (T. 46) (The Arbitrator took note of Petitioner's constant need to shift in his wheelchair due to continuous discomfort during the trial.)

Petitioner testified that as he goes about his day-to-day activities, he has unbearable pain. (T. 52) The pain is constant in his legs, and he can barely stand. (T. 52-53) His house no longer has interior doors because he must use his wheelchair. (T. 53) In the morning, Petitioner has the urgency to use the restroom, but because he has no feeling in his groin, he cannot find the ability to do it; he has to get himself started with his catheter. (T. 53-54) Since he has no muscle control in his groin, all of his movements are by force. (T. 54) Petitioner has to keep a schedule because there are consequences to carrying urine. (T. 55) Since he cannot feel it, Petitioner uses the catheter when he suspects there is a urine buildup. (T. 55) If he goes too long without using the catheter, his legs will swell up from the bacteria. (T. 55)

The constant pain also makes Petitioner extremely irritable and always on edge. (T. 54) Psychologically, Petitioner says the pain makes it impossible to function. (T. 58) The pain overwhelms him to the point where he cannot think, function, or focus. (T. 58) Since Petitioner's initial injury, surgery and cauda equina syndrome, he has not been pain free in his lower back or legs and his bladder and bowel issues have worsened. (T. 59) Petitioner has substituted medical marijuana for other pain medications. (T. 58-59)

His father is essentially his caretaker. (T. 56) He assists him with getting in and out of the house, with getting his food, and runs his errands. (T. 56) Petitioner's father massages his legs with H-Wave guns daily. (T. 54)

Petitioner testified that if it were not for his back injury, it was his intention to continue his career as a union carpenter. (T. 52)

On cross-examination, Petitioner explained that when he was doing his spinal cord stimulator trial period, he told his doctor that his relief was around 40 percent. (T. 48) He then testified that his doctor "did him a favor" and wrote into the records that he reached the 60 percent threshold so that they would give him the permanent spinal cord stimulator implant. (T. 48) Petitioner was asked whether or not there was a falsification of the medical records, to which he replied that he told his doctor that the trial was only working at 40 percent, but that his doctor told him that the relief had to be 60 percent, which is why the doctor wrote 60 percent relief, despite Petitioner's own reports of pain relief. (T. 67-68) Petitioner additionally testified that it was not his idea to say that he had 60 percent relief and that it was his doctor's idea. (T. 74) Petitioner was aware that 60 percent relief is the threshold for the permanent implant only after his doctor had told him and he was honest with his doctor. (T. 74) Petitioner was also asked whether he had ever considered ending his treatment, but he replied that he believes he will need treatment forever. (T. 70)

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 finds that Petitioner testified credibly at trial.

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

Whether a causal connection exists between an accident and a condition of ill-being may be determined from both medical and non-medical evidence. *International Harvester v. Industrial Comm'n*, 93 Ill.2d 59, 442 N.E.2d 908 (1982). A chain of events demonstrating a prior condition of good health, an accident and a subsequent disabling condition of ill-being will suffice to establish a causal connection between the accident and the employee's injury. *Westinghouse Elec. Co. v. Industrial Comm'n*, 64 Ill.2d 244, 356 N.E.2d 28 (1976); *Plano Foundry Co. v. Industrial Comm'n*, 356 Ill. 186, 190 N.E.2d 255 (1934); *Phillips v. Industrial Comm'n*, 187 Ill.App.3d 704, 543 N.E.2d 946 (1989).

Petitioner's treating doctors all agree that after his January 12, 2017, work accident, he had a new onset of lower back symptoms. Petitioner's treating doctors all agree that his cauda equina syndrome arose as a result of his March 17, 2017, surgery, which was a result of the January 12, 2017, work accident.

Dr. Goldberg related all of Petitioner's ongoing symptoms to his January 12, 2017, back injury based on the fact that he had no prior lumbar symptomology. Dr. Bijari has related all of Petitioner's continued symptoms to post-surgical cauda equina syndrome, which occurred after the surgery to treat his lumbar injury from January 12, 2017. Dr. Farag also agreed that Petitioner's symptomology is related to the January 12, 2017, work accident. Additionally, both of Petitioner's treating psychologists relate their treatment of Petitioner to the work accident.

The Arbitrator also notes that Dr. Butler believed that Petitioner's condition was related to his work accident of January 12, 2017. Dr. Landre agreed that Petitioner's symptoms were related to his work accident and that he would likely have a good outcome from a spinal cord stimulator. Dr. Elterman, Respondent's also agreed that Petitioner's complaints were causally related to his work accident.

Dr. Zelby did not believe that Petitioner had cauda equina syndrome and felt that Petitioner had a satisfactory postoperative condition. Dr. Zelby also disagreed with the FCE findings and felt Petitioner could return to work full duty. Dr. Noren believed that Petitioner was not being honest about his symptoms and diagnosed him with subjective residual pain complained exacerbated by symptom magnification. The Arbitrator notes that Dr. Noren is the only physician in this case who has accused Petitioner of exaggeration. Based on the medical evidence and Petitioner's testimony, the Arbitrator finds the opinions of Dr. Zelby and Dr. Noren unpersuasive and unsupported by the evidence.

Based on the above, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the January 12, 2017, work accident.

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

The Arbitrator notes that Petitioner's treating doctors, as well as several of Respondent's Section 12 examiners, all agree that the medical services administered were reasonable, related, and necessary.

The only disputes regarding Petitioner's medical care again come from Drs. Zelby and Noren. For the reasons detailed in the section above, the Arbitrator finds the opinions of Petitioner's treating physicians, Dr. Bijari, Dr. Goldberg, Dr. Adelstein and Dr. Farag all more credible than the opinions of Dr. Zelby or Dr. Noren. Each of Petitioner's treating physicians have agreed with his course of ongoing treatment, including the use of spinal cord stimulation.

Based on the above, the Arbitrator finds that Petitioner's medical treatment has been reasonable, necessary, and causally related to his January 12, 2017, work accident. Respondent shall pay reasonable and necessary medical services of $145,606.37, as provided in Sections 8(a) and 8.2 of the Act.

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 began medical treatment on January 12, 2017. Further, on February 17, 2017, Petitioner was seen by Dr. Goldberg who took Petitioner off work as of January 12, 2017.

On March 5, 2018, Dr. Goldberg cleared Petitioner to return to work within the limits outlined by the FCE. After Petitioner was given restrictions by Dr. Goldberg, he began a self-directed job search. Petitioner submitted job logs from April 13, 2018, until May 9, 2018. (PX29) which ended when he began formal vocational rehabilitation and training with Vocamotive on May 7, 2018. Petitioner continued with vocational rehabilitation until July 30, 2018, when Dr. Farag took him off work. From July 30, 2018, through the date of trial, Petitioner has remained off work.

As explained below, Petitioner remained temporary and totally disabled from July 30, 2018, through August 2, 2020, as Petitioner became permanently and totally disabled as of August 3, 2020.

Based on the above, the Arbitrator finds that Petitioner is entitled to temporary total disability benefits from January 13, 2017, through March 5, 2018, and from July 31, 2018, through August 2, 2020. Additionally, Petitioner is entitled to maintenance benefits from May 7, 2018, through July 30, 2018.

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

An expert medical opinion indicating that a Petitioner is totally disabled will shift the burden to the employer to demonstrate employability. *Electro-Motive Division, General Motors Corp. v. Industrial Commission,* 240 Ill.App.3d 768, 608 N.E.2d 162, 181 Ill.Dec. 89 (1st Dist. 1992). A Petitioner can prove a permanent total disability by a preponderance of the medical evidence. This type of permanent total disability is

proven when the Petitioner's medical condition make them obviously unemployable. *ABB C-E Services v. Industrial Commission*, 316 Ill.App.3d 745, 737 N.E.2d 682, 250 Ill.Dec. 60 (5th Dist. 2000).

On August 3, 2020, Dr. Bijari opined that Petitioner could never return to work due to his work injury and ongoing conditions as a result of the work injury. Dr. Bijari reiterated this opinion on March 16, 2021. Due to his inability to walk, stand, or sit without pain for any significant amount of time, Dr. Bijari does not believe that Petitioner will ever be able to work again.

Petitioner credibly testified to his ongoing symptoms. Petitioner explained that he still experiences nerve issues and inflammation every day in his lower regions. His rectum routinely spasms due to the nerve endings around it. Petitioner uses a catheter daily for urination and uses a pelvic floor tool in order to stretch the walls in his rectum to give himself an easy bowel movement. The swelling in his lower body affects his ability to walk. Because of Petitioner's high pelvic floor on the left side and the damage with his sciatica, sitting down gives him pain, making it impossible to sit still. After about five minutes of sitting still, Petitioner starts to shift and move around to try to alleviate his symptoms. At trial, the Arbitrator noted Petitioner's constant need to shift in his wheelchair due to continuous discomfort. After about fifteen minutes of standing Petitioner begins to get "Jell-O" legs because his nerves give out and his legs begin to shake, and he can't hold himself up.

Due to the nerve damage in the lower half of his body, Petitioner experiences pain daily. The pain is constant, and he can barely stand up. He has to use a wheelchair to get around his home. Because he has no feeling in his groin, he cannot find the ability to urinate and has to get himself started with his catheter. Since he has no muscle control in his groin, all of his movements are by force. Petitioner uses the catheter when he suspects there is a urine buildup. If he goes too long without using the catheter, his legs will swell up from the bacteria. The pain overwhelms him to the point where he cannot think, function, or focus. Petitioner is cared for by his father.

Because of Petitioner's ongoing issues, restrictions, and Dr. Bijari's opinion that Petitioner is permanently and totally disabled, the burden of proving that a stable labor market exists for Petitioner shifts to Respondent.

Respondent has attempted to show that Petitioner is capable of returning to a stable labor market in two ways. The first was through the opinions of Dr. Zelby and Dr. Noren. However, as detailed in the sections above, Dr. Zelby and Dr. Noren's opinions are unpersuasive and unsupported by the evidence. The second way Respondent attempted to show Petitioner can return to work is through the vocational labor market survey from Laura and Joseph Belmonte of Vocamotive. The labor market survey does not appear to have involved any meeting with or testing of Petitioner, other than the information received from Petitioner while Petitioner was working with Vocamotive between May and July 2018 and the FCE. The Arbitrator notes that the FCE was done prior to Dr. Bijari's finding that Petitioner is permanently and totally disabled. Further, the labor market survey does not appear to consider Petitioner's ongoing conditions and Dr. Farag taking Petitioner off work as a result of Petitioner's ongoing problems.

The Arbitrator further notes that the survey simply contains a list of employers with general job descriptions. That in itself is not proof of a stable labor market. Given the worsening of Petitioner's condition since 2018 and the lack of details or evidence of possible job accommodations found in this report, the Arbitrator finds that this labor market survey in no way establishes that a stable labor market exists for Petitioner.

Therefore, since the labor market survey did not consider Petitioner's ongoing conditions, treatment and the fact that Petitioner had been taken off work by his treating physicians, nor did it establish a stable labor

market existed for Petitioner in his condition, the Arbitrator finds the labor market survey not credible and unpersuasive.

After reviewing all evidence and testimony in this case, the Arbitrator finds that Petitioner has established that he is medically permanently and totally disabled, and further finds that Respondent has failed to prove the existence of a stable labor market available to Petitioner.

Based on the above, the Arbitrator finds that Petitioner is permanently and totally disabled as of August 3, 2020, and orders Respondent to pay permanent and total disability benefits of $1,028.56 per week for life, commencing August 3, 2020, as provided in Section 8(f) of the Act.

WITH RESPECT TO ISSUE (M), SHOULD PENALTIES BE IMPOSED UPON THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

In a workers' compensation case, the Respondent has the burden of demonstrating a reasonable belief that its denial of liability was justified under the circumstances, as required by *Continental Distributing Company v. Industrial Commission,* 98 Ill.2d 407, 456 N.E.2d 847 (1983), *Board of Education of the City of Chicago v. Industrial Commission,* (John F. Tully, Appellee) 93 Ill.2d 1, 442 N.E.2d 861 (1982) ("Tully" case). In *Tully*, the Illinois Supreme Court held that where a delay has occurred in payment of workmen's compensation benefits, the employer bears the burden of showing that it had a reasonable belief to justify the delay. Thus, it is not good enough to merely assert honest believe that the employee's claim is invalid or that his award is not supported by the evidence; the employer's belief is "honest" only if the facts are such that a reasonable person in the employer's position would have believed the same. 442 N.E.2d at 865. The Court added in *Norwood* that the question whether an employer's conduct justifies the imposition of penalties is a factual question and their conduct is considered in terms of reasonableness. *The Board of Education of the City of Chicago v. Industrial* Commission, 93 Ill 2d 20, 24; 442 N.E. 2d 883, 885 (1982). Moreover, the Appellate Court has noted on multiple occasions that the burden of proof of the reasonableness of its conduct is upon the employer. *Consolidated Freightways, Inc. v. Industrial Commission,* 136 Ill.App.3d 630, 483 N.E.2d 652, 654 (3rd Dist. 1985); accord, *Ford Motor Company v. Industrial Commission,* 140 Ill.App.3d, 488 N.E.2d 1296 (1st Dist. 1986). Penalties were assessed in the case of *Consolidated Freightways, Inc. v. Industrial Commission,* 136 Ill.App.3d 630, 483 N.E.2d 652, 91 Ill.Dec. 306 (3d Dist. 1985) when the examining doctor for respondent Consolidated Freightways authorized an injured employee to return to work. Petitioner in this case was being treated by several other doctors, none of whom released him for work. Penalties were assessed against Consolidated Freightways because it was determined there was no reasonable or good-faith challenge to the liability to pay compensation.

In light of the multiple opinions provided by Petitioner's treating doctors and some of the Section 12 examiners, as well as the vast medical evidence showing Petitioner's ongoing and worsening conditions, the Arbitrator finds Respondent's reliance on the opinions of Dr. Zelby and Dr. Noren unreasonable in this case. Further, the Arbitrator also finds Respondent's reliance on the updated vocational opinions from Vocamotive to pay Petitioner wage loss benefits rather than temporary total disability benefits or permanent total disability benefits was not reasonable. Again, Vocamotive issued a report which simply listed jobs without considering the fact that subsequent to the FCE, Petitioner had been forced to use a wheelchair, been catheterized, had increased pain in his lower body with even short periods of standing or walking, and had been declared permanently disabled by his treating neurologist. Respondent's reliance on such a report to determine that a stable labor market exists for Petitioner and how much Petitioner would be able to earn was unreasonable and the delay in payment of proper benefits has been vexatious.

Based upon the above, the Arbitrator finds that Respondent shall pay penalties under Section19(k) in the amount of $97,225.60, representing 50% of the total amount due to date in weekly benefits and medical expenses. ($48,844.83 in weekly benefits due + $145,606.37 in medical) / 2 = $97,225.60 due under Section 19(k).) Additionally, Respondent shall pay $10,000.00, representing the maximum under Section 19(l). ($30.00 per day for the 1,388 days that the Respondent refused payment of weekly benefits in this matter would equate to $41,640.00, which is well over the $10,000.00 maximum.) Finally, Respondent shall pay the sum of $58,335.36 in attorneys' fees, with the remainder of Petitioner's attorneys' fees, if any, to be paid by Petitioner to his attorneys, pursuant to Section 16 of the Act. ($48,844.83 in weekly benefits x 20% = $9,768.97. $145,606.37 in medical x 20% = $29,121.27. $9,768.97 + $29,121.27 = $38,890.24)

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC017083
Case Name	Annette Jones v. Gilster-Mary Lee Corporation
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0044
Number of Pages of Decision	29
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Jason Coffey
Respondent Attorney	Pieter Schmidt

DATE FILED: 1/24/2024

/s/Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF)
COLLINSVILLE

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANNETTE JONES,

Petitioner,

vs. NO: 21 WC 17083

GILSTER-MARY LEE CORPORATION,

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 causal connection and prospective medical treatment, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The 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 and finds that the Petitioner's current cervical condition is causally related to her November 16, 2019 work-related injury. As such, the Commission awards Petitioner perspective medical treatment consisting of a 3-level disc replacement from C4-C5, C5-C6, and C6-C7 as recommended by Dr. Gornet.

It is well settled that recovery in cases involving pre-existing conditions depends on the claimant's ability to present evidence showing "that a work-related accidental injury aggravated or accelerated the pre[-]existing disease such that the [claimant's] current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a

normal degenerative process of the pre[-]existing condition." *Sisbro v. Industrial Comm'n*, 207 Ill. 2d 193, 205-06, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003). However, a work-related injury need not be the sole or principal causative factor in the resulting condition of ill-being. *Sisbro*, 207 Ill. 2d at 205. Thus, even if a claimant suffered from a pre-existing degenerative condition which made him more vulnerable to injury, recovery for an accidental injury will not be denied so long as the claimant can show that his or her employment was also a causative factor in the resulting condition. *Id.; Swartz v. Industrial Comm'n*, 359 Ill. App. 3d 1083, 1086, 837 N.E.2d 937, 297 Ill. Dec. 486 (2005). A claimant may establish a causal connection in such cases by showing that a work-related injury played a role in aggravating his or her pre-existing condition. *Mason & Dixon Lines, Inc. v. Industrial Comm'n*, 99 Ill. 2d 174, 181, 457 N.E.2d 1222, 75 Ill. Dec. 663 (1983); *Azzarelli Construction Co. v. Industrial Comm'n*, 84 Ill. 2d 262, 266, 418 N.E.2d 722, 49 Ill. Dec. 702 (1981); *Swartz*, 359 Ill. App. 3d at 1086.

Furthermore, it is within the province of the Commission to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence." *Hosteny v. Ill. Workers' Comp. Comm'n*, 397 Ill. App. 3d 665, 674, 928 N.E.2d 474, 340 Ill. Dec. 475 (2009).

The Petitioner sustained an undisputed work-related injury on November 16, 2019. Hoping the pain would go away, Petitioner continued to work. Thereafter, Petitioner completed an accident report on December 24, 2019. Petitioner indicated on the report that she injured her right upper arm, lower back, and abdomen on November 16, 2019. She then began treating for those issues. Due to continued symptoms, an EMG was performed on February 24, 2020 that revealed mild denervation in the left C6-C7 nerve distribution. She later underwent a cervical MRI that revealed foraminal stenosis at C5-C6 with associated canal stenosis that was interpreted as being worse when compared to the prior study from 2009.

Petitioner eventually began treating with Dr. Gornet on June 28, 2021. Dr. Gornet reviewed the cervical MRI and noted there was central disc pathology abutting the cord at C5-C6 with a central disc annular tear at C4-C5 and a central disc protrusion at C6-C7. An updated MRI was performed that revealed disc pathology centrally at C4-C5 and greater at C5-C6 and C6-C7. Dr. Gornet opined that the accident caused some acute pathology on top of chronic degeneration at C4-C5, C5-C6, and C6-C7. Dr. Gornet recommended a cervical disc replacement at C4-C5, C5-C6 and C6-C7.

Dr. Cantrell and Dr. Bernardi both performed Section 12 examinations on behalf of the Respondent. Dr. Cantrell found no diagnoses related to Petitioner's cervical spine or left shoulder attributable to her work injury. He did note that the 2020 cervical MRI showed worsening of the cervical degenerative disease when compared to the 2009 MRI. Dr. Cantrell testified that a cervical disc injury can cause pain symptoms in the upper extremity and can cause a person to experience pain into their arms, shoulders, and hands. Dr. Bernardi noted the cervical MRI was unchanged when compared to the earlier MRI and disagreed with the recommendation for a 3-level disc

replacement. Dr. Bernardi agreed that a cervical injury could cause arm pain. Dr. Bernardi, however, did not examine Petitioner's neck during the Section 12 examination.

While the Petitioner had some neck issues prior to the accident, the record establishes that the Petitioner was not under any active medical treatment for her neck at the time of the accident, that her treatment was sporadic, and that her condition did not limit her ability to perform her job duties. While the Petitioner did not initially complain of neck pain after the accident, all the doctors agree that neck pain can cause arm pain. When her arm pain did not subside, Petitioner underwent an EMG and an MRI that confirmed the cervical pathology. The Commission finds that Petitioner's delay in reporting her neck symptoms is not detrimental to her claim.

Further, the Commission finds Dr. Gornet's opinions persuasive. It was only after the accident that Petitioner had a manifestation of symptoms which brought about the need for treatment and the recommendation for surgery. The post-accident MRIs demonstrate a worsening of her condition when compared to the pre-accident MRI. Dr. Gornet's testimony that the accident caused some acute pathology on top of chronic degeneration at C4-C5, C5-C6, and C6-C7 is supported by the evidence. Conversely, the Commission is not persuaded by Dr. Bernardi and Dr. Cantrell's opinions. Their opinions that there was no injury to Petitioner's cervical spine is contradicted by the EMG, the MRIs and the lack of medical records indicating that she was undergoing any active medical treatment leading up to the accident.

Based upon the above, the Commission finds that the Petitioner established that her cervical condition is causally related to her work injury. The Commission further finds that the Petitioner is entitled to prospective medical treatment consisting of a 3-level disc replacement from C4-C5, C5-C6, and C6-C7 as recommended by Dr. Gornet. All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed March 13, 2023, is hereby modified as stated above and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall authorize and pay for prospective medical treatment consisting of a 3-level disc replacement from C4-C5, C5-C6, and C6-C7 as recommended by Dr. Gornet.

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 $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

January 24, 2024
O: 1-17-24
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	21WC017083
Case Name	Annette Jones v. Gilster-Mary Lee Corporation
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	24
Decision Issued By	Maureen Pulia, Arbitrator

Petitioner Attorney	Jason Coffey
Respondent Attorney	Pieter Schmidt

DATE FILED: 3/13/2023

THE INTEREST RATE FOR THE WEEK OF MARCH 7, 2023 4.97%

/s/Maureen Pulia, 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)

ANNETTE JONES,
Employee/Petitioner

v.

GILSTER-MARY LEE CORPORATION,
Employer/Respondent

Case # **21** WC **17083**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen Pulia**, Arbitrator of the Commission, in the city of **Collinsville**, on **2/23/23**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **11/16/19**, 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 as it relates to her lumbar spine ***is*** causally related to the accident through 11/21/22.

Petitioner's current condition of ill-being as it relates to her cervical spine/left upper extremity ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**21,535.18**; the average weekly wage was $**453.00**.

On the date of accident, Petitioner was **57** years of age, ***married*** with **0** dependent children.

Respondent ***has or will*** pay all reasonable and necessary charges for all reasonable and necessary medical services related to the lumbar spine through 11/21/22.

Respondent shall be given a credit of $**00.00** for TTD, $**00.00** for TPD, $**00.00** for maintenance, and $**00.00** for other benefits, for a total credit of $**00.00**.

Respondent is entitled to a credit of $**9,209.44** under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services related to the lumbar spine from 11/16/19 through 11/21/22, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit of $9,209.44 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.

Petitioner has failed to prove by a preponderance of the credible evidence that her current condition of ill-being as it relates to her cervical spine/left upper extremity is causally related to the injury she sustained on 11/16/19.

Petitioner’s claim for prospective medical services from Dr. Gornet is denied.

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

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

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

MARCH 13, 2023

Signature of Arbitrator

ICArbDec19(b)

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 57 year old line worker, sustained an injury that arose out of and in the course of her employment by respondent on 11/16/19. The parties stipulate that petitioner's lumbar spine condition is causally related to the injury petitioner sustained on 11/16/19, through 11/21/22. Respondent disputes that petitioner's alleged cervical spine condition is causally related to the injury petitioner sustained on 11/16/19.

Petitioner testified that she has worked for respondent for 20 years. On the date of injury she was a line worker. She testified that she lifted a large screen with big metal magnets, weighing between 50-80 pounds, from the barrel and placed it on the floor. As she attempted to lift the screen back off the ground to place it on the barrel she experienced immediate pain. Following the injury petitioner reported to her supervisor that she had hurt her back.

When her symptoms persisted petitioner presented to Sparta Community Hospital on 12/24/19. She reported a workplace injury while lifting/bending. She complained of left abdominal pain radiating to her lower back. She also mentioned intermittent left wrist pain when performing certain work duties. X-rays taken of her left wrist and hand showed mild degenerative changes in the hand and wrist. X-rays of the lumbar spine showed moderate lumbar spondylosis with severe facet joint arthropathy greater on the right side; mild levoscoliosis; Grade 1 spondylolisthesis at L3-L4; transitional lumbosacral level likely representing either a 6th lumbar vertebrae or lumbarized S1; and, incidental abdominal calcifications, possible renal/urethral calculi versus phleboliths; and, if there are symptoms to suggest stone disease consider CT. Petitioner was prescribed Tylenol and placed on light duty.

On 12/24/19 petitioner completed an accident report for respondent. She identified the date of injury as 11/16/19. She noted that she had been seen at Sparta Convenient Care. She alleged injuries to her upper right arm, lower back and abdomen. She indicated that the nature of her injury was "strain/sprain?", and the accident type was 'overexertion?". She described the injury as "while lifting up rework screen from floor area she noticed burning sensation or pain in arm and lower abdomen and back pain."

Petitioner returned to Sparta Convenient Care on 12/31/19 because she was still having back pain. The record from this date includes a history of the injury on 11/16/19. This history indicates that when petitioner "went to lift barrel [screen] from floor and felt pain in left ulnar hand/wrist and subsequently had to turn to put the barrel [screen] back on it's machine when she noted LLQ pain. That evening she gradually developed diffuse lumbar pain and LLQ pain improved." Petitioner noted that she reported the

incident to her supervisor on the date of injury, but did not complete a formal report until 12/24/19, because she thought the pain would improve, but it did not.

Petitioner reported that she was still having constant diffuse lumbar pain, non-radiating, rated at a 8/10, despite Tylenol use. Petitioner reported that she had a history of an extra vertebrae in her lumbar spine, and was previously diagnosed with degenerative arthritis in her spine. She stated thar her left hand still bothered her from her ulnar aspect radiating up her forearm with certain movements. She rated the pain at a 5/10. She gave a history of a previous surgery on her lateral left elbow approximately 6 months prior. She reported side effects with Tylenol and ibuprofen so she was prescribed Mobic. Physician's Assistant, Danielle Preuss, examined petitioner and was of the opinion that since petitioner's pain was so severe, it was hard to determine if this was from a work injury 1.5 months ago, especially with chronic findings on imaging studies. Preuss restricted petitioner from lifting over 15 pounds, and limited use of the left hand. Petitioner was prescribed physical therapy for her low back pain three times a week for two weeks.

On 1/24/20 petitioner presented to Dr. James Krieg at Chester Clinic. She gave a consistent history of the injury and reported that she felt sudden pain in her left hand and forearm, as well as low back and abdominal pain. She also reported that treatment to date had not helped. She noted that she was working in a job that did not require so much lifting. She complained of general low back discomfort and nonspecific abdominal wall paresthesias with discomfort in the left arm and hand. Following an examination, petitioner was assessed with back pain due to injury; pain of the left arm; and abdominal pain. Dr. Krieg was of the opinion that her complaints and his findings were consistent with an injury from lifting in November, especially since there has been no time since then that she has not had problems. He recommended an EMG/NCS of the left arm and hand based on symptoms and recent history of ulnar nerve transposition on that side. Because of consistent pain in the lower lumbar region, Dr. Krieg recommended an MRI of the lumbar spine. Dr. Krieg restricted petitioner from lifting over 5 pounds; limited repetitive bending and stooping; and limited repetitive lifting and reaching involving the left arm. He prescribed Ultram.

On 2/6/20 petitioner underwent an MRI of the lumbar spine. The impression was mild 18 degrees thoracolumbar levoscoliosis centered at L2-L3 and 2mm degenerative anterolisthesis of L3 on L4, minor lumbar degenerative spondylosis, and mild to moderate hypertrophic facet arthropathy without significant foraminal stenosis; and, no lumbar disc herniations.

On 2/14/20 petitioner followed up with Dr. Krieg. She continued to complain of low back discomfort with no improvement, worse with motion. Dr. Krieg did not have the results of the MRI yet.

She also continued to complain of left arm paresthesias. He continued her restrictions. Following an examination, petitioner was assessed with low back pain, and strain of the left upper arm.

On 2/24/20 petitioner underwent an EMG/NCS of her left upper extremity. The results of the NCS were within normal limits. The results of the EMG revealed mild denervation in the left C6-C7 nerve distribution.

On 3/4/20 petitioner returned to Dr. Krieg. Petitioner complained of generalized lower lumbar discomfort that was somewhat aggravated by repetitive bending and stooping. She denied any radicular symptoms. Dr. Krieg noted that the MRI showed no evidence of disc herniation or significant stenosis, but did show diffuse facet arthropathy with varying degrees of foraminal stenosis most prominent at T11-T12. Petitioner complained of discomfort in the left posterior neck, as well as occasional paresthesias into the left arm. The NCS of the median and ulnar nerve were unremarkable. An EMG of the left upper extremity did reveal mild denervation in the left C6-C7 nerve distribution. Dr. Krieg examined petitioner and assessed low back pain, and neck pain on the left side. Dr. Krieg noted that petitioner continued to have discomfort in both the neck and the low back. He recommended evaluation by pain management. Petitioner continued working light duty.

On 3/12/20 petitioner underwent an MRI of the cervical spine, compared to the MRI of the cervical spine on 6/30/09. The impression was worsening degenerative disc disease seen at the C5-C6 displaced worsening cervical spondylosis resulting in worsening moderate central canal stenosis; worsening bilateral foraminal stenosis, left greater than right, seen at the C5-C6 level; and, additional worsening bilateral foraminal stenosis also seen at the C6-C7 disc space.

On 3/27/20 petitioner returned to Dr. Krieg continuing to complain of pain in the left lateral aspect of the neck with radicular-like discomfort going down the left arm to the hand. Dr. Krieg noted that petitioner had an MRI of the neck that showed foraminal stenosis at C5-C6 with associated canal stenosis which seemed worse when compared to a study done in 2009. Petitioner also complained of some discomfort in the anterior lateral aspect of the left shoulder especially with range of motion. Dr. Krieg noted that this seemed separate from the neck pain and associated radiculopathy. Petitioner also noted at her back pain was worse with activity. She reported that Tramadol gives her some relief. Following an examination, Dr. Krieg assessed low back pain, neck pain, and left shoulder pain. He noted that based on the x-rays foraminal stenosis and possible canal stenosis may be leading to the radiculopathy. Dr. Krieg recommended physical therapy for the left shoulder/neck/back three times a week for the next four weeks. Petitioner continued working light duty.

Petitioner testified that after March 2020 COVID prevented her from getting treatment.

On 7/1/20 petitioner underwent a Section 12 examination performed by Dr. Russell Cantrell at the request of the respondent. Dr. Cantrell took a history and physical examination, reviewed personal medical records from the date of accident through 3/12/20, reviewed radiographic and advanced imaging studies, if provided. Petitioner reported that when she went to lift the screen back on the barrel she felt pain shooting from her left wrist up to her left shoulder, as well as pain in her left abdomen wrapping around to her left lower back. She stated her symptoms persisted and she reported the injury to respondent after several weeks. She gave a history of her treatment to date. She reported a previous pinched nerve in her lower back two years prior, that completely resolved. She reported a prior left elbow surgery, and MRIs of her cervical and lumbar spine. Following his medical review, as well as his physical examination, Dr. Cantrell assessed mechanical low back pain. He was of the opinion that she sustained a lumbar strain/sprain superimposed on preexisting degenerative disc and degenerative facet disease as a result of the injury she sustained on 11/16/19. He noted no symptoms associated with lumbosacral radiculopathy. Dr. Cantrell was of the opinion that petitioner may benefit from physical therapy three times a week for three weeks to address her mechanical back pain complaints. Prior to completion of this physical therapy, he suggested a 20 pound lifting restriction, and avoiding repetitive bending.

With respect to her left upper extremity complaints, Dr. Cantrell was of the opinion that they were consistent with adhesive capsulitis in her left shoulder. He was further of the opinion that any radiating pain complaints extending from her left wrist to her left shoulder from the date of accident ongoing, is not supported by his review of her medical records. He was of the opinion that based on the medical records her symptoms evolved, based on her documented complaints. When he considered this, along with Dr. Krieg's documentation that petitioner had undergone a prior ulnar nerve transposition, which he did not believe occurred due to the location of the surgical scar in her left elbow, Dr. Cantrell opined that petitioner's left upper extremity complaints are not causally related to her 11/16/19 work injury. Independent of causation, Dr. Cantrell was of the opinion that an MRI of her left shoulder could be done to rule out intra-articular pathology. He indicated that the MRI should be done with contrast in order to rule out labral pathology as a possible cause of her complaints. Dr. Cantrell was of the opinion that any restrictions deemed necessary for her left shoulder would not be causally related to the injury on 11/16/19. He was further of the opinion that she had reached maximum medical improvement with respect to the injury on 11/16/19.

On 12/2/20 petitioner saw Dr. Krieg. Following an examination, Dr. Krieg assessed low back pain and arm pain. Dr. Krieg noted that petitioner had continued symptoms related to the injury on 11/16/19. He recommended that she return to Apec for therapy of her left arm and shoulder, as well as her low back, three times a week, for four weeks.

Petitioner began her course of physical therapy at Apex on 12/21/20. She described the pain in her arm as a burning pain which started in her hands as she lifted the screen, and then radiated up her arm. She noted that the pain was equal throughout the left upper extremity from the left hand through the left axilla and shoulder. She reported that the pain was worse with activities such as reaching overhead, reaching out to the side, reaching behind her back, and with sweeping.

On 1/6/21 petitioner return to Dr. Krieg still complaining of discomfort in the back and left arm. He noted that she was in physical therapy, and that it may be helping slightly. She noted that her back was most painful when she used motion. She also noted tenderness in her left arm and shoulder. She noted that she was still working light duty. Following an examination, Dr. Krieg noted that petitioner continues to have problems with her left arm and shoulder, as well as her low back. He recommended she continue in physical therapy. He also continued her light duty restrictions.

On 1/27/21 petitioner followed up with Dr. Krieg after completing physical therapy. Despite completing her physical therapy, petitioner continued to complain of pain in her left arm and shoulder, and did not feel that therapy had helped much at all. She also stated that despite the therapy for her low back she continued to complain of generalized discomfort, and rated her pain at a 7/10, especially when she works. Dr. Krieg was of the opinion that since petitioner continues with pain in the left arm and shoulder he was recommending further imaging. With respect to the low back, Dr. Krieg recommended further imaging of the lumbar spine. Petitioner was referred back to Workmen's Comp to see what further recommendations they will have.

On 2/22/21 petitioner underwent a second Section 12 examination performed by Dr. Russell Cantrell, at the request of the respondent, for her low back complaints. Dr. Cantrell took another history from petitioner, reviewed additional medical records from 12/2/20 through 1/27/22, and performed a physical examination. Following this, Dr. Cantrell assessed persistent lumbar back pain complaints, despite participation in additional physical therapy. Dr. Cantrell found no indication for an MRI scan of the lumbar spine. He also noted that his examination was noteworthy for several positive symptom magnification behaviors, that made a prognosis for resolution of her subjective complaints guarded to poor. Dr. Cantrell indicated that he had no further treatment recommendations for petitioner, and saw no reason that to keep her on restricted duty based on her subjective complaints of lumbar back pain. He

opined that petitioner's work-related diagnosis of a lumbar strain or sprain, had reached maximum medical improvement. Dr. Cantrell was of the opinion that the findings on the lumbar spine MRI in February of 2020 of a scoliotic curvature and multi-level degenerative disc and degenerative facet disease were not caused by her work injury.

On 3/31/21 petitioner returned to Dr. Krieg still complaining of generalized low back discomfort. With respect to her left arm, she complained of paresthesias along the inner aspect of the left arm, and some discomfort around the shoulder. Following an examination, Dr. Krieg noted that he had previously recommended an appointment with pain management, but it was denied by Workmen's Comp. He also noted that he had recommended a visit with an orthopedist, but was told by petitioner that Workmen's Comp has refused to let her have an appointment with anyone other than who they recommend. He noted that it appeared that petitioner was going to seek legal advice. He continued her current restrictions.

On 4/5/21 Dr. Cantrell issued a supplemental report after reviewing additional records of 12/17/18 where she was seen for left elbow pain and was diagnosed with lateral epicondylitis. He also reviewed therapy notes of 6/3/19, 6/14/19, and 7/18/19 regarding complaints of pain in her left shoulder, left elbow and left wrist following a left epicondylar release on 4/19/19. Dr. Cantrell noted that on 1/10/20 petitioner was seen in therapy for lower back pain and pain in her left hand radiating up to her shoulder after her injury at work on 11/16/19. Following this review, Dr. Cantrell did not change any of his opinions.

Petitioner testified that she filed her claim in May of 2021, and was given Dr. Gornet's name by her attorney.

On 6/28/21 petitioner presented to Dr. Matthew Gornet complaining of low back pain to both sides, both buttocks, as well as left arm pain from her shoulder to her hand. Her pain diagram showed aching pain throughout her left upper extremity, and her low back. She rated her pain at an 8/10. She stated that her current problem, at least in its level of severity, began on or about 11/16/19. She reported that when she lifted the metal screen she felt pain in her left arm, as well as her low back. She noted that she had left elbow surgery in April of 2019, and was doing well until the event on 11/16/19. She also noted a history of low back pain briefly after a foot injury, as well as a subsequent episode after that, and a brief course of physical therapy. She reported that this resolved her low back pain, and she had no further treatment until after the injury on 11/16/19. She reported her symptoms as constant and worse with prolonged sitting, standing, bending, or lifting. She reported her left arm symptoms are made worse with reaching or arm activity. Following a physical examination, and review of the radiographs and tests, Dr. Gornet's impression was that the accident on 11/16/19, as described by petitioner, could have easily

aggravated an underlying degenerative condition or cause of disc injury. He believed she may have aggravated her underlying facet changes at L2-L3 and L4-L5, as well as causing a disc injury at L4-L5. He believed she aggravated her underlying degeneration at C5-C6, as well as potentially at C4-C5, and causing disc injuries at both C5-C6 and C6-C7, which would account for her radicular symptoms. He ordered diagnostic tests, dispensed Meloxicam and Cyclobenzaprine, and released her to light duty with no lifting over 5 pounds, no repetitive bending or lifting, and alternating sitting and standing as needed. 11/16/19.

Following the MRI of the lumbar spine, Dr. Gornet noted that it revealed an annular tear with some central disc pathology at L4-L5 with a sacralized L5-S1 segment, as well as some facet changes at multiple levels including the L3-L4 and L4-L5 and even at L2-L3. Dr. Gornet noted that the CT scan also confirms facet changes at L2-L3, L3-L4, and L4-L5. Dr. Gornet recommended medial branch block and facet rhizotomies at L2-L3, L3-L4, and L4-L5, bilaterally. He continued petitioner on light duty. He noted that they would follow up for her neck. He diagnosed a disc injury L4-L5, and aggravation of preexisting facet arthroplasty at L2-L3, L3-L4, and L4-L5 in her low back.

On 7/6/21 petitioner underwent a right L2-L3, L3-L4, L4-L5 facet MNBB. She was diagnosed with right lumbar spondylosis. On 7/20/21 petitioner underwent a left L2-L3, L3-L4, and L4-L5 MNBB. She was diagnosed with left lumbar spondylosis. On 8/3/21 petitioner underwent a lumbar radiofrequency ablation of the right L2-L3, L3-L4, L4-L5 facet joint nerves. Her post operative diagnosis was lumbar facet arthropathy without myelopathy, and low back pain. On 8/20/21 petitioner underwent a lumbar radiofrequency ablation of the left L2-L3, L3-L4, L4-L5 facet joint nerves. Her post operative diagnosis was lumbar facet arthropathy without myelopathy, and low back pain.

On 9/16/21 petitioner followed-up with Dr. Gornet for her neck and back pain, particularly the left arm more than neck and shoulder. Petitioner noted that the injections and radiofrequency ablation provided only mild relief. Dr. Gornet reviewed the results of petitioner's MRI of the cervical spine and was of the opinion that it revealed some disc pathology centrally L4-L5 and to a greater extent at C5-C6 and C6-C7; significant foraminal encroachment by disc at both C5-C6 and C6-C7; and, a disc osteophyte at C5-C6 with also a small central profusion slightly more to the left side at C4-C5. He ordered an injection at C6-C7, and if that did not work, a cervical disc replacement at C4-C5, C5-C6, and C6-C7. Given that petitioner did not have good relief from the treatment to her facet joints, he believed that she may have more discogenic pain then facet pain. He recommended a single injection at L4-L5 for her obvious annular tear, and if not better, he was considering at least a discography at L3-L4 and L4-L5. He continued her on light duty.

On 12/6/21 petitioner returned to Dr. Gornet. He noted that petitioner did not have any significant relief following the C6-C7 injection on 10/12/21. He further noted that the injection at L4-L5 on 10/26/21 provided about 2 weeks of relief. He noted that that petitioner's main symptoms in her neck remained left arm pain down her arm to her hand with some shoulder pain, and her symptoms were more radicular. Nonetheless, Dr. Gornet indicated that he might consider a shoulder evaluation with a shoulder specialist. He recommended cervical disc replacement at C4-C5, C5-C6 and C6-C7. He continued her on light duty and continued dispensing medications. He noted that they would ultimately treat her low back.

On 1/18/22 petitioner underwent a Section 12 examination performed by Dr. Robert Bernardi, at the request of the respondent. Petitioner gave a history of injuring herself at work on 11/16/19 while working for respondent. She reported symptoms involving her low back and left arm which she attributed to her work accident. Dr. Bernardi was only seeing petitioner for her low back. He noted that petitioner told him that several years after surgery for her left foot tarsal tunnel syndrome and plantar fasciitis, she developed lower back pain attributable to her altered gait while she was in a boot during her recovery. She also reported a similar bout after fracturing her right foot and wearing a boot during her recovery. She stated that her symptoms were self-limiting. She also denied any issues in the weeks, months or years preceding the work accident. Petitioner reported undergoing surgery for her left elbow in 2019.

Petitioner gave a history of immediate pain that radiated from her left hand up to her shoulder, and pain in her abdomen that extended posteriorly to her back, after lifting the screen from the floor back onto the barrel on 11/16/19. Petitioner reported that her low back was getting worse, with pain concentrated across the waist line. She reported that she once had sciatica for which she underwent physical therapy, and her pain promptly resolved and never recurred. Dr. Bernardi reviewed records from 12/24/19 through 9/16/21. He noted that petitioner's symptom diagram showed stabbing, burning and aching across the low back, and aching and burning along the anterior aspect of the left shoulder, upper arm, and forearm, that terminates in the small digits of the left hand. She noted no neck, interscapular or periscapular involvement.

Following his record review and physical examination. Dr. Bernardi was unable to conclude that petitioner suffered any injury to her low back as a result of her work activities on 11/16/19. He noted that her injury was unwitnessed and unverifiable, and no formal incident report was completed until 12/24/19. He also noted that the medical treatment record completed on 12/24/19 made no mention of lower back pain. He noted that her complaint of abdominal pain radiating to her low back is not typical of a lumbar

injury. He also noted her history of lower back pain. Dr. Bernardi saw no evidence of trauma in petitioner's imaging studies. He was of the opinion that petitioner has degenerative disc disease that developed slowly and over the course of her lifetime. He opined that these changes were present before 11/16/19. Dr. Bernardi was of the opinion even if petitioner suffered a lumbar sprain/strain or aggravation of her underlying degenerative disc and or facet disease, it is not possible that either could be responsible for her now chronic and severe symptoms. He was of the opinion that both conditions are self-limiting and would have run their course within a matter of weeks. He was of the opinion that her persistent pain is not associated with any objective physical or neurological abnormalities, or any acute/post-traumatic imaging findings. Dr. Bernardi noted that petitioner exhibited multiple Waddell's signs. Dr. Bernardi was of the opinion that the etiology of the petitioner's pain is unclear. Dr. Bernardi could not attribute petitioner's ongoing back condition/complaints to her work activities on 11/16/19. Dr. Bernardi found treatment petitioner received up to her last physical therapy visit on 1/25/20 was reasonable and necessary and related to her injury on 11/16/19. He was also of the opinion that petitioner's treatment up to, and shortly after her visit to Dr. Cantrell, was reasonable and appropriate. He saw no need for a repeat MRI of the lumbar spine or a discogram, because she has axial low back pain without radicular features. Dr. Bernardi was of the opinion that petitioner did not need any restrictions.

On 3/31/22 Dr. Cantrell issued an addendum report after reviewing additional records from March of 2007 that predated petitioner's 2019 work injury. He identified all records that referenced low back, hip, SI, neck, groin, shoulders, upper arms, elbows, forearms, and wrists and hands through 6/21/19. He also reviewed notes from 6/21/19, 7/15/19 and 8/16/19 related to petitioner's right foot/ankle, and records from 7/29/16 related to her left lateral epicondylar release, as well as the accident report dated 12/24/19. Dr. Cantrell also reviewed records from Dr. Krieg from 1/24/20 through 3/31/21, and Dr. Gornet's records beginning 6/28/21. Based on these additional records he reviewed, Dr. Cantrell's prior opinions had not changed.

On 4/24/22 Dr. Bernardi issued an addendum. Dr. Bernardi had seen petitioner for her non-radiating lower back pain that she attributed to an injury at work on 11/16/19. Given that she also reported previous episodes of lumbago, he reviewed her pre-injury records. These included various records from 3/28/07 through 2/23/22. He was of the opinion that review of these additional records did not lead him to alter any of the opinions he outlined in his 1/18/22 report, but in fact reinforce them. Dr. Bernardi noted that petitioner told him that prior to her 11/16/19 accident she had experienced two episodes of low back pain and a single episode of sciatica, and each episode had been self-limiting. He

noted that petitioner told him that she had not had any issues with her low back in the months or years prior to the alleged work incident for which he was seeing her. His opinion was that her records do not support this history, and in fact show it to be fallacious.

Dr. Bernardi noted that petitioner led him to believe that she had experienced isolated episodes of back/leg discomfort, but her records revealed a continuous history that begins in at least 2007 and extends forward in an uninterrupted fashion to the months preceding 11/16/19. Dr. Bernardi counted at least 67 chiropractic visits during this period, where most include a reference to her low back. He believed these visits were spread out in a relatively even fashion over that interval. He was also of the opinion that petitioner was having problems much more proximate to her alleged work injury than she had let on to him. He noted that on 7/14/18 her family care doctor noted that she had chronic low back pain and sciatica which had not responded to chiropractic treatment or medications. She complained of intermittent low back pain when she saw him again on 10/14/18. He also noted that petitioner saw her chiropractor with complaints of lower back discomfort on 12/12/18, that was noted to be an ongoing issue when she saw her nurse practitioner on 6/21/19. Dr. Bernardi was of the opinion that his review of these additional records strengthened his opinions that petitioner's lower back complaints are not causally related to her job duties for respondent on 11/16/19.

On 4/28/22 the evidence deposition of Dr. Matthew Gornet, an orthopedic surgeon, was taken on 4/28/22. Dr. Gornet opined that petitioner's current condition and need for treatment, including the current recommendations for treatment, are causally connected to her alleged injury on 11/16/19, based on her objective findings on exam that correlated with her subjective complaints, which correlate with the diagnostic studies. He further opined that the treatment he provided, and the treatment he is recommending are both reasonable and necessary in light of his diagnosis. Dr. Gornet testified that he based these opinions additionally on his review of petitioner's outside records that included records predating her injury from Dr. Buskohl, the EMG done on 2/24/20, the IMEs of Dr. Cantrell and Dr. Bernardi, as well as all the MRI films.

On cross-examination, Dr. Gornet testified that he thought petitioner's main issue was always her shoulder, based on what she told him. He further testified that he thought her neck pain seemed to creep in a little bit later. He testified that on his first visit with her she noted that her left arm pain is from her shoulder to her elbow, and that her neck pain was really secondary. Dr. Gornet noted that petitioner had no neck pain reproduced on motion of her cervical spine, but kept describing pain in her left shoulder. He was of the opinion that although there may be some mild extension into her neck, her main problem is her left shoulder and upper arm.

Dr. Gornet testified that he is not sure if he reviewed the medical records of Chester Clinic between November 2017 and June of 2019, but that petitioner told him that at the time of the injury on 11/16/19 her back problems had resolved, and there was really no treatment between the episodes of back pain she mentioned and the injury on 11/16/19. Dr. Gornet was of the opinion that if a person has preexisting arthritis and degeneration in her lumbar spine, a change in gait could easily make her back temporarily worsen until it resolves. He was not sure when petitioner's foot injury was. Dr. Gornet testified that he did not review Apex Physical Therapy records between January 2020 and January 2021. Dr. Gornet was of the opinion that petitioner's pain in her left shoulder is referred pain from her cervical spine until proven otherwise, unless a shoulder specialist weighs in and says there is also additional pathology there. Dr. Gornet was of the opinion that petitioner's function study showed mild nerve changes back in 2020 at C6-C7. He was further of the opinion that everything fits: her nerve function studies, her MRI, and her subjective complaints. He noted that the only thing he was wrestling with is why the petitioner did not have neck pain, and the only thing he could say is that some people just don't have a lot of neck pain, and they feel the problem is in their shoulder.

Dr. Gornet testified that the records of Dr. Burkhol for 15-20 visits from 2007 to 2020, or 1-2 a year on averge, is not unusual for someone that works in a factory. Dr. Gornet was of the opinion that someone with chronic low back pain would have much more in the way of treatment, including MRIs, CTs, injections, and visits to specialists. He did not see any indication that petitioner had chronic low back pain. Dr. Gornet was unaware that petitioner had 42 visits between March of 2007 and June of 2012, and another 22 between April of 2014 and December 2018. Dr. Gornet was unaware of petitioner being in a motor vehicle accident in May of 2021. Dr. Gornet was of the opinion that the disc herniation at C6-C7 was caused by the injury on 11/16/19, and C5-C6 was aggravated by the injury on 11/16/19, with a new component on top of that. He was also of the opinion that the disc at C4-C5 looked new.

On redirect examination Dr. Gornet was of the opinion that after Dr. Krieg got the results of the left upper extremity EMG/NCS, he wanted an MRI of her cervical spine, because Dr. Krieg felt petitioner's problem might be related to her cervical spine. Dr. Gornet testified that the courts have always upheld off-label usage and permitted it even if it isn't used exactly by the FDA labeling of the product. Dr. Gornet testified that the State of Illinois approved off-label usage 15 years ago, and he has used cervical disc replacements in 2 to 4 levels off-label and it had always been approved by the State of Illinois.

On 6/2/22 a report from ESIS Global RiskAdvantage was issued, closing out the incident from 11/16/19. The close date of the claim was 6/2/22. The description of the Claim Summary was "while lifting rework screen noticed burning sensation in left shoulder, neck and back". The report shows no

TTD was paid, and $9,209.44 in medical expenses were paid. Expenses paid was identified as $14,275.64.

On 6/14/22 Dr. Cantrell performed a records review at the request of the respondent. These records included records that predated and postdated petitioner's alleged injury on 11/16/19. He also reviewed Dr. Gornet's records. Following this review, he opined that it remained his opinion that petitioner had reached maximum medical improvement regarding the alleged injury on 11/16/19, and did not need any further treatment. He found it notable that prior to November 2019 petitioner underwent multiple diagnostic studies regarding her lumbar spine over the span of many years for her low back pain, or her low back pain with sciatica. He found it noteworthy that petitioner has reported to Dr. Gornet that she had had a brief bout of low back pain following a foot injury, for which she received conservative treatment. Dr. Cantrell was of the opinion that this was not at all consistent with the medical records and diagnostic studies he reviewed.

On 11/3/22 the evidence deposition of Dr. Russell Cantrell was taken on behalf of respondent. Dr. Cantrell specializes in physical medicine and rehabilitation. Dr. Cantrell testified that a physical examination of petitioner's neck on 7/1/20 was negative, without any evidence of clinical cervical radiculopathy. He also noted full painless range of motion of her neck. He noted pain and limitation with passive and active motion of petitioner's left shoulder. Her left shoulder motion was limited as compared to her right shoulder. Dr. Cantrell testified that it was initially his opinion that petitioner sustained a lumbar strain for which he recommended additional physical therapy, but after reexamining her the 2nd time and noted the chronicity of her complaints and then later learned about the chronicity of her symptoms that predated her reported with injury, and when considering the non-physiologic pain behaviors on her examination the second time around, it was his opinion that petitioner did not require any further treatment as it relates to her lower back, including a recommendation to have a discography of her L4-L5 and L5-L6, or a three-level cervical disc replacement surgery at C4-C5, C5-C6, and C6-C7. He opined that he found petitioner reached maximum medical improvement on 2/22/21.

On cross-examination, Dr. Cantrell testified that he does not perform surgery. He testified that during COVID there was a stretch of about a month or several weeks that his office was closed, and they did not see patients, but did telemedicine visits, until they gradually reopened. He testified that the pandemic forced delays in treatment due to the fact that he could not see patients in person. Dr. Cantrell testified that petitioner did not relate any neck pain complaints when he examined her that were consistent with her pain diagram when he initially saw her. Dr. Cantrell was of the opinion that a cervical disc injury can cause pain symptoms into the upper extremities, and can cause an individual to

experience shoulder pain, pain into their arms, and pain into their hand. Dr. Cantrell was of the opinion that following the injury on 11/16/19 petitioner had no neck complaints until she saw Dr. Krieg, and there were left arm, forearm, and wrist pain complaints in the months prior to petitioner's work injury. Dr. Cantrell was of the opinion that since arm pain can be caused by cervical pathology, and petitioner had arm pain and paresthesias predating her work injury, there is a possibility that cervical pathology could have been causing her arm symptoms prior to November of 2019. Dr. Cantrell was of the opinion that the reason for the nerve conduction study was that Dr. Krieg was trying to evaluate what may be causing those symptoms that were noted by Dr. Guyton to be pain in the fourth and fifth fingers extending to her arm pit. Dr. Cantrell was of the opinion that there is pathology in her neck that long predates the injury in 2019 as evidenced by the MRI scan in 2014. Dr. Cantrell admitted that after the cervical MRI in 2014 he did not see any records that show petitioner had any physical therapy or injections for her neck prior to 11/16/19.

On redirect examination Dr. Cantrell was of the opinion that petitioner did not report any neck pain complaints consistent with her pain diagram, but did report left arm complaints diffusely during his examination of her. Then after this he saw no findings that would indicate something arising from her cervical spine as a cause of those complaints, and there was nothing in her medical records that he reviewed in the weeks following her injury to indicate that she had any symptoms arising from her cervical spine. For these reasons, Dr. Cantrell testified that he did not believe petitioner had a spinal cord injury as a result of the injury on 11/16/19, and did not need any further treatment for her neck in relation to the injury.

On 12/16/22 the evidence deposition of Dr. Bernardi, a neurosurgeon, was taken on behalf of respondent. Dr. Bernardi's practice is 100% confined to spinal neurosurgical problems. Dr. Bernardi was of the opinion that the findings on the EMG/NCV of her left upper extremity did not correlate with her pain in the 4th and 5th digits of her left hand. He was of the opinion that the mild denervation involving the muscles supplied by the 6th and 7th nerve roots would involve the index and middle fingers, and would not cause pain that started in the hand and migrated up the arm. He opined that it is just not consistent with a neck problem. Dr. Bernardi noted that petitioner was treating for her low back pain as recently as 6/21/19, and was treating for her left arm as recently as 11/5/18, both instances with complaints similar to those she reported to him. Dr. Bernardi opined that the MRI of the lumbar spine performed 3/12/20 was unchanged compared the MRI of the lumbar spine performed on 9/26/14. Dr. Bernardi opined that a discography is not reasonable and necessary, and not related to the injury on 11/16/19. He also noted that it is a purely subjective test and only to be used if considering surgery. Dr.

Bernardi opined that petitioner is a terrible candidate for surgery because she has no acute abnormalities; has no neurological findings; has no objective or subjective physical or neurological findings; has multilevel degenerative disease; and, has a very chronic history of back pain. He opined that she would be worse after surgery. Dr. Bernardi opined that her current lumbar complaints are not causally related to the injury on 11/16/19. He further opined that petitioner is not a candidate for a three level cervical disc replacement because the only indication for surgery on the cervical spine is neurological involvement, which petitioner does not have. He also opined that petitioner's cervical condition is not causally related to the injury on 11/16/19, and her left arm complaints are not causally related to any cervical spine condition.

On cross-examination Dr. Bernardi admitted that he never performed a cervical examination on petitioner. Dr. Bernardi agreed that a cervical disc injury can cause symptoms in the upper extremities, and parts of the shoulder and arm. Dr. Bernardi agreed that the 3/12/20 cervical disc MRI, as compared to the 2009 MRI, showed worsening degenerative disease at C5-C6, which would support suspicion of a potential cervical injury following her work injury.

Respondent offered the records of Dr. Jody Buskhol of Southern Illinois Chiropractic from 3/28/07 through 2/18/19. From 3/8/07 through 6/1/12 there were about 20 mentions regarding treatment for her lumbar spine; about 5-6 mentions regarding treatment for her foot; about 5 mentions regarding treatment for her left shoulder arm; and about 7 mentions of treatment for her cervical spine. Many of petitioner's reports of pain during this time were related to work activities.

From 6/1/12 through 4/9/14 Dr. Buskhol had no records regarding petitioner. In 2014 petitioner only saw Dr. Buskhol on two occasions in April of 2014. At these visits, petitioner reported that she was hit from behind by a car in a parking lot. Treatment was for the lumbar spine. In 2015 petitioner was seen by Dr. Buskhol 12 times; twice in January, April, August, and October; and once in June, September, November and December. This treatment was to petitioner's lumbar spine.

In 2016, petitioner saw Dr. Buskhol only 3 times on 1/8/16, 2/1/16, and 7/22/16. Treatment was for her right foot, lumbar spine and headaches. Petitioner was only seen in 2017 on 12/13/17. She complained of right hip and groin pain. In 2018 she was seen 4 times on 4/23/18, 4/27/18, 5/18/18 and 12/12/18. Complaints were primarily to the right hip with involvement of the right leg to the thigh, and the low back. In 2019, before the date of injury, petitioner was seen by Dr. Buskhol on one occasion on 2/18/19. She complained of right trapezius pain shooting up to the neck. She reported a difficult time turning her head to the right. Dr. Buskhol made adjustments to the thoracic and lumbar spine, and pelvis, as well as electrical stimulation to the cervical thoracic muscles on the right.

Petitioner slipped on water condensation on the floor at work on 5/24/10, and was diagnosed with a cervical, thoracic and sternoclavicular sprain and strain. She treated with Dr. Buskhol 3 times a week for 2 weeks.

On 9/26/14 petitioner underwent an MRI of the cervical spine. The impression was multilevel degenerative disc disease; moderate narrowing at the C4-C5, C5-C6 and C6-C7 levels; slight disc bulge at C3-C4; mild disc bulging and mild left sided spondylosis and foraminal narrowing at C4-C5; moderate focal right paramedian disc protrusion, moderate canal stenosis, moderate left sided spondylosis and foraminal narrowing at C5-C6; and, generalized disc bulging and possible small right posterolateral disc protrusion, and mild bilateral foraminal narrowing at C6-C7.

On 4/17/15 petitioner underwent an MRI of the lumbar spine. The impression was only mild bulging at L4-L5 disc with no definite disc protrusion. Findings were similar to a prior study.

Respondent offered into evidence medical records from 12/29/17 through 3/23/22 from Chester Clinic. On 11/1/17 petitioner saw Dr. Krieg and complained of right low back tenderness extending out toward the hip on the right side. Dr. Krieg associated the right low back pain with ionrochanteric bursitis. On 12/29/17 Dr. Krieg diagnosed right sacroiliitis and trochanteric bursitis, for which Dr. Krieg injected the right hip. On 4/14/18 petitioner saw Dr. Krieg for her right trochanteric bursa. She said the injection she had 4-6 weeks ago wore off. Dr. Krieg referred petitioner for chiropractic care. On 7/13/18 petitioner complained of chronic back pain with radiation into the right hip/knee, and occasionally into the left upper leg. She said chiropractic care did not help. Dr. Krieg assessed low back pain and sciatica. He recommended stretching and Tylenol. On 10/12/18 petitioner reported to Dr. Krieg occasional low back discomfort that radiates to her right leg. On 3/11/19 petitioner presented to Dr. James Davis at The Orthopedic Institute of Southern Illinois for a recheck of her left elbow, with an onset of a year ago. She stated that her symptoms were intermittent, chronic, non-traumatic, and mild moderate. She reported prior steroid injections provided relief for about 2 weeks. She also reported physical therapy provided no relief. Petitioner was diagnosed with lateral epicondylitis of the left elbow and cubital tunnel syndrome on the left. On 4/9/19 petitioner underwent a lateral epicondyle release. On 7/19/19 petitioner underwent an MRI of her right ankle due to pain in her right ankle and joints. The impression was early stress reaction involving the distal fibula and lateral malleolus. On 6/21/19 petitioner was seen for pain on top of right foot going up leg to knee for 3 days, and low back pain across her back. She also reported that she got a shot in her left shoulder on Monday. On 7/29/19 petitioner returned to Dr. Davis and reports she was improving post-op, but still had mild pain. On 8/16/19 petitioner was seen for her right foot stress fracture. She said she wore a CAM boot for 7 weeks. She

reported less pain. She refused ortho referral for her right foot, and physical therapy. The CAM boot was removed. On 9/13/19 petitioner said she was walking ok with her regular shoes, but had occasional pain. She was instructed to continue strengthening exercises.

Petitioner testified that she wants to undergo the cervical spine surgery recommended by Dr. Gornet. Petitioner testified that since November of 2019 her low back, neck and left shoulder and arm pain have not subsided for a long period of time. Petitioner testified that the pain in her left arm after 11/16/19 was different from pain she had following her left elbow surgery.

On cross examination petitioner testified that she was in a motor vehicle accident in March of 2014 when she was struck from behind. She testified that she could not remember the details of the accident or if she was injured. Petitioner stated that she told Dr. Buskhol in months prior to 11/16/19 that she had trouble turning her head to the right because of neck pain. Petitioner could not remember if she treated with Dr. Krieg before 11/16/19 for her low back, or underwent any physical therapy for her low back.

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

Given that the parties have stipulated that there is a causal connection between the petitioner's current condition of ill-being as it relates to her lumbar spine and the injury on 11/16/19 through 11/21/22, the arbitrator will not be addressing this issue. However, since there does exist an issue as it relates to the current condition of the petitioner's cervical spine/left upper extremity and the injury on 11/16/19, the arbitrator will be addressing this issue.

With regards to the issue of a causal connection between the petitioner's current condition of ill-being as it relates to her cervical spine/left upper extremity and the injury on 11/16/19, causation opinions were offered by Dr. Gornet, Dr. Cantrell, and Dr. Bernardi.

The arbitrator finds it significant that petitioner testified at trial that immediately following the injury on 11/16/19 she only had pain in her low back. The arbitrator also found it significant that when petitioner first sought medical treatment on 12/24/19 she had no neck complaints, and her complaints with respect to her left upper extremity were 'intermittent left wrist pain when performing certain work duties'; that the accident report she completed on 12/24/19 only made mention of injuries to her upper right arm, low back and abdomen; and, that on each and every office visits from 12/24/19 through 2/14/20, petitioner made no mention of any neck complaints, and her left upper extremity complaints ranged from left hand/wrist pain to left forearm pain, and left arm paresthesias.

The arbitrator also finds it significant that petitioner's first neck complaints are not documented until 3/4/20, after she underwent an EMG/NCS of her left upper extremity that revealed mild denervation

in the left C6-C7 nerve distribution. Her EMG was normal. Her complaints at that time were discomfort in her left posterior neck. She also reported occasional left arm paresthesias. Then on 3/27/20, only a few weeks later she reported pain in the lateral aspect of her neck with radicular like discomfort going down her left arm to her hand. From 3/27/20 through 12/1/20, petitioner does not seek any treatment. She testified that this was due to COVID. However, she did undergo her first Section 12 examination with Dr. Cantrell during this period on 7/1/20.

Petitioner resumed treating with her providers on 12/2/20. There are no cervical complaints in Dr. Krieg's records of 12/2/20, 1/6/21, 1/27/21, or 3/31/21. During this period petitioner's complaints were related to her low back, left upper extremity, and left shoulder. Even when petitioner presented to Dr. Gornet on 6/28/21 she made no specific complaints of any neck pain. She did report left arm pain from her shoulder to her hand. Despite the lack of any cervical spine complaints, Dr. Gornet, after reviewing the MRI of the cervical spine, was of the opinion that as a result of the injury on 11/16/19 petitioner aggravated her underlying degeneration at C5-C6, as well as potentially at C4-C5, and, sustained disc injuries at both C5-C6 and C6-C7, which would account for her radicular symptoms. When petitioner returned to Dr. Gornet on 9/16/21 for her neck and back pain, Dr. Gornet noted "particularly the left arm more than the neck and shoulder." He recommended an injection at C6-C7, after which petitioner did not experience any significant relief. At that point, Dr. Gornet noted that petitioner's main symptoms in her neck remained left arm pain down to her hand with some shoulder pain, and her symptoms were more radicular. For this reason, he indicated that he might consider a shoulder evaluation with a shoulder specialist. However, Dr. Gornet never referred petitioner to a shoulder specialist. Instead, he recommended a 3-level disc replacement from C4 to C7.

During his deposition, Dr. Gornet testified that he thought petitioner's main issue was always her shoulder, based on what she told him, and thought her neck pain seemed to creep in a little bit later. On his first visit, he noted that petitioner had no neck pain reproduced on motion of her cervical spine, but kept describing pain in her left shoulder. He testified that he was of the opinion that although there may be some mild extension into her neck, her main problem was her left shoulder and upper arm, and this pain in her left shoulder is referred pain from her cervical spine until proven otherwise, unless a shoulder specialist weighs in and says there is also additional pathology there. However, Dr. Gornet never referred petitioner to a shoulder specialist for such an evaluation. Dr. Gornet was of the opinion that her nerve conduction studies, her cervical MRI, and her subjective complaints all fit, and the only thing he was wrestling with was why petitioner did not have neck pain, to which he responded, 'some people just don't have neck pain.' The arbitrator finds these varying opinions of Dr. Gornet to be less than

persuasive on the issue of causation as it relates to petitioner's cervical spine/left upper extremity. The arbitrator is also concerned that Dr. Gornet only reviewed Dr. Buskhol's records prior to 11/16/19, and not necessarily the records from Chester Clinic that predated the 11/16/19 injury and involved the left upper extremity, especially those earlier in 2019, and the cervical MRI performed on 9/26/14.

Even though Dr. Gornet did not refer petitioner to a shoulder specialist, respondent had Dr. Cantrell examine petitioner's left upper extremity. On 7/1/20 Dr. Cantrell examined petitioner's left upper extremity and neck on behalf of respondent. He noted that her neck examination was negative, without any evidence of cervical radiculopathy. He also noted that petitioner had full painless range of motion of her neck. With respect to her left upper extremity, Dr. Cantrell noted pain limitation with passive and active motion of petitioner's left shoulder. He noted that her left shoulder motion was limited, as compared to the right. Dr. Cantrell determined that petitioner's complaints were consistent with adhesive capsulitis in her left shoulder. He was of the opinion that any claim by petitioner that she had immediate pain shooting from her left wrist to her left shoulder when she lifted the screen back on the barrel on 11/16/19, is not supported by the any of the credible medical records or reports most contemporaneous to the injury on 11/16/19. He was also of the opinion that petitioner's left upper extremity complaints evolved. Based on these opinion; the fact that petitioner was diagnosed with left carpal tunnel syndrome on 3/11/19; that petitioner was diagnosed with lateral epicondylitis of the left elbow on 3/11/19, for which she underwent a left lateral epicondylitis release on 4/9/19; and, the fact that petitioner had complaints of pain in her left shoulder, left arm and left wrist in physical therapy on 6/3/19, 6/14/19, and 7/18/19, Dr. Cantrell opined that petitioner's left upper extremity complaints are not causally related to the injury on 11/16/19. The arbitrator finds it significant that petitioner also underwent a left shoulder injection in June of 2019.

Dr. Bernardi did not examine petitioner's neck, but did review the EMG/NCS of petitioner's left upper extremity. Dr. Bernardi did not the find the normal NCS findings, and the EMG findings of mild denervation in the left C6-C7 nerve distribution, consistent with any neck injury. He found it more consistent with a peripheral problem, or perhaps a musculoskeletal problem. Dr. Bernardi also reviewed the MRI of the cervical spine from 9/26/14 that even at that time, showed multi-degenerative disease, and mild degenerative foraminal stenosis on the left. He also reviewed Dr. Buskohl's records from 2007-2018.

Dr. Bernardi was of the opinion that the only thing that can cause the pain petitioner reported in her left shoulder and arm would be a pinched nerve in the neck, which Dr. Bernardi opined she did not have. He was further of the opinion that any cervical spine or left upper extremity complaints petitioner has are

not related to her cervical spine. Based on these findings, Dr. Bernardi opined that petitioner's current condition of il-being as it relates to her cervical spine is not causally related to the injury on 11/16/19.

The arbitrator also finds it significant that although petitioner was very forthcoming on direct examination, she was often very evasive on cross-examination and often responded with "I don't remember", or "I don't recall." For this reason, as well as her inconsistent histories to her treating and examining doctors as to the immediate complaints she had following the injury on 11/16/19, the arbitrator finds the petitioner was less than credible.

Based on the above, as well as the credible evidence, the arbitrator finds the opinions of Dr. Cantrell and Dr. Bernardi are based on a more accurate interpretation of the credible evidence, and therefore more persuasive than those of Dr. Gornet, on the issue of causation as it relates to petitioner's cervical spine and/or left upper extremity. The arbitrator also relies on the significant amount of treatment petitioner had over the years related to her cervical spine and/or left upper extremity; the petitioner's less than credible testimony at trial; and, the fact that petitioner provided histories/complaints to Dr. Gornet, Dr. Bernardi, and Dr. Gornet that were not consistent with the history complaints she had to her cervical spine and left upper extremity immediately after the injury, and for some time after. The arbitrator also finds petitioner's medical records from 2007 to the date of injury, do not support a finding that she had no cervical spine or left upper extremity complaints in the months following up to the incident. Petitioner even had cervical spine complaints as far back as 2014 when she underwent an MRI for her cervical spine due to neck complaints.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence that her current condition of ill-being as it relates to her cervical spine/left upper extremity is causally related to the injury she sustained on 11/16/19.

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 that the parties stipulated that all treatment for the petitioner's lumbar spine was reasonable and necessary to cure or relieve petitioner from the effects of her injury on 11/16/19 through 11/21/22. However, the respondent disputes that any treatment related to petitioner's cervical spine/left upper extremity was reasonable and necessary to cure or relieve petitioner from the effects of the injury on 11/16/19.

Having found the petitioner's current condition of ill-being as it relates to her cervical spine/left upper extremity is not causally related to the injury she sustained on 11/6/19, the arbitrator finds any

treatment to the petitioner's cervical spine/left upper extremity was not reasonable to cure or relieve petitioner from the effects of the injury she sustained on 11/16/19.

K. IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE?

Having found petitioner has failed to prove by a preponderance of the credible evidence that her current condition of ill-being as it relates to her cervical spine/left upper extremity is causally related to the injury she sustained on 11/16/19, the arbitrator finds the petitioner is not entitled to the prospective medical care as it relates to her cervical spine/left upper extremity. Dr. Gornet's recommended surgery to petitioner's cervical spine is denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC023956
Case Name	Karen Tripp v. State of Illinois - Anna Veteran's Home
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0045
Number of Pages of Decision	24
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Thomas C Rich
Respondent Attorney	Shannon Rieckenberg

DATE FILED: 1/24/2024

/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

KAREN TRIPP,

Petitioner,

vs. NO: 19 WC 23956

STATE OF ILLINOIS,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed under Section 19(b) of the Act by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, prospective medical care, temporary total disability (TTD) benefits and permanent partial disability (PPD) benefits, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator which is attached hereto and made a part hereof. The Commission also remands this case to the Arbitrator for further proceedings and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Indus. Comm'n*, 78 Ill. 2d 327 (1980).

The Commission affirms the Arbitrator's conclusion that Petitioner proved by a preponderance of the evidence that her current condition of ill-being in the right shoulder is causally related to the July 15, 2019 work accident. The Commission also affirms the Arbitrator's award of medical bills to be paid pursuant to Sections 8(a) and 8.2 of the Act. The Commission clarifies that the medical bills will be paid according to the parties' stipulations on the Request for Hearing form. Petitioner agreed that Respondent would be entitled to a credit under Section 8(j) of the Act for any medical bills paid through its group medical plan. The parties also agreed that all medical bills awarded shall be paid directly to the medical providers per the Illinois Fee Schedule or PPO agreement, whichever is less. The parties further agreed that Respondent shall receive a credit for all medical bills previously paid. (Arb. Ex. 1).

The Commission next modifies the Arbitrator's award for prospective medical care to specify that Petitioner is entitled to the arthroscopic right shoulder rotator cuff debridement versus

repair surgery recommended by her treating physician, Dr. Bradley, as well as the attendant post-operative care. The Commission finds this treatment plan to be reasonable and necessary.

With respect to TTD benefits, the Commission notes that on December 2, 2019, Dr. Brown allowed Petitioner to return to modified duty on December 3, 2019 and Petitioner returned to work for Respondent. The Commission therefore finds that Petitioner is entitled to TTD benefits from July 28, 2019 through December 2, 2019 and modifies the Arbitrator's award to conform with the evidence. The Commission additionally affirms the Arbitrator's award of credit to Respondent in the amount of $17,111.54 for TTD benefits previously paid to Petitioner plus five (5) service connected days as stipulated by the parties on the Request for Hearing form. (Arb. Ex. 1).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 3, 2023 is hereby modified as stated 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.

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.

January 24, 2024

CAH/pm
O: 1/11/24
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	19WC023956
Case Name	Karen Tripp v. State of IL/Anna Veteran's Home
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	21
Decision Issued By	Jeanne AuBuchon, Arbitrator

Petitioner Attorney	Thomas Rich
Respondent Attorney	Shannon Rieckenberg

DATE FILED: 4/3/2023

THE INTEREST RATE FOR THE WEEK OF MARCH 28, 2023 4.65%

/s/ Jeanne AuBuchon, Arbitrator

Signature

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

April 3, 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)

Karen Tripp
Employee/Petitioner

v.

State of IL / Anna Veteran's Home
Employer/Respondent

Case # **19** WC **23956**

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, Illinois**, on **November 28, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **07/15/2019**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**72,259.82**; the average weekly wage was $**1,389.61**.

On the date of accident, Petitioner was **47** years of age, ***married*** with **1** dependent child.

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

Respondent shall be given a credit of $**17,111.54** for TTD, $**N/A** for TPD, $**N/A** for maintenance, and **5 service connected days** for other benefits, for a total credit of $**17,111.54 + 5 service connected days**.

Respondent is entitled to a credit of $**if any** 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 Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $926.41/week for 18 4/7 weeks, commencing 07/28/2019 through 12/04/2019, as provided in Section 8(b) of the Act.

Respondent shall authorize and pay for the prospective treatment recommended by Dr. Bradley, including, but not limited to, surgery.

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

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

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

Jeanne L. AuBuchon

Signature of Arbitrator

APRIL 3, 2023

PROCEDURAL HISTORY

This matter proceeded to trial on November 28, 2022, pursuant to Sections 19(b) and 8(a) if the Illinois Workers' Compensation Act (hereinafter "the Act"). The issues in dispute are: 1) the causal connection between the accident and the Petitioner's right shoulder condition; 2) payment of medical expenses; 3) entitlement to TTD benefits from July 28, 2019, through December 4, 2019; 4) entitlement to prospective medical care to the Petitioner's right shoulder; and whether the Petitioner has reached maximum medical improvement.

FINDINGS OF FACT

At the time of the accident, the Petitioner was 47 years old and employed with Respondent as a registered nurse at the Anna Veterans Home. (AX1, T. 10) On July 15, 2019, one of the veterans was on an electric scooter and backed into another veteran in a wheelchair, with the scooter and wheelchair getting connected so that when the veteran on the scooter drove off, he was dragging the veteran in his wheelchair to the point where the wheelchair was tipping over. (T. 11) When she and an aide got the scooter to stop and tried to separate it from the wheelchair, the Petitioner had to lift up on the scooter with the veteran sitting on it and injured her right shoulder. (T. 11-12)

The Petitioner testified that she had a prior injury to her right shoulder in 2002 or 2003 and had surgery for a rotator cuff repair. (T. 12) She said her last follow-up visit with her orthopedic surgeon was about 12 weeks after the surgery, and she had no pain or symptoms in her shoulder since then until the work accident. (Id.) She said she was working full duty at the time of the work accident. (Id.)

The day following the accident, the Petitioner made an injury report, describing the incident consistently with her testimony. (RX1) She reported feeling a strain in her right shoulder with a

burning sensation. (Id.) That same day, she saw Physician Assistant Britney Arnold at the Orthopaedic Institute of Southern Illinois and reported the accident and that she woke up with extreme discomfort in her shoulder to the point where it was making her nauseous, her range of motion was not limited, and she had exquisite pain with certain movements. (PX3) She said the pain began in her shoulder, mostly posterior, and radiated down her triceps (muscle on the underside of the upper arm) into her elbow and wrist at times. (Id.) She denied numbness. (Id.) Shoulder X-rays revealed no bony abnormalities. (Id.) A physical examination revealed maximum tenderness over the posterior shoulder, mild tenderness over the trapezius (muscle over the back of the neck and shoulders), painful range of motion with abduction and forward flexion, limited external rotation strength and painful empty can test (for integrity of the supraspinatus tendon at the top and back of the rotator cuff). (Id.) PA Arnold diagnosed pain in the right shoulder and rotator cuff injury, ordered an MRI, prescribed oral steroids and ordered the Petitioner off work. (Id.) The MRI was performed on August 7, 2019, at the Orthopaedic Institute by radiologist Dr. Dan Riherd and showed an approximately 30 percent bursal surface tear through the proximal supraspinatus tendon of the rotator cuff (tear to the top of the tendon located at the top and back of the shoulder). (Id.)

The Petitioner followed with Physician Assistant Darrel Cutler at the Orthopaedic Institute on August 13, 2019, with the same complaints. (Id.) A physical examination revealed pain with forward elevation of the arm, weakness of the supraspinatus (muscle near the top of the rotator cuff), impingement signs and a positive Speed's test (for biceps tendon injury and SLAP (superior labrum anterior posterior – thick tissue that surrounds the shoulder socket) lesions). (Id.) PA Cutler read the MRI as showing fluid in the joint and bursal-sided fraying of the rotator cuff. (Id.) He diagnosed a rotator cuff strain, but said he could not rule out a tear. (Id.) He performed a

corticosteroid and lidocaine injection, recommended physical therapy and gave work restrictions of sedentary duty with 1-2 pounds lifting, pushing and pulling. (Id.) The Petitioner testified that the injection provided short-term relief. (T. 14)

The Petitioner underwent physical therapy at SIH Anna Rehab from August 20, 2019, through September 16, 2019, for a total of 12 visits. (PX4) At her last visit, the Petitioner reported that her pain level continued to stay at 5/10 and the pain kept her from performing daily activities at home. (Id.) Physical therapist Leslie Treat noted that the Petitioner's function had decreased, she was unable to tolerate full passive range of motion, her active range of motion was limited due to pain, and she was not making progress. (Id.) PT Treat contacted the Orthopaedic Institute for the Petitioner to get an earlier appointment and was told to hold off on therapy. (Id.) The Petitioner did not return and was discharged from therapy on October 25, 2019. (Id.) The Petitioner testified that the physical therapy didn't really provide any relief. (T. 14)

On September 19, 2019, the Petitioner saw Dr. Treg Brown, an orthopedic surgeon at the Orthopaedic Institute and reported that she was very frustrated at her continued pain and difficulties with even simple daily activities. (PX3) Upon examination, Dr. Brown found impingement signs, pain with empty can testing, decreased supraspinatus strength, positive O'Brien's test (for lesions of the SLAP or acromioclavicular (AC joint between the shoulder blade and collar bone) tenderness over the anterior greater tuberosity (bone at the top of the humerus that attaches to the rotator cuff muscles) and over the proximal biceps. (Id.) Dr. Brown believed the Petitioner had an incomplete bursal surface rotator cuff tear and some mild biceps tendinopathy (strain). (Id.) He recommended an arthroscopic rotator cuff debridement (removal of damaged tissue) versus repair and use of an augmentation patch (implant or patch). (Id.) The Petitioner wished to proceed to surgery as soon as possible, and Dr. Brown stated he would begin the

precertification process. (Id.) He gave light duty restrictions with a 5-10-pound weight limit, no chest-high or above activities and no repetitive reaching. (Id.) Dr. Brown's office was informed on September 27, 2019, that work comp disapproved surgery. (Id.)

On November 26, 2019, the Petitioner underwent a Section 12 examination by Dr. Michael Nogalski, an orthopedic surgeon at Orthopedic Associates. (RX2) The Petitioner described the accident, her treatment and her symptoms, which included pain, inability to move her shoulder, tingling in her arm, catching sensations, weakness, muscle spasms, stiffness, tenderness, swelling, difficulty falling asleep, popping, burning, crunching noises and numbness. (Id.) The only notations as to precise locations of the pain were "in the shoulder" and "shooting down into the armpit." (Id.) Dr. Nogalski also reviewed the Petitioner's medical records. (Id.)

Upon physical examination, Dr. Nogalski noted that the Petitioner placed herself at somewhat unusual angles, writhed and moved back and forth with the shoulder without essentially any manipulation of the shoulder, actively resisted moving the arm in certain planes of motion on a nonreproducible basis, was able to bring her arm actively up to about 90 degrees of forward flexion and abduction and stopping abruptly and did not show indication of maximal effort. (Id.) He stated the Petitioner appeared to have capsular tightness and that her putting her arm in unusual rotational positions coming up to chest level did not appear to be specifically indicative of a distinct reproducible exam finding. (Id.) She had pain with both abduction and forward flection and seemed to prefer abduction in any position but in the neutral plane, which he said was somewhat abnormal. (Id.) He said subscapularis (under the shoulder blade) tests appeared relatively normal except for some complaints of pain with muscle testing modes. (Id.) He said there was no appreciable crepitus (grating) noted in the shoulder. (Id.)

X-rays were normal except for the AC joint showing slight high-riding distal clavicle relative to a lower acromion and a small calcification in that region consistent wither with previous injury or dystrophic calcification (deposition of calcium salt in degenerated tissues often associated with trauma, infection or inflammation). (Id.) Dr. Nogalski reviewed the MRI and said it showed some generalized tendinopathic change of the superior rotator cuff with loss of normal organization of the signal predominately on the bursal side of the rotator cuff. (Id.) He said the superior labrum appeared to show some mild changes but nothing distinctly suggesting a tear. (Id.) He saw a small cystic change in the superior distal clavicle but no distinct bone marrow signal changes. (Id.) There appeared to be some thickening and loss of inferior capsular space, likely consistent with adhesive capsulitis (frozen shoulder). (Id.)

Dr. Nogalski diagnosed right shoulder pain without reproducible exam findings to validate specific rotator cuff or intrinsic glenohumeral shoulder joint (ball and socket joint between the scapula and humerus) pathology. (Id.) For pre-existing injuries or health conditions, Dr. Nogalski noted previous right shoulder surgery for ostensible rotator cuff repair with no indications of fixation. (Id.) He added that the Petitioner had a history of anxiety and post-traumatic stress disorder (PTSD), which may have impacted some of her behavioral observations that day. (Id.) He said objective findings were not conclusive, and the Petitioner had a disconnect between her active and passive motions and unusual behaviors that did not support her providing a reproducible exam. (Id.) He stated that behavioral observations supported that the Petitioner was responding intentionally to avoid exam findings, with her body motion and movements supporting that she was trying to avoid or demonstrate reproducible findings in the shoulder. (Id.) He added that whether this was intentional or not, he was not sure. (Id.) He again noted potential impact of the Petitioner's history of anxiety and PTSD. (Id.) He said the Petitioner may have adhesive capsulitis

and avoiding pain with certain movements of the shoulder but added that those were not reproducible in nature as they went through the exam. (Id.)

Dr. Nogalski concluded that there was not a causal relationship between her objective findings and reported accident. (Id.) He said there was no direct outside support of the singular event as the cause for the Petitioner's shoulder complaints. (Id.) He believed she had an idiopathic (of unknown cause) adhesive capsulitis, unusual myofascial (of the musculoskeletal system) symptoms unrelated to a claimed injury or intentional, inconsistent exam findings that softly suggest this as her diagnosis. (Id.) He noted that the Petitioner initially described pain in the back of her shoulder, which was not characteristic of acute trauma to the rotator cuff. (Id.) He stated that the Petitioner had switched around to having different symptoms than before and did not have a reproducible description of her event – indicating to a therapist that she heard a pop that was not mentioned elsewhere in the medical records. (Id.)

Regarding treatment, Dr. Nogalski said medical treatment to date appeared to have been reasonable and necessary relative to subjective complaints. (Id.) He said additional treatment reasonably would involve some sort of physical therapy and said he "would be very concerned about moving forward with surgery". (Id.) He suggested that an arthrogram MRI would be a reasonable test to obtain, given that the Petitioner had previous surgery on that shoulder. (Id.) He believed the Petitioner could work at a full-duty level and had reached maximum medical improvement as of the date of the MRI on August 7, 2019. (Id.)

The Petitioner's last visit to Dr. Brown was on December 2, 2019, at which time her status was unchanged. (Id.) Dr. Brown reiterated his diagnoses and surgical recommendation. (Id.) He gave restrictions of 25 pounds lifting, pushing or pulling and overhead lifting beginning December 3, 2019. (Id.) The Petitioner testified that she had asked Dr. Brown if she could go back to work

light duty, and he said she could if she felt like it. (T. 15) The Petitioner testified that she did not return to Dr. Brown for follow-up appointments because the COVID pandemic had begun, and she was working in the COVID unit at the facility. (T. 15) She said Dr. Brown's staff would not allow her to come to the office. (T. 15-16) The Petitioner testified that she worked full duty throughout 2020 but received assistance from her staff when lifting or rolling over a patient. (T. 18)

Dr. Nogalski testified consistently with his report at a deposition on May 20, 2020. (RX3) He defined reproducible test findings as those that are consistent and support a specific anatomic problem or deficit and not reproducible as the same thing not happening several times and unusual behavior, movements, grimaces or lack of motion on a consistent basis. (Id.) He said that the type of exam the Petitioner had was "almost completely off the wall with respect to corresponding with rotator cuff tendon issue." (Id.) He said the Petitioner's reports in her medical records of pain in the back of the shoulder radiating into the arm and numbness and tingling were not consistent with rotator cuff injury. (Id.) Regarding the MRI, Dr. Nogalski saw just some tedinopathy or tendinosis (degeneration of the tendon's collagen) but not a distinct finding that would correlate with a loss of tissue. (Id.)

As to Dr. Brown's surgical recommendation, Dr. Nogalski said it was not clear to him that treating rotator cuff tendinosis with a tendon graft would significantly benefit the Petitioner. (Id.) He said the use of grafts is relatively controversial, and tendon grafts has not been shown to conclusively optimize tendon function. (Id.) He said that even if the Petitioner had a 30 percent tear in her rotator cuff tendon, he would recommend primary repair to the rotator cuff insertion site rather than a graft. (Id.)

On April 15, 2021, the Petitioner sought treatment from Dr. Matthew Bradley, an orthopedic surgeon at Metro East Orthopedics, and described the accident, her treatment and her

symptoms similarly to her prior descriptions, stating that her pain was gradually getting worse and her strength was weakening over the past six months. (T. 18, PX5) She denied any other trauma since the accident. (Id.) Dr. Bradley reviewed the Petitioner's medical records, including Dr. Nogalski's report, and performed an examination that revealed decreased active range of motion, decreased rotator cuff strength in the supraspinatus and positive impingement testing. (Id.) X-rays were normal except for mild arthritic changes of the AC joint. (Id.) Dr. Bradley said the MRI showed a reported 30 percent bursal-sided tear to the supraspinatus. (Id.)

Dr. Bradley concluded that the Petitioner's physical examination was "very consistent" with having a rotator cuff tear. (Id.) As to Dr. Nogalski's observations of lack of effort, ratcheting and rigidity during his examination, Dr. Bradley said he found none of these during his examination. (Id.) He said the Petitioner was very cooperative and her examinations were repeatable. (Id.) He said she did not have any stiffness or signs of adhesive capsulitis. (Id.) Dr. Bradley wanted to repeat the MRI scan with a high-grade MRI magnet and use of intra-articular contrast (MRI arthrogram) to fully evaluate the degree of pathology. (Id.) He mentioned a work restriction form, but none was included in the records for that date. (Id.)

The MRI arthrogram performed by radiologist James Schoen on May 13, 2021, at MRI Partners of Chesterfield showed a SLAP (superior labrum anterior posterior) tear without displaced fragment or loose body and mild AC (acromioclavicular) joint arthropathy (arthritis in the joint between the collarbone and shoulder blade). (PX6) He found the rotator cuff intact. (Id.) That day, the Petitioner followed up with Dr. Bradley, who read the MRI arthrogram as showing tendinopathy of the supraspinatus tendon with a less than 25 percent partial thickness tear near the insertion. (PX. 5) Dr. Bradley said there should be an outlet stenosis (narrowing of the space

containing nerves and blood vessels) with some mechanical impingement on the supraspinatus. (Id.) He also appreciated some mild to moderate AC degenerative disease. (Id.)

Based on the results of the MRI and physical examination, which was identical to the prior examination, Dr. Bradley diagnosed right shoulder traumatic impingement syndrome, and recommended anti-inflammatories daily and a home exercise program. (Id.) He performed a steroid injection. (Id.) The Petitioner followed up with Dr. Bradley on January 6, 2022, and reported that the injection helped significantly for a month but her pain continued to worsen back to the point it was prior to the injection. (PX5) A physical examination showed her active range of motion improved with flexion and abduction and decreased with extension. (Id.) Her rotator cuff strength improved, but she had pain. (Id.) Impingement tests were still positive. (Id.) X-rays showed no arthritis of the glenohumeral joint but the joint was reduced without humeral head superiorization. (Id.) Dr. Bradley reiterated his diagnosis of right shoulder traumatic impingement syndrome and performed another injection. (Id.) The Petitioner testified that the first injection helped for a few weeks, with the last one lasting a day or maybe a few hours. (T. 19)

The Petitioner testified that by the time she last saw Dr. Bradley on June 23, 2022, she felt like her shoulder was progressively getting more sore and weak. (T. 20) At that visit, she reported that the last injection gave 2-3 hours of excellent pain relief but all of her pain had recurred. (PX5) She described a clicking sensation with motion of her shoulder above shoulder level and significant pain and difficulty reaching out in front of her or out to the side. (Id.) She pointed to the lateral aspect of her shoulder (surface of the glenohumeral joint) over her deltoid (muscle attaching the shoulder blade and collarbone) and acromion (top outer edge of the shoulder blade) as the location of her pain. (Id.) Her active range of motion and rotator cuff strength decreased from the last visit, and impingement tests were still positive. (Id.) Dr. Bradley diagnosed a right shoulder partial

rotator cuff tear. (Id.) He did not feel that any further non-operative treatment was likely to provide sustained pain relief and improved function. (Id.) He recommended arthroscopic debridement versus repair of a partial rotator cuff tear. (Id.)

On September 7, 2022, Dr. Nogalski performed another Section 12 examination. (RX4) The Petitioner reported difficulty using her right arm to lift anything and pain down the back side of her shoulder and down her arm. (Id.) Dr. Nogalski reviewed updated records from Dr. Bradley. (Id.) During a physical examination, the Petitioner again stopped moving her arm somewhat abruptly with forward flexion and abduction. (Id.) Dr. Nogalski reported that impingement tests were not possible due to the Petitioner's limited motion. (Id.) He reviewed the MRI arthrogram and found an intact rotator cuff with some mild enthesopathic (of the connective tissues between the bones and tendons or ligaments) changes around the rotator cuff insertion site, especially in the superior cuff. (Id.) He stated that while there were some tendinopathic changes, the study did not show significant "partial-thickness" loss of normal footprint (the insertional anatomy and common tendon of the rotator cuff) attachment on the articular side. (Id.) He noted signal changes again on the bursal side that were not conclusive for a tear of the rotator cuff. (Id.) He said glenoid labral structures showed some mild generalized abnormalities that appeared to be age-appropriate and inconclusive for specific traumatic change. (Id.) He saw some degenerative change of the AC joint without distinct bone marrow signal change. (Id.)

Dr. Nogalski concluded that both MRIs showed findings consistent with some rotator cuff tendinopathy in general. (Id.) He said objective findings continued to indicate inconsistent range of motion, adding that behavioral observations supported this, and Dr. Bradley's reports noted even more motion in the shoulder. (Id.) He said objective findings on the MRIs do not conclusively support significant traumatic injury to the shoulder, nor do they correlate with the

clinical findings at that time. (Id.) He said the findings did not conclusively correlate with specific pain from structural issues that would be advance by Dr. Bradley as the source of the need for surgery. (Id.) As an example of no correlation, he cited the Petitioner not having pain with supraspinatus isolation nor weakness but having pain with infraspinatus testing, while the infraspinatus the middle muscle surrounding the rotator cuff below the supraspinatus) was "absolutely fine" on the MRI. (Id.) He again stated he did not believe there was a causal relationship between the Petitioner's current objective findings and the accident. (Id.)

Dr. Nogalski said medical treatment through his first examination appeared to have been necessary and noted in bold lettering that the Petitioner apparently had not had any attempt or trial at physical therapy. (Id.) He said that performing surgery on a patient that has unreliable findings is often just the beginning of worse problems after surgery is performed. (Id.) He diagnosed right shoulder pain, believed the Petitioner could work full duty and said she reached maximum medical improvement as of the first MRI. (Id.)

On October 24, 2022, Dr. Nogalski again testified consistently with his reports at a deposition. (RX5) He said the Petitioner's inconsistencies with range of motion and subjective complaints were out of proportion to any objective findings present on the MRIs and in other tests. (Id.) He said he saw no changes between the two MRIs. (Id.) He said the Petitioner's range of motion was not consistent with her objective findings or with a rotator cuff or labral problem, nor – at the last visit – with adhesive capsulitis. (Id.) He explained his concerns about surgery because of risks associated with surgery, such as infection, stiffness and unusual pain complaints. (Id.)

On cross-examination, Dr. Nogalski acknowledged that the Petitioner had physical therapy early in her course of treatment but added that she had none during her treatment with Dr. Bradley. (Id.) Regarding inconsistencies, he said Dr. Brown did not provide enough data in his report to

validate a finding and that Dr. Bradley did not identify any inconsistencies. (Id.) Dr. Nogalski also acknowledged that the first MRI was performed with a 1.5 Tesla magnet, while the second was performed with a 3.0, which provides further resolution. (Id.) When queried about the report from the second MRI, Dr. Nogalski said he did not have it and didn't think he ever had. (Id.) He also did not have Dr. Bradley's office note from after the injections. (Id.)

Dr. Bradley testified consistently with his reports at a deposition on November 18, 2022. (PX7) He opined that the work accident was at least a precipitating factor in her ongoing right shoulder pain and need for more treatment and testing. (Id.) He said that after reviewing Dr. Brown's records, he found that the Petitioner's complaints, the location of her pain and the physical examinations were all very similar, and their interpretations and recommendations were identical, although he was not recommending the use of an implant, as Dr. Brown did. (Id.) He said that during the course of his examinations, the Petitioner never once demonstrated any signs of exaggeration or malingering. (Id.) He added that he performed the physical examination multiple times, and the results were very consistent. (Id.) He said he disagreed with Dr. Nogalski's findings and opinions, stating that it was almost like he was reading a different patient. (Id.) He said Dr. Nogalski's examination was inconsistent with any of his or the other treating physicians and physician assistants. (Id.)

On cross-examination, Dr. Bradley acknowledged that he did not recommend another round of physical therapy and said that was because she already had significant physical therapy and knew how to do the exercises as part of the home exercise he was recommending. (Id.) Regarding the six-month gap in treatment from when the Petitioner had the injection in May 2021 through January 2022 when she complained of increasing pain over the past five months, Dr. Bradley said that the month of relief told him he put the injection into the spot that was creating

the pain and that the pain coming back indicated that there was a tear or something that could not heal. (Id.) He said he did not know why the Petitioner did not seek treatment for six months. (Id.) He said there was no indication that the Petitioner was not doing her home exercises because she had good range of motion and had not developed frozen shoulder. (Id.) The gap in treatment between January 2022 and June 2022 did not concern Dr. Bradley, and he said such a gap did not mean she was cured. (Id.) He said he allowed the Petitioner to return to work in May 2021 because she felt she could safely perform all of her job requirements without posing a risk to herself and had the desire to go back to work and try and work through the pain. (Id.) He said he didn't feel this was going to drastically worsen her symptoms or etiology. (Id.)

The Petitioner testified that at the time of arbitration, she had stiffness, soreness and pain in her entire shoulder area and towards the backside of her shoulder, pain down her right arm, weakness and trouble with lifting her arm higher than chest level, lifting anything heavy, driving, sleeping and any type of physical activity. (T. 21-22) She said she was taking anti-inflammatories daily – sometimes three times per day. (T. 23) She said she had never gone back to feeling the way she did before the accident and cannot participate in activities such as golf, swimming, housekeeping and some laundry. (Id.) She said she wants to have surgery to restore function to her shoulder and get back to herself. (T. 23-24)

On cross-examination, the Petitioner acknowledged that she was able to hold her right hand at head height to take photos that were posted on Facebook. (T. 27)

CONCLUSIONS OF LAW

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

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

Circumstantial evidence, especially when entirely in favor of the Petitioner, is sufficient to prove a causal nexus between an accident and the resulting injury, such as a chain of events showing a claimant's ability to perform manual duties before accident but decreased ability to still perform immediately after accident. *Pulliam Masonry v. Indus. Comm'n*, 77 Ill. 2d 469, 397 N.E.2d 834 (1979); *Gano Electric Contracting v. Indus. Comm'n*, 260 Ill.App.3d 92, 96–97, 631 N.E.2d 724 (1994); *International Harvester v. Indus. Comm'n*, 93 Ill.2d 59, 442 N.E.2d 908 (1982).

In this case, the circumstantial evidence showed a chain of events in which the Petitioner was pain free and able to perform her job duties without restriction before the accident and pain and decreased abilities afterwards. The main issue is what kind of injury the Petitioner suffered and whether that specific injury is causally connected to the accident.

Dr. Brown and Dr. Bradley both believed – based on the Petitioner's history, complaints imaging studies and examinations – that the Petitioner had a rotator cuff tear. Dr. Nogalski believed the Petitioner had idiopathic frozen shoulder syndrome, which would be very coincidental, considering the chain of events.

In addition, Dr. Nogalski appeared to rely greatly on the Petitioner's behaviors – holding her arm in unusual positions, body motions and movements. He mentioned inconsistencies numerous times, including behaviors and complaints. However, his own reports are inconsistent with those of the other medical providers who examined the Petitioner. Neither Dr. Brown and his staff nor Dr. Bradley appeared to find any of the behaviors or inconsistencies to which Dr. Nogalski referred. The Arbitrator poured over all the various reports in which the Petitioner described her complaints and looked at the results of the physical examinations performed by Dr.

Brown and his staff and Dr. Bradley – as noted in detail above – and does not see any glaring inconsistencies. Dr. Nogalski's failed to explain how the Petitioner's pain complaints were inconsistent.

For the reasons above and the fact that they were treating physicians, the Arbitrator gives greater weight to the opinions of Drs. Brown and Bradley. The Arbitrator also finds the Petitioner to be credible and her reports consistent.

The Arbitrator also finds the gaps in the Petitioner's treatment does not break the causal connection between the accident and her current symptoms. Where a gap in treatment exists, "(t)he ultimate issue is not whether there was a gap in treatment but rather, whether the initial accident was a causative factor in the condition of ill-being which was produced." *William Gordon v. State of Illinois DOT Joliet Yard*, 07 I.W.C.C. 1599 (2007). The important issue is whether the symptoms and findings later in the treatment match up to the symptoms immediately following the accident, and whether the gap was logically explained. *Id.* In that case, the claimant did not seek treatment for almost nine months at one point and four months after that. *Id.* The Commission agreed with the Arbitrator that it is not unreasonable for claimants to expect to "simply heal with time" and would not penalize an employee who works through pain. *Id.* See also *Sharon Langorgen v. K-Mart*, 09 I.W.C.C. 1160 (2009), where the Commission recognized that, although there was a gap in formal treatment for two years, the claimant continued to identify the accidental injury as the source of her complaints without rebuttal. *Id.* The Commission relied on her credible testimony and the circumstantial evidence, which showed an absence of any intervening accident, in holding that causal chain remained unbroken and awarding benefits. *Id*.

As in those cases, the gap in treatment does not defeat the Petitioner's claim. She was not cured during those times, and there were no intervening incidents to explain her continued symptoms and the pathology noted by Dr. Brown and Dr. Bradley.

For all these reasons, the Arbitrator finds that the Petitioner has met her burden of proof establishing causal connection between the accident and her right shoulder condition as diagnosed by Dr. Brown and Dr. Bradley.

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

The right to be compensated for medical costs associated with work-related injuries is at the very heart of the Workers' Compensation Act. *Hagene v. Derek Polling Const*., 388 Ill. App. 3d 380, 383, 902 N.E.2d 1269, 1273 (2009).

Based on the findings above regarding causation, the Arbitrator finds that the treatment rendered was reasonable and necessary, and the Respondent has not paid for these services. Therefore, the Arbitrator 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?
Issue (O): Has the Petitioner reached maximum medical improvement?

Upon establishing causal connection and the reasonableness and the necessity of recommended medical treatment, employers are responsible for necessary prospective medical care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691

N.E.2d. 13 (1997). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 325 Ill. App. 3d 527, 758 N.E.2d 18 (2001).

The Petitioner underwent physical therapy and injections, which all failed to give sustained relief. Like Dr. Bradley, the Arbitrator is perplexed as to Dr. Nogalski's theory that surgery was not warranted because the Petitioner did not undergo physical therapy during Dr. Bradley's treatment. She already had physical therapy – 12 visits in a month's time – that did not resolve her symptoms. The Arbitrator notes that in his report, Dr. Nogalski stated that the Petitioner had no physical therapy. He later acknowledged that she did but persisted in his recommendation for it. For these reasons and those stated above, the Arbitrator gives Dr. Bradley's opinions greater weight than Dr. Nogalski's.

As noted above, there were gaps in the Petitioner's treatment, during which time she was working full duty with the assistance of her coworkers, the Arbitrator finds that it is not unusual for claimants to try to work through the symptoms and/or modify their activities – especially when a doctor (i.e. Dr. Nogalski) is saying they don't need surgery or work restrictions. The Petitioner's condition has not stabilized nor otherwise reached maximum medical improvement, and Dr. Bradley has recommended surgery to alleviate Petitioner's symptoms. The Petitioner finds this treatment plan to be reasonable and necessary.

Therefore, the Arbitrator finds that the Petitioner is entitled to prospective medical care as recommended by Dr. Bradley, and the Respondent shall authorize and pay for such care.

Issue (L): What temporary benefits are in dispute? (TTD)

The parties dispute temporary total disability benefits for the period of July 16, 2029, through December 4, 2019. An employee is temporarily totally incapacitated from the time an injury incapacitates him for work until such time as he is as far recovered or restored as the

permanent character of his injury will permit. *Archer Daniels Midland Co. v. Indus. Comm'n*, 138 Ill.2d 107, 118 (1990). The ability to do light or restricted work does not preclude a finding of temporary total disability. *Id.* at 121.

The physician assistant at the Orthopaedic Institute took the Petitioner off work starting July 16, 2019. She was given sedentary work restrictions beginning August 14, 2019. The Petitioner went back to work December 4, 2019, after Dr. Brown gave less stringent work restrictions on the request of the Petitioner. Dr. Nogalski found no reason for work restrictions following the August 7, 2019, MRI. For the reasons stated above, the Arbitrator gives little weight to Dr. Nogalski's opinions – especially in light of the Petitioner's continued symptoms after the MRI. Therefore, the Petitioner is entitled to temporary total disability benefits pursuant to Section 8(b) of the Act for 18 4/7 weeks, from July 28, 2019, through December 4, 2019.

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	22WC015001
Case Name	Ronald Eertmoed v. City of Peoria
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0046
Number of Pages of Decision	7
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Stephen Kelly
Respondent Attorney	Adam Casson

DATE FILED: 1/25/2024

/s/ Amylee Simonovich, 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

RONALD EERTMOED,

Petitioner,

vs. NO: 22 WC 15001

CITY OF PEORIA,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 16, 2023 is hereby affirmed and adopted.

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

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.

January 25, 2024
O121223
AHS/ldm
051

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC015001
Case Name	Ronald Eertmoed v. City of Peoria
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	4
Decision Issued By	Adam Hinrichs, Arbitrator

Petitioner Attorney	Stephen Kelly
Respondent Attorney	Adam Casson

DATE FILED: 6/16/2023

/s/Adam Hinrichs, Arbitrator

Signature

THE INTEREST RATE FOR THE WEEK OF JUNE 13, 2023 5.15%

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

Ronald Eertmoed
Employee/Petitioner

v.

City of Peoria
Employer/Respondent

Case # **22** WC **15001**

Consolidated cases: _____

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Adam Hinrichs**, Arbitrator of the Commission, in the city of **Peoria**, on **May 18, 2023**. By stipulation, the parties agree:

On the date of accident, **6/8/22**, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $**89,499.80**, and the average weekly wage was $**1,721.15**.

At the time of injury, Petitioner was **48** years of age, ***married*** with **0** dependent children.

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

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**. Respondent shall be given a full credit for any amounts paid under its group health insurance plan pursuant to Section 8(j).

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

The Petitioner testified that he began his employment with the City of Peoria as a firefighter 16 years ago. The Petitioner testified that his current rank is captain (AT 9). The Petitioner testified that his job duties include running medical and fire calls and being on the HAZMAT team (AT 9).

The Petitioner testified that he performs quarterly training running HAZMAT calls throughout the county. The Petitioner further testified that during HAZMAT training, he wears gear and specific suits that can weigh upwards of 100 lbs. (AT 10). The Petitioner testified that as a firefighter, he is exposed to extreme cold and hot exposures while performing his tasks (AT 11).

The Petitioner testified that prior to June 8, 2022, he did not suffer any type of dehydration or lightheadedness. The Petitioner was able to perform his job duties unrestricted leading up to June 8, 2022 (AT 12).

The Petitioner testified that on June 8, 2022, he was enduring a HAZMAT training scenario when his air device was getting low on air. The Petitioner testified that it felt like he was suffocating and had loss of oxygen. The Petitioner testified that another person at the site saw him struggling and helped him get out of the suit. The Petitioner testified that Engine 3 was called out to check his vitals. The Petitioner's blood pressure was high, and they instructed him to go to the hospital (AT 13).

The Petitioner testified that at the moment he was losing air, he felt his life could be at risk. The Petitioner further testified that he carries a pocketknife on him for that reason in case he needs to cut himself out of the suit (AT 14).

The Petitioner testified that he still sees his family doctor on a regular basis to keep an eye on his blood pressure. (AT 23) The Petitioner testified that his blood pressure was never an issue, prior to this work accident. (AT 24)

The Petitioner testified that he did not miss any work as a result of the accident (AT 16). The Petitioner testified that at the time of trial he becomes tired more easily (AT 17).

The Petitioner presented to UnityPoint Health Methodist on June 8, 2022. The Petitioner indicated to the medical staff that he had just finished a 24-hour shift and began a HAZMAT training session shortly after finishing his shift. The Petitioner presented with complaints of lightheadedness, dehydration, and fatigue. The Petitioner was released to the company doctor (PX 2).

The Petitioner followed up with the company doctor at OSF Occupational Health and was released (PX 3).

With regard to the issue of nature and extent, the Arbitrator notes that pursuant to Section 8.1b of the Act, for accidental injuries occurring after September 1, 2011, permanent partial disability shall be established using five enumerated criteria, with no single factor being the sole determinant of disability.

Per 820 ILCS 305/8.1b(b), the criteria to be considered are as follows: (i) the reported level of impairment pursuant to subsection (a) [AMA "Guides to the Evaluation of Permanent Impairment"]; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. Applying this standard to this claim, the Arbitrator makes the following findings listed below.

With regard to Sec. 8.1(b) (i); the Arbitrator notes that there was no impairment rating performed on the Petitioner in this case. The Arbitrator lends no weight to this factor.

With regard to Sec. 8.1(b) (ii); the occupation of the Petitioner, the Arbitrator notes that the Petitioner was employed by the Respondent as a Fire Fighter Engineer. The Arbitrator has considered this factor and lends it some weight.

With regard to Sec. 8.1(b) (iii); the Arbitrator notes that the Petitioner was 48 years old at the time of the injury. The Arbitrator has considered this factor and lends it some weight.

With regard to Sec. 8.1(b) (iv); the Petitioner did not lose earnings as a result of the work injury. The Arbitrator has considered this factor and lends it some weight.

With regard to Sec 8.1(b) (v); the Arbitrator notes that the Petitioner was diagnosed with lightheadedness, fatigue and diaphoresis. The Petitioner testified that he still sees his family doctor on a regular basis to keep an eye on his blood pressure, and that his blood pressure was never an issue, prior to this work accident. (AT 23-24) The Petitioner testified that he gets more tired post-accident than he did pre-accident. (AT 17) The Arbitrator has considered this factor and lends it some weight.

Based on the foregoing, the Arbitrator awards the Petitioner .5% loss of use of Petitioner's person as a whole.

ORDER

Respondent shall pay Petitioner the sum of $**937.11**/week for a further period of **2.5** weeks, as provided in Section **8(d)(2)** of the Act, because the injuries sustained caused a **.5% loss of use of the Petitioner's body as a whole.**

Per the stipulation of the parties, Respondent shall pay all outstanding reasonable, necessary and related medical bills from the date of the accident through the date of trial.

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

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

Signature of Arbitrator

June 16, 2023

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC014732
Case Name	Vincent T. Snyder v. Village of Bradley
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0047
Number of Pages of Decision	17
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	David Figlioli
Respondent Attorney	John Fassola

DATE FILED: 1/25/2024

/s/Carolyn Doherty, Commissioner

Signature

DISSENT

/s/ Christopher Harris, Commissioner

Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

VINCENT T. SNYDER,

Petitioner,

vs. NO: 21 WC 14732

VILLAGE OF BRADLEY,

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, causal connection, medical expenses, 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 modifies the Decision of the Arbitrator on the issue of occupational disease. Petitioner, as a COVID-19 first responder or front-line worker under section 1(g) of the Occupational Disease Act (Act), was rebuttably presumed to have contracted COVID-19 arising out of and in the course of the employment and that the injury or disease was causally connected to the hazards or exposures of the employee's first responder or front-line worker employment. See 820 ILCS 310/1(g)(1)(2) (West 2022). The Arbitrator found that Respondent failed to produce sufficient evidence to rebut the presumption under section 1(g)(3) of the Act, which provides:

> "(3) The presumption created in this subsection may be rebutted by evidence, including, but not limited to, the following:
>
> (A) the employee was working from his or her home, on leave from his or her employment, or some combination thereof, for a period of 14 or more consecutive days immediately prior to the

> employee's injury, occupational disease, or period of incapacity resulted from exposure to COVID-19; or
>
> (B) the employer was engaging in and applying to the fullest extent possible or enforcing to the best of its ability industry-specific workplace sanitation, social distancing, and health and safety practices based on updated guidance issued by the Centers for Disease Control and Prevention or Illinois Department of Public Health or was using a combination of administrative controls, engineering controls, or personal protective equipment to reduce the transmission of COVID-19 to all employees for at least 14 consecutive days prior to the employee's injury, occupational disease, or period of incapacity resulting from exposure to COVID-19. For purposes of this subsection, 'updated' means the guidance in effect at least 14 days prior to the COVID-19 diagnosis. For purposes of this subsection, 'personal protective equipment' means industry-specific equipment worn to minimize exposure to hazards that cause illnesses or serious injuries, which may result from contact with biological, chemical, radiological, physical, electrical, mechanical, or other workplace hazards. 'Personal protective equipment' includes, but is not limited to, items such as face coverings, gloves, safety glasses, safety face shields, barriers, shoes, earplugs or muffs, hard hats, respirators, coveralls, vests, and full body suits; or
>
> (C) the employee was exposed to COVID-19 by an alternate source." 820 ILCS 310/1(g)(3) (West 2022).

The Arbitrator also found that, assuming *arguendo* that Respondent had presented sufficient evidence to rebut the statutory presumption, it was more probable than not that the Petitioner contracted COVID-19 from his contacts with individuals both inside the police station and during his interactions with the general public while performing his job duties as a police officer, thus finding the claim compensable.

Initially, the Commission notes that the statutory COVID-19 presumption is an ordinary presumption, and that the employer need only introduce "some evidence" that the employee's occupation was not the cause of the injury or disease to rebut the presumption. "Some evidence" is defined as sufficient evidence to support a finding that something other than the claimant's occupation caused his condition. See *Johnston v. Illinois Workers' Compensation Commission*, 2017 Il App (2d) 160010WC ¶ 44. The Arbitrator relied on *Johnson*, just as Respondent has done in its Statement of Exceptions. The Arbitrator's later use of the phrase "sufficient evidence" should be understood as meaning evidence sufficient to meet the "some evidence" standard. In addition, the amount of evidence required to rebut an ordinary presumption is not determined by any fixed rule. See *Johnston*, 2017 Il App (2d) 160010WC ¶ 39.

The first issue is whether Respondent produced some evidence sufficient to rebut the

statutory presumption. The Commission finds that Respondent met this burden. Respondent relied on evidence within the scope of section 1(g)(3)(B) of the Act. The Arbitrator acknowledged that Respondent instituted policies, procedures, and training in an effort to minimize the risk of exposure to the COVID-19 virus, both in the police station and in the interactions with the general public, though the enforcement of these policies and procedures lessened as the pandemic continued into 2021. The language of the Act requires only evidence that an employer was "*to the best of its ability* applying industry-specific workplace sanitation, social distancing, and health and safety practices." (Emphasis added.) 820 ILCS 310/1(g)(3)(B) (West 2022). The employer also may submit evidence that it was "using a combination of administrative controls, engineering controls, *or personal protective equipment* to *reduce* the transmission of COVID-19 to all employees for at least 14 consecutive days prior to the employee's injury." (Emphases added.) *Id*. The Act addresses the minimization or reduction of the risk, not its elimination.

In finding that Respondent met its burden to rebut the presumption in this case, the Commission notes that Respondent submitted exhibits establishing that it instituted industry-specific policies based on CDC guidance to minimize the risk of contracting COVID-19, as well as industry-specific training on the subject which was completed by Petitioner. Lt. Mason testified that the department purchased UV light machines which were used periodically in the roll call room, and the roll call table was sanitized regularly. He stated that the department also had a fogging machine to kill anything airborne. Lt. Mason also testified that every officer was initially issued an N95 mask, but a shortage caused them to resort to KN95 masks, adding that the department also provided multiple cloth masks to officers, and had supplies of surgical masks, which was consistent with the CDC guidance regarding masking included in the exhibits. Compliance with these protocols was less than perfect and Lt. Mason testified that he and other supervisors had to remind officers to wear their masks on occasion. Petitioner testified that he was not disciplined for not wearing the goggles he was issued. He also testified that roll call meetings did not employ social distancing, although the meetings were short. The record suggests that the station was sanitized by staff in the morning, but otherwise perhaps once weekly. Nevertheless, given this record, the Commission concludes that Respondent produced some evidence to rebut the statutory presumption.

The remaining issue is whether, after Respondent rebutted the presumption, Petitioner proved by a preponderance of the evidence that his contracting COVID-19 arose out of and was in the course of his employment. The Commission finds that Petitioner met this burden of proof. An employee who contracts COVID-19 is not precluded from filing for compensation under this Act, even when the statutory presumption has been rebutted. See 820 ILCS 310/1(g)(9) (West 2022). Section 1(d) of the Act provides:

> "(d) In this Act the term "Occupational Disease" means a disease arising out of and in the course of the employment or which has become aggravated and rendered disabling as a result of the exposure of the employment. Such aggravation shall arise out of a risk peculiar to or increased by the employment and not common to the general public." 820 ILCS 310/1(d) (West 2022).

"Nothing in the statutory language requires proof of a direct causal connection." *Sperling v. Industrial Comm'n*, 129 Ill. 2d 416, 421 (1989). "[A] chain of events suggesting a causal connection may suffice to prove causation even if the etiology of the disease is unknown." *Consolidation Coal Co. v. Industrial Comm'n*, 265 Ill. App. 3d 830, 839 (1994). For example, in *Omron Electronics v. Illinois Workers' Compensation Comm'n*, 2014 IL App (1st) 130766WC, the Illinois Appellate Court affirmed the Commission's decision that the employee's special administrator proved that the employee had contracted Neisseria meningitides during his business trip to Brazil, based on evidence that there was an increased risk of contracting the disease in that country, rejecting the employer's argument that the special administrator did not present any evidence that the employee was exposed to a specific carrier of Neisseria meningitides or that he was in any crowded areas in Brazil where there might have been an increased risk of infection. See *id*. ¶¶ 40-48.

It is undisputed that Petitioner contracted COVID-19 manifesting on May 2, 2021. Petitioner testified that during two-week period prior to May 2, 2021, he lived only with his immediate family, none of whom experienced or exhibited any symptoms consistent with COVID-19 or tested positive for COVID-19. He also testified that other than working, his activities during this period were limited to driving his children to school in the morning, after which he would go home until it was time for work. Petitioner stated that he would go grocery shopping while wearing a mask. He testified without rebuttal that he "maybe" went out to eat and would wear a mask except while eating or drinking. Accordingly, the Commission concludes that during the two weeks prior to Petitioner's disease manifesting, there is minimal evidence that he could have contracted COVID-19 from an alternate source other than at work.

The Commission finds that the record establishes Petitioner's primary exposure to people or environments potentially infected with COVID-19, particularly persons not observing health and safety precautions, was through his work as a police officer. Most of Petitioner's work was outside the station, often in situations where health and safety protocols were not and could not be maintained. During the two-week period prior to May 2, 2021, Petitioner had contact with between 5 to 15 people on service calls during his shift, and performed between three and eight traffic stops per shift. Petitioner estimated that roughly half of the people he encountered wore personal protective equipment such as masks or gloves. Petitioner also testified that he would try to maintain a distance from other people during service calls, but that traffic stops often required him to be closer than six feet from other people. At the police station, Petitioner processed at least one unmasked DUI arrestee for between 30 to 90 minutes. Lt. Mason acknowledged that it was difficult to maintain social distancing when processing an arrestee, and the exhibits acknowledge that it would not always be possible to follow the COVID-19 protocols during police work. Although the statutory presumption was rebutted in this case, the statute itself reflects our government's judgment that COVID-19 first responders and front-line workers were subject to an elevated risk of contracting COVID-19 due to the essential nature of their work. See 820 ILCS 310/1(g)(2) (West 2022) (referring to individuals employed by essential operations required by their employment to encounter members of the general public during the pandemic period).

In short, despite Respondent's efforts to reduce the risk of COVID-19 transmission at the police station, the record is undisputed that most of Petitioner's work was performed outside the

station, including situations where social distancing could not be observed, as well as encounters with members of the public not using personal protective equipment. Moreover, as noted above, Respondent's enforcement of safety protocols within the station was not perfect and could not be perfect, due to the nature of the work. Most of Petitioner's work exposed him to the exact sort of risks of contracting COVID-19 contemplated by the Act and there is minimal evidence that he could have contracted the virus from an alternate source. Given this record, the Commission finds that Petitioner proved by a preponderance of the credible evidence that his COVID-19 infection arose out of and was in the course of his work as a police officer.

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 June 5, 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 the Respondent pay to Petitioner interest under Section 19(n) of the Act, if any.

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

Bond for the removal of this cause to the Circuit Court is hereby fixed at the sum of $7,100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

JANUARY 25, 2024
o: 12/21/23
CMD/kcb
045

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

/s/ *Marc Parker*
Marc Parker

DISSENT

I agree with the majority that the rebuttable presumption was successfully rebutted. The majority, however, argues that being a worker in front of the public is itself sufficient to prove that Petitioner potentially contracted Covid-19 at work without any additional evidence of exposure. The majority relies on *Omron Electronics* to support its finding of workplace exposure in the absence of any other evidence. However, in *Omron Electronics*, expert testimony was offered about the transmission of Neisseria meningitides, its symptoms, its increased prevalence in Sao Paolo, Brazil as compared to the United States, and that it was likely the decedent contracted the disease while in Sao Paolo. The Commission found the Petitioner's experts more persuasive in finding that the decedent was exposed to Neisseria meningitides during his business trip to Sao Paolo, Brazil. The Appellate Court affirmed noting that it is the function of

the Commission to judge the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence.

Unlike the Petitioner in *Omron Electronics*, the Petitioner in the present case did not provide a scintilla of evidence that he contracted Covid-19 from work. The evidence reflects that nobody in Petitioner's life during this period, whether at home or work, exhibited signs of being sick or were positive for Covid-19. As Petitioner's potential exposure to Covid-19 was not limited solely to his encounters at work, it is equally feasible that Petitioner contracted Covid-19 from his wife who was a teacher or his three children who attended school during this period.[1] As there is no evidence of workplace exposure, I find that Petitioner failed to prove that he was exposed to Covid-19 at work. Therefore, I respectfully dissent from the majority.

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

[1] Petitioner asserted at hearing that his wife and children did not test positive for Covid. At oral arguments, Petitioner's counsel could not confirm whether Petitioner's family had tested negative or were even tested at all.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC014732
Case Name	Vincent T. Snyder v. Village of Bradley
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	10
Decision Issued By	Jessica Hegarty, Arbitrator

Petitioner Attorney	David Figlioli
Respondent Attorney	John Fassola

DATE FILED: 6/5/2023

THE INTEREST RATE FOR THE WEEK OF MAY 31, 2023 5.29%

/s/ Jessica Hegarty, Arbitrator

Signature

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

☐ 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

Vincent T. Snyder
Employee/Petitioner

v.

Village of Bradley
Employer/Respondent

Case # **21** WC **014732**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jessica Hegarty**, Arbitrator of the Commission, in the city of **Joliet**, on **April 5, 2023**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute? 3
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other

FINDINGS

On **May 2, 2021**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $ **88,526.88** ; the average weekly wage was $ **1,702.44** .

On the date of accident, Petitioner was **34** years of age, ***married*** with **3** dependent children.

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

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

Respondent shall be given a credit of $241.96 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 $167,227.00 under Section 8(j) of the Act.

ORDER

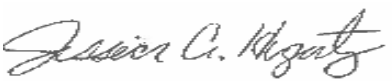
- Respondent shall pay Petitioner temporary partial disability benefits of $1,134.96 per week for a period of 5-4/7 weeks commencing May 6, 2021, through June 13, 2021, as provided for under Section 8(b) of the Act.

- Respondent shall pay to Petitioner reasonable and necessary medical services in the sum of $880.00, as provided in Section 8(a) and 8.2 of the Act. Respondent shall be given a credit of $167,227.11, under Section 8(j) of the Act, for medical benefits that have already been paid to medical providers on behalf of Petitioner for treatment of this work injury.

- Respondent shall hold the Petitioner harmless for any subrogation or reimbursement claim made by or on behalf of the group health insurance carrier.

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 5, 2023

Signature of Arbitrator

ADDENDUM TO THE DECISION OF THE ARBITRATOR

FINDINGS OF FACT

Petitioner's testimony

On May 2, 2021, Petitioner was a 33-year-old police officer employed by Respondent, the Village of Bradley, for just over nine years. (Arb. 1; TX. 6-7)

In April and May of 2021, Petitioner was assigned to the patrol division of the Bradley Police Department, second shift, which began at 2:45 pm and ended at 11:15 pm. During this period of time, Petitioner was in full police uniform, utilizing a police vehicle assigned by the department. (TX.11-12)

During the two-week period leading up to May 2, 2021, Petitioner had frequent contact with various individuals while performing his job duties. Such contact occurred while Petitioner responded to domestic disputes, performed welfare checks, while removing unwanted individuals from hotels and residences, during traffic accidents, and while executing warrants, (Id.,12-14) In addition, Petitioner came into contact with individuals while arresting people for various offenses including retail theft and DUI. Further, Petitioner made between 3 and 8 traffic stops per shift, during which, he came into contact with people. Petitioner estimated that he came into contact with 5 to 15 individuals per shift, during this two-week period, depending upon the call volume. Petitioner was not aware whether any of these individuals had tested positive for or contracted the COVID-19 virus. Petitioner estimated that about 50% of the individuals he came into contact with during this period wore personal protective equipment such as masks or gloves. (Id.,12-15)

Petitioner did wear a mask during this time period, issued by Respondent. He attempted to maintain a safe distance between himself and the various individuals he came into contact with although, under some circumstances, that was not possible. One such incident involved a DUI arrest on April 24, 2021, when Petitioner was in close proximity to an arrestee who refused to wear a mask while Petitioner processed the arrest in the booking room at the police department. According to Petitioner, he was unable to socially distance himself from this individual during the booking process which lasted between 30 and 90 minutes. (TX. 23-25, PX 8)

Three times per week, at the beginning of his shift, Petitioner was required to attend a roll call meeting in which four to eight officers would discuss various work-related topics. According to Petitioner, it was impossible to maintain social distancing during roll call, given the size of the room and the number of officers in attendance. (TX.16-18)

Early in the pandemic, the police department sent e-mails to the officers describing best practices in avoiding the COVID-19 virus. Officers were required to complete on-line training courses and personal protective equipment was provided to the officers including various types of masks, gloves, and goggles. Petitioner who had facial hair, testified he was not instructed on how to properly fit a mask over his bearded face. Petitioner never wore the goggles and was not disciplined for this practice. (Id.,18-21, 52-53)

The police department had a maintenance person who cleaned surfaces and items in the station, although Petitioner never observed this person cleaning anything during his afternoon shift. Bottles of sanitizing spray were placed around the police station so surfaces exposed to the public or officers could be sanitized. Petitioner was not aware of the frequency of this practice. (Id., 22-26)

On Sunday, May 2, 2021, Petitioner developed a fever. When he arrived home from work, Petitioner took some Tylenol and went to bed. Petitioner testified that at no time prior to that day had he experienced any symptoms consistent with the COVID-19 virus, nor had he contracted or tested positive for COVID-19. At that time, Petitioner was married with three children. His wife worked as a teacher. Petitioner testified that during two-week period prior to May 2, 2021, none of his children or his wife experienced or exhibited any symptoms consistent with COVID-19, nor did any of them test positive for COVID-19. Additionally, none of Petitioner's parents, in-laws, or other family members exhibited symptoms consistent with COVID-19 or tested positive for COVID-19 within this two-week period. (Id., 31-34) Further, other than working his shift for the police department, Petitioner's activities during this period were limited to driving his children to school in the morning, after which he would go home until it was time for work. Periodically, he would go grocery shopping and maybe out to eat. When engaging in these activities during that two-week period leading up to May 2, 2021, Petitioner wore a mask. (Id., 34-36)

On May 3, 2021, Petitioner went to work his regular shift but by the end of his shift, his fever worsened. He was off work for the next few days and tried to alleviate his symptoms with over-the-counter medication, to no avail. He developed a cough, along with the fever, and sought treatment from Midwest Express Clinic on May 7, 2021. The Petitioner declined COVID-19 testing at that time. He did not think he had contracted the virus and was given some antibiotics. (Id., 37-38, PX. 1) Over the next three days, Petitioner's fever and cough persisted, and he started to feel fatigued. On May 11, 2021, Petitioner's wife brought him to St. Mary's Hospital where he was admitted after testing positive for COVID-19. Petitioner was placed on a ventilator and administered various medications and therapy over the next eight days, before his discharge on May 19, 2021. (TX. 39-40; PX. 2) Petitioner followed up with an internist, Dr. Moparthi, and with a pulmonologist, Dr. Khanna, who monitored his breathing therapies and provided various medications. He last treated with Dr. Khanna on July 16, 2021, and with Dr. Moparthi in December 2021. (TX. 40-42, PX. 3 & 4)

Petitioner was off work from May 6, 2021, until he was released to light duty work by Dr. Moparthi, beginning June 14, 2021. (TX. 42, PX. 3, p. 57) During this period of time, he was paid his full salary but was required to utilize his accrued sick time, accumulated during his service time on the police department. This sick time could be utilized for any type of surgery or if his child had a doctor's appointment. Petitioner did not receive any workers' compensation benefits or Public Employee Disability Act benefits for his time off work. (TX. 42)

Petitioner's medical bills related to his COVID-19 diagnosis were paid by his group health insurance carrier although he paid a portion of these bills in deductibles and co-payments for office visits in the amount of $880.00. (TX. 45-46, PX. 5)

Petitioner is a member of the Fraternal Order of Police ("FOP") union. His yearly salary is determined by a collective bargaining agreement between the FOP and Respondent. In 2020 and 2021, the FOP and Respondent, were in the process of contract negotiations. Pursuant to the new contract, Petitioner received a retroactive pay raise of $3,098.65, and two payments of $2,250.00 for "hazard pay". (TX. 7-11, PX 6 & 7)

Testimony of Lieutenant Robert Mason

Respondent presented a witness, Lieutenant Robert Mason, a Commander on the Bradley Police Department, who has worked for the department for 20 years and was promoted to the position of Lieutenant in 2018.

At the beginning of the pandemic, Lt. Mason was the training coordinator for the department who assisted in disseminating the policies and guidelines to the officers regarding the use of personal protective equipment and other precautions to take when dealing with the public. Lt. Mason testified that over the next year, while the

pandemic was on-going, he and other supervisors would periodically remind officers to utilize the personal protective equipment, provided to them by the department. (TX. 66-70)

Lt Mason testified that he observed the maintenance person cleaning and sanitizing the various rooms and equipment in the police station on a regular basis. The department also purchased two UV light machines which were utilized periodically in the roll call room. (Id., 70-72) Lt. Mason identified the memorandums distributed to the officers and the training courses required by the officers to complete in the initial months of the pandemic. (TX.73-79; RX. 1- 5)

Lt. Mason agreed, during cross exam, that no one was brought into the station to train the officers on the proper use of a mask. Due to shortages in masks during the pandemic, N95 masks were not always available, so surgical masks were utilized. Lt. Mason confirmed that the maintenance person who clean the station worked from early morning until mid-afternoon and would not have been present in the late afternoon or evening when the Petitioner worked his shift. During these times, Lt. Mason or other supervisors would clean and sanitize the tables and equipment once per week. (TX. 80-84)

Lt. Mason recalled multiple instances when he had to remind officers who were not wearing masks in the station, to put their masks on. (Id., 85-86) He agreed that when an individual in custody was unwilling to wear a mask while being processed, they could not force that individual to do so. (Id., 86-87) Lastly, Lt. Mason testified that in March and April 2021, there were no department directives advising officers to limit the number of traffic stops they made or to limit their contact with individuals during investigations. (Id., 90)

CONCLUSIONS OF LAW

C. Whether Petitioner was last exposed to an occupational disease on May 2, 2021, that arose out of and in the course of his employment by Respondent?

On June 5, 2020, the Illinois Legislature amended the Occupational Diseases Act to provide benefits for certain classes of workers who may have contracted COVID-19 at the workplace. This amendment, contained in paragraph 1(g) of the Act, created a rebuttable presumption in favor of certain first responders and frontline workers. A first responder is defined as; "all individuals employed as police, fire personnel, emergency medical technicians, or paramedics." This COVID-19 presumption provides that any such worker that develops any injury or occupational disease that resulted from the exposure to a contraction of COVID-19, that "exposure and contraction shall be rebuttably presumed to have arisen out of and in the course of the employee's…employment."

In other words, exposure and contraction of the COVID-19 virus is presumed to have arisen from the work environment and the occupational disease is presumed to be causally connected to the hazards or exposures of employment. As such, it creates a *prima facie* case that the injury arose out of and in the course of the employment.

This presumption is applied retroactively to cases filed by qualified workers who contracted COVID-19 between March 9, 2020, through a sunset date of December 31, 2020. The presumption was later extended through June 30, 2021. For cases occurring on or before June 15, 2020, a worker must provide a confirmed medical diagnosis by a licensed medical practitioner or a positive laboratory test for COVID-19 or for COVID-19 antibodies. For cases occurring on or after June 15, 2020, the worker must provide a positive laboratory test for COVID-19 or for COVID-19 antibodies.

The COVID-19 presumption under the ODA is an ordinary presumption and the employer need only introduce some evidence that the employee's occupation was not the cause of the injury or disease. "Some evidence" is defined as sufficient evidence to support a finding that something other than the claimant's occupation caused his condition. *Kevin Johnston v. Illinois Workers' Compensation Commission, 2017 Il App (2d) 160010WC.* Section 1(g)(3) outlines the evidence an employer may present to rebut this presumption; 1) Showing that the claimant was working from home or leave from his or her employment for a period of 14 or more consecutive days immediately prior to the employee's injury or occupational disease diagnosis; or, 2) Demonstrating that the employer was engaging in and applying to the fullest extent possible or enforcing to the best of its ability, industry-specific workplace sanitation, social distancing, and health and safety practices based upon updated guidance issued by the CDC or the Illinois Department of Health, or using a combination of controls, or personal protective equipment to reduce the transmission of COVID-19 to all employees for at least 14 consecutive days prior to the employee's injury or occupational disease; or, 3) Presenting some evidence that the claimant contracted or was exposed to COVID-19 by an alternate source. If the employer presents sufficient evidence to rebut the presumption, the Petitioner will have to establish by a preponderance of the evidence, the COVID-19 disease was contracted at work.

In this case, the Petitioner developed his initial symptoms of COVID-19, a fever, on May 2, 2021. When his symptoms worsened, he presented to the emergency room at St. Mary's Hospital on May 11, 2021, he underwent testing for COVID-19. The lab results contained in Petitioner's treating records confirm that Petitioner tested positive for COVID-19 on May 11, 2021, prior to his admission for in-patient treatment. (PX. 2, p. 49, 64)

No evidence was presented that Petitioner was working from home or on leave from Respondent's facility for 14 or more consecutive days immediately prior to his development of symptoms consistent with COVID-19, on May 2, 2021. Petitioner testified that he performed his regular job duties as a police officer and worked his regular afternoon shift for the two-week period leading up to May 2, 2021. During this time, Petitioner interacted with various individual in the performance of his duties. Petitioner was present in the police station on numerous occasions in close contact with other officers and supervisors. No evidence was presented regarding an alternate source of exposure. Petitioner credibly testified that at no time prior to May 2, 2021, had he, or any members of his household, experienced any symptoms consistent with the COVID-19 virus nor had, or any members of his household, contracted or tested positive for COVID-19. Additionally, none of Petitioners family members such as parents or in-laws exhibited symptoms consistent with COVID-19 or tested positive for COVID-19 within this two-week period. Petitioner testified that his outside activities were limited to certain tasks during this two-week period leading up to May 2, 2012, during which, he always wore a mask.

The Arbitrator acknowledges that Respondent instituted various policies, procedures, and training in an effort to minimize the risk of exposure to the COVID-19 virus, both in the police station, and in the interactions between the police and the general public, however, the enforcement of these policies and procedures lessened as the pandemic continued into 2021. Moreover, the Arbitrator finds it nearly impossible to apply the "best practices" to reduce the transmission of the COVID-19 virus in some scenarios and situations in which Petitioner was forced to confront in the course of his duties.

Petitioner testified at length regarding the numerous instances in the two-week period leading up to May 2, 2021, in which he had contact with individuals who may have had the virus. Although he wore a mask during these activities, many of the citizens he came in contact with, did not wear masks or protective equipment, including the April 24, 2021, processing of a DUI arrestee in which Petitioner was in close proximity, unable to maintain a safe distance, to the mask-less individual for 30-90 minutes. During roll call, three times per week, social distancing was impossible to maintain given the number of officers attending and the size of the room.

Petitioner's testimony regarding the numerous instances involving his fellow officers not wearing their masks in the station was confirmed by Lt. Mason.

Based upon the preponderance of evidence contained in the record, it is clear that Respondent was unable to apply and enforce industry specific workplace sanitation, social distancing and health and safety practices to reduce the transmission of COVID-19 to all employees for at least 14 consecutive days prior to May 2, 2021. The Arbitrator finds Respondent has failed to produce sufficient evidence to rebut the presumption under Subsection (g)(3)(b).

The Arbitrator finds that the preponderance of evidence contained in the record establishes that Petitioner's COVID-19 condition arose out of and in the course of his employment for Respondent.

Assuming *arguendo* that Respondent had presented sufficient evidence to rebut the presumption provided in the ODA, the Arbitrator finds that Petitioner's credible, unrebutted testimony has established that in the two weeks leading up to his development of his COVID-19 symptoms on May 2, 2021, Petitioner had contact with numerous individuals who were not utilizing personal protective equipment and may have been diagnosed with the COVID-19 virus. Petitioner was also involved in numerous situations where proper social distancing was impossible to maintain such as when attending roll call, when attempting to defuse a domestic situation, or during the booking process in which Petitioner was in close contact with a DUI arrestee who refused to wear a mask.

Additionally, the evidence established that Respondent's sanitation procedures were not regular and consistent during Petitioner's shift. Lt. Mason agreed that the only maintenance person who performed the sanitation procedures did not work in the late afternoon or evening hours when the Petitioner might have been in the station performing various duties. Lt. Mason confirmed that on numerous occasions, he had to remind other officers to wear their masks when they were in the police station interacting with coworkers. This suggests that the officers were not complying with the department directive regarding the wearing of masks when interacting with other individuals.

Given the preponderance of evidence contained in the record, the Arbitrator finds that it is more probable than not that the Petitioner contracted COVID-19 from his contacts with individuals both inside the police station and during his interactions with the general public while performing his job duties as a police officer for the Respondent.

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

To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that he or she has suffered a disabling injury which arose out of and in the course of his or her employment. 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 Commission, 207 Ill. 2d 193 (2003).* Additionally, a chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury. *International Harvester v. Industrial Commission, 93 Ill.2d 59 (1982).*

Having already found that Petitioner's contraction of the COVID-19 virus arose out of and in the course of his employment, and there being no medical evidence submitted to show that Petitioner's condition of ill-being was from any other source, the Arbitrator finds that Petitioner's condition of ill-being is causally related to the work accident of May 2, 2021.

G. What were the Petitioner's earnings?

Petitioner's earnings in the year preceding his May 2, 2021, injury was $88,526.88 and his average weekly wage equaled $1,702.44. This calculation is based upon the unrebutted testimony of the Petitioner which is supported by the Employee Earnings History Report for the Village of Bradly and the contract between Petitioner's union and Respondent, submitted as Petitioner's Exhibits 6 & 7, respectively.

The Petitioner testified that his yearly salary is determined by a collective bargaining agreement between his union and Respondent. Pursuant to the April 29, 2021, contract terms, Petitioner received a retroactive pay raise and resulting check in the amount of $3,098.65. He also received an additional two payments in the amount of $2,250.00 for "hazard pay". These three payments were made to the Petitioner on April 29, 2021.

Since these three additional payments were paid to the Petitioner in the year preceding his May 2, 2021, work injury, they are included in his earnings for purposes of determining his average weekly wage pursuant to Section 10 of the Act. *Sylvester v. Industrial Commission, 197 Ill2d 225 (2001). See also, City of Chicago v. Industrial Commission, (Giuseppe Cianci), 331 Ill. App.3d 402, 770 N.E.2d 1208, (1st Dist. 2002).*

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

Consistent with the Arbitrator's findings with respect to accident and causation, the Arbitrator finds that the medical services provided to the Petitioner for treatment of his COVID-19 related symptoms, were reasonable and necessary. As such, Respondent is liable for payment of the disputed medical bills incurred by Petitioner for his COVID-19 related medical treatment, up to the date of the arbitration hearing, pursuant to the Medical Fee Schedule under Sections 8(a) and 8.2 of the Act.

Respondent shall reimburse Petitioner for the payments he made to the various medical providers totaling $880.00 as set forth in Petitioner's Exhibit #5.

Respondent, by agreement of the parties, shall receive credit for payments it has previously made to these various medical providers totaling $167,227.11 as outlined in Petitioner's Exhibit #5.

K. What temporary benefits are in dispute?

Consistent with the Arbitrator's findings with respect to accident and medical causation, the Arbitrator finds that the Petitioner is entitled to temporary total disability benefits for the time period commencing May 6, 2021, through June 13, 2021, a period of 5-4/7 weeks.

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

The Arbitrator finds that Petitioner has not sustained any degree of permanent disability as a result of contracting the COVID-19 virus. He is therefore not entitled to an award under Section 8(d)2 of the Act. By Petitioner's own admission, he has not seen any physician for COVID-19 related symptoms or issues since December 2021. He has been working full-duty as a police officer without difficulty since July 2021. The only physical difference he noticed after recovering from this disease is that he now has to take high blood pressure medication. However, he does not know if this high blood pressure condition resulted from the COVID-19 virus. The Arbitrator notes that no medical evidence was submitted to document any degree of permanent disability or on-going symptoms the Petitioner may be experiencing up to the date of the arbitration hearing.

N. Is Respondent due any credit?

The parties stipulated that the medical bills incurred by Petitioner as a result of his COVID-19 condition were paid by Petitioner's group health insurance carrier except for various co-payments and deductibles totaling $880.00. Given this, the Arbitrator finds that Respondent is due credit under Section 8(j) of the Act as set forth above in Section "J".

The amount of credit for payment of medical bills totals $167,227.11 as listed in Petitioner's Exhibit #5.

Additionally, Respondent shall hold the Petitioner harmless for any subrogation or reimbursement claim made by or on behalf of the group health insurance carrier.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	11WC041652
Case Name	Christopher Johnson v. Greyhound Lines, Inc.
Consolidated Cases	13WC023566;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0048
Number of Pages of Decision	15
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Steven Seidman
Respondent Attorney	Courtney Cronin

DATE FILED: 1/26/2024

/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

CHRISTOPHER JOHNSON,

Petitioner,

vs. NO: 11 WC 41652

GREYHOUND LINES, 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 permanent partial disability, permanent total disability, and penalties, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

This claim was consolidated with claim number 13 WC 23566 for purposes of the arbitration hearing and review before the Commission. A separate decision has been issued for claim 13 WC 23566. There is only one bond comprising both claims in the amount of $3,800.00 as both claims share the same award.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed March 3, 2023, is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $3,800.00. 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.

January 26, 2024
O: 1-18-24
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	11WC041652
Case Name	Christopher Johnson v. Greyhound Lines, Inc.
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	Antara Nath Rivera, Arbitrator

Petitioner Attorney	
Respondent Attorney	Courtney Cronin, Katharine Gainer

DATE FILED: 3/3/2023

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

/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

Christopher Johnson
Employee/Petitioner

v.

Greyhound Lines, Inc.
Employer/Respondent

Case # **11 WC 41652**

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 **January 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 **5/29/2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$21,048.56**; the average weekly wage was **$404.78**.

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

Petitioner ***has not*** received all reasonable and necessary medical services.

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

Respondent was previously given a credit for benefits paid in the Arbitrator's April 4, 2016 Decision, including **$38,153.07** for TTD and maintenance, **$357.43** for TPD, and **$3,002.40** for other benefits, for a total credit of **$41,512.90**.

Respondent was given a credit under Section 8(j) of the Act per the Arbitrator's prior decision.

ORDER

Respondent shall pay all reasonable and necessary medical services, incurred up to date, and related to Petitioner's contact dermatitis, pursuant to the medical fee schedule and as outlined in PX 2, PX 3, and RX 1 as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner PPD benefits of $253.00 per week for 175 weeks, because the injuries sustained caused a 35% loss of use of the person as provided in Section 8(d)2 of the Act.

Penalties and fees shall not be awarded as the Arbitrator notes that the Respondent's actions in this case were not unreasonable, vexatious, or without good cause.

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

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

Signature of Arbitrator

MARCH 3, 2023

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Christopher Johnson,	)	
	)	
Petitioner,	)	
v.	)	
	)	Case No. 11WC41652
Greyhound,	)	13WC23566
	)	
Respondent.	)	

PROCEDURAL BACKGROUND

This matter is being heard on a remand. This case was initially heard by Arbitrator Donald Steffenson on April 4, 2016. Arbitrator Steffenson denied all benefits and found that no causal connection existed between Petitioner's current condition of ill-being and the May 29, 2011, accident. (Arbitrator's Exhibit "AX" 2) Petitioner appealed this decision to the Commission.

On April 13, 2018, the Commission partially reversed the Arbitration decision and found that Petitioner suffered from an occupational disease, contact dermatitis, which stemmed from a work-related exposure. *Id*. However, the Commission denied the Petitioner's demand for vocational rehabilitation and maintenance benefits, finding that he failed to prove he was entitled to such benefits pursuant to the Act. *Id*. The Circuit Court affirmed the Commission's decision. Petitioner appealed to the Appellate Court.

On January 17, 2020, the Appellate Court found that the appeal was interlocutory and concluded that neither the Circuit Court, nor the Appellate Court had jurisdiction to consider Petitioner's appeals. The Appellate Court vacated the Circuit Court's Order and remanded the case back to the Commission. The Commission remanded the case to the Arbitrator for further proceedings to determine the issue of permanency. The parties presented for hearing on the issues of temporary total compensation, permanency, and penalties and fees, on January 11, 2023, before Arbitrator Antara Nath Rivera on Petitioner's Request for Hearing. (AX 1)

FINDINGS OF FACT

Petitioner's testimony

Christopher Johnson ("Petitioner") is a 60 year-old-male who testified that he was diagnosed with contact dermatitis, after being exposed to waste from a bus as a result of a work-related accident. (Transcript "T." 40; 53) Petitioner testified that he was exposed to waste and chemicals, on May 29, 2011, when he pulled the nozzle from the Greyhound bus he was working on. (T. 53; 59) He testified that the nozzle from the bus was held on by duct tape and not properly secured. *Id*. Petitioner testified that when he originally got splashed with the chemicals, the burn was on his ankle. (T. 21) Petitioner testified that his contact dermatitis, which he experienced from this work-related exposure, spread from his ankle to his face, behind his ears, and inside his nostril. *Id*. Petitioner testified that he also had contact dermatitis on his right shoulder, in his buttocks, in the shaft of his penis, and on his hands, specifically the small finger on his right hand. (T. 20-21) Petitioner testified that his symptoms included severe itching, rashes, burning, and dry skin. (T. 19) Petitioner testified that his pain was at a 4 out of 10, while testifying at the hearing. (T. 22) Petitioner testified that he has never experienced a day where his discomfort/pain level was 0; it would be 2 on a regular day. *Id*.

Petitioner testified that he wore cotton dress pants, a cotton dress shirt, and vinyl gloves, to the hearing, because he was not allergic to cotton. (T. 17-18) Petitioner testified that he was not feeling well, at the hearing, and stated that he was experiencing an upset stomach and sinus headache. (T. 18) Petitioner testified that his forehead and eyes were burning. (T. 19) Petitioner testified that he had dry skin in his nose as well as having difficulty breathing. *Id*. He testified that he takes spray medications and lays down to feel better. *Id*.

Petitioner testified that "just about everything" caused him to experience contact dermatitis pain and discomfort. (T. 23) Petitioner testified that he wears gloves in the house and wears a mask if he encountered anyone cleaning with solvents. *Id*. Petitioner testified that other household objects were a concern as well, including cooking utensils, stainless steel, and air fresheners. (T. 24) Petitioner also testified that he cannot have canned goods stored in stainless steel and must know what ingredients are in everything he eats. *Id*. Petitioner testified that he has to eat organic foods to ensure the antibiotics in the meat will not make him sick. (T. 30)

Petitioner testified that he suffered from insomnia since the work accident. (T. 25) He testified that his sleeping habits are different every day and that he usually goes to sleep when the sun comes up. (T. 29) He testified that he did not fall asleep until 3:00am the night before the hearing. *Id*. Petitioner also testified that he gets sick from smells from Lysol. Id. He testified that he had to go outside once because he got nauseous. *Id.* Petitioner testified that he recently became sick at a Thanksgiving dinner, when he experienced dizziness, difficulty breathing, and itching all over. (T. 25-26) Petitioner testified that breathing has become difficult as well. (T. 27) Petitioner testified that his doctors told him to deal with his symptoms as much as he could, but if he felt his throat was closing and couldn't swallow, he was to call 911. (T. 27)

Petitioner testified that he experiences panic attacks with accompanying shortness of breath, rapid heartbeat, nausea, dizziness and throat closing as a result of the contact dermatitis. (T. 65) Petitioner testified that he feels anxiety as a result of his condition as well as knowledge that his immune system changed permanently. *Id*. Petitioner testified that the reason being is that things that did not bother him before do bother him now and will for the rest of his life. *Id*.

Petitioner testified that he had been prescribed ointments since 2016 and while it makes him feel better temporarily, it does not take away the pain. (T. 27-28) Petitioner described itching and burning that is present every day, which affects his sleep severely (T. 28) Petitioner also testified that that his marriage has been affected by this. (T. 29) He testified that his wife gives him a heads up when she is cleaning so that he can go outside. (T. 29-30) Petitioner testified that even if he's in the store, and smells chemicals, he has to leave to go outside because he needs to get air. (T. 31) He also testified that he was concerned with a possible severe allergic reaction from the chair he was sitting on in the trial room because he could have a severe allergic reaction to the metal on it. (T. 32) Petitioner testified that he was not supposed to touch keys or keep change in his pocket. *Id.* Petitioner testified that he would break out when using a metal shaving razor and experienced burning because the contact dermatitis moved to his face. (T. 34)

Petitioner testified that he does not receive "active medical care" for his contact dermatitis, nor does he have plans to see any in the future, because he was told there was nothing they could do and that he had to live with this condition. (T. 35) Petitioner testified that his physician told him to put Vaseline in his nose for the nasal issues but that made it hard to breathe. *Id*. Petitioner also testified that he the doctors advised him that to go the emergency room when and if he had problems breathing or chest pains. (T. 40) Petitioner testified that there was no cure for his condition. *Id*.

The Petitioner testified that the only restriction he was given by his doctor was to wear gloves in the workplace (T. 57; 62-63) Petitioner testified that after the 2011 work accident, he went back to work and used vinyl gloves. (T. 60) He testified that, despite wearing vinyl gloves, he still had an allergic reaction. (T. 61; 70) Petitioner testified that he told his manager, Dave Ortega, about the allergic reaction. *Id*. Petitioner testified that in order to return to work again, he was told to go to Respondent's physician and get cleared. (T. 62) Petitioner testified that he wasn't cleared because he was given additional restrictions which were to avoid four chemicals: cobalt, chloride, carba mix, nickel sulfate, and thiuram mix. (T. 63) Petitioner testified that when he wears vinyl gloves now, it helps a little but not much because he still gets allergic reactions. (T. 70) Petitioner testified that he cannot wear rubber gloves because it would be dangerous for him. *Id*. Petitioner testified that he was currently suffering from an active allergic reaction on his small finger of his right hand[1]. (T. 21)

[1] At the hearing, Petitioner took three photographs of his left and right hands and submitted them into evidence. (PX 6)

Petitioner testified that he had not worked since the April 4, 2016, hearing. (T.17) Petitioner testified that he applied for and obtained Social Security Disability benefits as a result of his contact dermatitis. (T. 35-36) Petitioner testified that his highest level of education is high school. (T. 38-39) Petitioner's work history has consistently been a laborer type job. (Petitioner's Exhibit ("PX" 5) Petitioner testified that he spoke to Edward Pagella and Susan Entenberg, both vocational rehabilitation experts. (T. 36-37) Records indicated that Petitioner reported that his wage was $11.50 per hour in 2008. (PX 1 at 6) Petitioner testified that he applied for jobs, but did not apply to remote jobs. (T. 59)

Summary of Medical Records

Petitioner testified that his primary care physician is Dr. Prabhakar Parikh, that one of his dermatologists was Dr. Kastytis Jucas, and that he was diagnosed with contact dermatitis by Dr. Mary Martini. (T. 53-54) Petitioner testified that he has not sought treatment from Dr. Jucas nor Dr. Martini since 2016. (T. 54) Petitioner testified that he received treatment from Dr. Parikh for contact dermatitis, hypertension, reflux disorder, high cholesterol, and other illnesses, like COVID after 2016. (T. 55)

On February 2, 2018, Dr. Parikh diagnosed Petitioner with allergic rhinitis. (PX 2 at 13) Petitioner was advised to take Zyrtec and Robitussin DM instructed to follow up with his dermatologist. *Id*. Medical records confirmed that Petitioner was allergic to carbamates, thiuram, cobalt, nickel, mixed dialkyl thioureas, and latex/natural rubber, and that his reaction was noted to be a skin rash on the contact area. (PX 2 at 14)

On August 15, 2018, Petitioner returned to Dr. Parikh for an allergic reaction/rash on his nose, face, and behind both ears, which had been present for 5 days. (PX 2 at 20-24) Petitioner reported burning and itching sensations. *Id*. Petitioner also complained of a headache, stuffy nose, and chest pain. *Id*. Dr. Parikh noted some redness around the nose and hyperpigmented rashes behind the ears. *Id*. Petitioner was diagnosed with idiopathic urticaria and prescribed cetirizine and hydrocortisone cream and was instructed to follow up with the dermatologist if his condition worsened. *Id*.

On April 10, 2019, Petitioner presented to Dr. Parikh. (PX 2 at 25-30) Petitioner complained of a sensation of burning skin around his nose, forehead, and ears for a few days and itching on the face. *Id*. Dr. Parikh noted that there was scattered hyperpigmented rash on his face with some scaly skin. *Id*. Dr. Parikh diagnosed Petitioner with idiopathic urticaria. *Id*. Petitioner was prescribed Hydrocortisone cream, Zyrtec, and Ranitidine. *Id*. Petitioner was referred to see a dermatologist if his condition failed to improve in two weeks. *Id*.

On September 4, 2019, Petitioner returned to Dr. Parikh with complaints of a cough, congestion, runny nose, and sneezing for the prior two weeks. (PX 2 at 31-36) Dr. Parikh addressed Petitioner's diagnosis of allergic rhinitis/bronchitis and advised Petitioner to take Zyrtec, Robitussin DM, and Cetirizine. *Id*. Petitioner was also given Ranitidine HCl for idiopathic urticaria and referred to a dermatologist. *Id.*

On March 18, 2020, Petitioner presented to Dr. Parikh for sinus congestion, headache, and a nosebleed. (PX 2 at 37-42) Dr. Parikh diagnosed Petitioner with epistaxis, or dry nose, and recommended he apply Vaseline and use a humidifier and again advised to see a dermatologist. *Id*.

On January 7, 2021, Petitioner presented to Dr. Parikh for his annual check-up. (PX 2 at 55-60) Petitioner complained of sinus pressure and stuffiness, burning in his eyes, upset stomach. *Id.* Petitioner was diagnosed with allergic rhinitis and advised to take Claritin, Flonase, and Robitussin DM. (PX 2 at 61-67)

Petitioner testified that he tried to get in touch with Dr. Martini as well as Dr. Jucas, both dermatologists, with no luck. (T. 56) Petitioner testified that he has not seen any dermatologists or allergists. (T. 56-57)

Testimony of Susan Entenberg

Ms. Entenberg testified that she has been a certified vocational rehabilitation counselor for 45 years and is currently licensed by the State of Illinois as a Licensed Clinical Professional Counselor. (T. 73-74; PX 5) Ms. Entenberg testified that, in the area workers' compensation, she handles predominantly Petitioner's cases. (T. 75)

Ms. Entenberg testified that, after evaluating Petitioner, she opined that there was no reasonable stable labor market for Petitioner. (T. 77) Ms. Entenberg testified that she concluded this based on a combination of his age of 60, his high school education, his work history, his transferrable skills, his lack of computer skills and office skills, and his medical limitations. (T. 77-80) Ms. Entenberg opined that Petitioner did not have transferrable skills because a bus cleaner which was considered an unskilled job. (T. 78) Ms. Entenberg also testified that Petitioner's other jobs were maintenance types of jobs such as cleaning, painting, assembly, and mail sorting were considered low end semi-skilled jobs with no transferable skills "especially give the limitations that he has." (T. 79) Ms. Entenberg testified that Petitioner lacks technology skills as witnessed by her when she set up a zoom call with Petitioner. (T. 79-80) She testified that she "worked with him quite awhile trying to get him on to it. And he just wasn't able to do it." (T. 80)

Ms. Entenberg testified that she reviewed the opinions of Edward Pagella, however, did not rely on his opinions. (T. 81) Ms. Entenberg testified that she relied on Petitioner's medical records, the treating physician's restrictions, and the transferrable skills analysis that was done by Genex. *Id*. Ms. Entenberg testified that she disagreed with Genex when they opined that Petitioner had skills in customer service and leadership. (T. 81-82)

Ms. Entenberg also testified that, in 2013, Petitioner would have been 10 years younger, and that it would have been easier for him to find a job at that time based on his age. (T. 84) Ms. Entenberg

testified that Petitioner did demonstrate an ability to find work on his own based on his past employment. (T. 99) Ms. Entenberg testified that Petitioner did not mention looking for other employment. (T. 84) Ms. Entenberg testified that that there wasn't a physician who had stated the Petitioner was unable to go back to work because of the allergens. (T. 92)

Ms. Entenberg testified that she is familiar with ADA accommodations. (T. 93) Ms. Entenberg testified that when it comes to getting time off from work, there cannot be an undue burden placed on the employer to provide reasonable accommodations. (T. 93-94) Ms. Entenberg testified that when Petitioner travels on trains and buses, he avoided metals and fragrances by wearing masks and gloves. (T. 96) Ms. Entenberg testified that Petitioner said while Petitioner does not know how to type, he can use internet and basic email. (T. 96-97) Ms. Entenberg testified that while Petitioner worked for Xerox, in the 1980's, most of that training and work experience is obsolete in this day and age. (T. 98) Ms. Entenberg opined that Petitioner demonstrated the ability to find employment as he was employed in the past and worked. (T. 99)

CONCLUSIONS OF LAW

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

Decisions of an Arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e) The burden of proof is on a claimant to establish the elements of his right to compensation, and unless the evidence considered in its entirety supports a finding that the injury resulted from a cause connected with the employment, there is no right to recover. *Board of Trustees v. Industrial Commission,* 44 Ill. 2d 214 (1969)

Credibility is the quality of a witness which renders his evidence worthy of belief. The Arbitrator, whose province it is to evaluate witness credibility, evaluates the demeanor of the witness and any external inconsistencies with his testimony. Where a claimant's testimony is inconsistent with his actual behavior and conduct, the Commission has held that an award cannot stand. *McDonald v. Industrial Commission,* 39 Ill. 2d 396 (1968); *Swift v. Industrial Commission,* 52 Ill. 2d 490 (1972)

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

In the case at hand, Arbitrator Nath Rivera observed Petitioner during the hearing and finds him be a credible witness. Petitioner was calm, well-mannered, composed, and spoke clearly. The Arbitrator

compared Petitioner's testimony with the totality of the evidence submitted and did not find any material contradictions that would deem the witness unreliable.

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

The Arbitrator finds that the medical treatment and services provided through April 11, 2022, which pertained to contact dermatitis, were reasonable, necessary and related to the May 29, 2011, incident. The Arbitrator notes that the issue of an award of medical bills was reserved by Respondent in its defenses for the payment of medical bills by the group health carrier. (AX 1 line 7)

Thus, the Arbitrator finds that Respondent shall pay all reasonable and necessary medical services, incurred up to date, and related to Petitioner's contact dermatitis, pursuant to the medical fee schedule and as outlined in PX 2, PX 3, and Respondent's Exhibit ("RX") 1 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:

Evidence pertaining to the record made in the instant proceedings as well as the first arbitration demonstrate that as of April 4, 2016, Petitioner was at maximum medical improvement. As a consequence thereof, the Arbitrator finds that no award for temporary total disability benefits is appropriate.

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

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

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

be explained in a written order.

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

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that Petitioner was employed as a bus cleaner/service worker for Greyhound Lines at the time of the accident. (PX 2) The Arbitrator notes that Petitioner's employment with Respondent was terminated in 2013. As such, the Arbitrator gives greater weight to this factor.

With regard to subsection (iii) of §8.1b(b), the age of the employee at the time of the injury, the Arbitrator notes that Petitioner was 49 years old at the time of the accident. (AX 1, line 6) As such, the Arbitrator gives lesser weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that Petitioner's earnings in 2008 was $11.50, but that there was no additional evidence presented about future earning capacity. The Arbitrator notes that Petitioner has not returned to work nor presented evidence that he, himself, applied for jobs which could accommodate his restrictions. (T. 59) (PX 1) The Arbitrator gives lesser 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 contact dermatitis, after being exposed to waste from a bus as a result of a work-related accident. (AX 2; T. 40; 53) The Arbitrator notes that Petitioner testified that his contact dermatitis spread from his ankle to his face, behind his ears, and inside his nostril. (T. 18) Petitioner testified that his forehead and eyes burned, that he had dry skin in his nose, and that he had difficulty breathing. (T. 19) The Arbitrator notes that Petitioner testified that he had contact dermatitis on his right shoulder, in his buttocks, in the shaft of his penis, and on his hands, specifically the small finger on his right hand. (T. 20-21) During the hearing, the Arbitrator observed small dark area of skin, noted over the small finger of the right hand. (PX 6) The Arbitrator notes that Petitioner experienced physical and mental debilitations, limitations, and pain for the last few years as a result of the contact dermatitis. (T. 65; PX 2)

The Arbitrator further notes that while Dr. Parikh diagnosed Petitioner with rhinitis, Dr. Parikh repeatedly instructed Petitioner to follow up with his dermatologist if his condition worsened. (PX 2) The Arbitrator notes that while Petitioner testified that there was no cure for his condition, Petitioner testified that he does not receive "active medical care" for his contact dermatitis, nor does he have plans to see any in the future, because he was told there was nothing they could do and that he had to live with this condition. (T. 35) The Arbitrator notes that Petitioner previously presented to dermatologists, Dr. Martini and Dr. Jucas. The Arbitrator notes that while Petitioner testified that he "tried to get in touch

with Dr. Jucas" there is no evidence Petitioner followed up with a dermatologist per Dr. Parikh's instructions that he go to a dermatologist if his condition got worse. Therefore, the Arbitrator gives greater weight to this factor.

While the Arbitrator heard the testimony of Ms. Entenberg, the Arbitrator noted that Petitioner failed to present evidence of Petitioner's own efforts to find a job that would accommodate his restriction. Thus, the Arbitrator finds that Petitioner failed to prove he falls into the "odd-lot" category of permanent and total disability as set forth in Section 8(f) of the Act.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Respondent shall pay Petitioner PPD benefits of $253.00 per week for 175 weeks, because the injuries sustained caused a 35% loss of use of the person as provided in Section 8(d)2 of the Act.

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

The Arbitrator notes that the Respondent's actions in this case were not unreasonable, vexatious, or without good cause and, therefore, penalties and fees shall not be awarded.

It is so ordered:

Arbitrator Antara Nath Rivera

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	13WC023566
Case Name	Christopher Johnson v. Greyhound Lines, Inc.
Consolidated Cases	11WC041652
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0049
Number of Pages of Decision	15
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Steven Seidman
Respondent Attorney	Courtney Cronin

DATE FILED: 1/26/2024

/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

CHRISTOPHER JOHNSON,

Petitioner,

vs. NO: 13 WC 23566

GREYHOUND LINES, 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 permanent partial disability, permanent total disability, and penalties, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

This claim was consolidated with claim number 11 WC 41652 for purposes of the arbitration hearing and review before the Commission. A separate decision has been issued for claim 11 WC 41652. There is only one bond comprising both claims in the amount of $3,800.00 as both claims share the same award.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed March 3, 2023, is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $3,800.00. 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.

January 26, 2024

O: 1-18-24
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	13WC023566
Case Name	Christopher Johnson v. Greyhound Lines, Inc.
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	Antara Nath Rivera, Arbitrator

Petitioner Attorney	
Respondent Attorney	Katharine Gainer, Courtney Cronin

DATE FILED: 3/3/2023

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

/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

Christopher Johnson
Employee/Petitioner

v.

Greyhound Lines, Inc.
Employer/Respondent

Case # **13 WC 23566**

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 **January 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 **5/29/2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$21,048.56**; the average weekly wage was **$404.78**.

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

Petitioner ***has not*** received all reasonable and necessary medical services.

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

Respondent was previously given a credit for benefits paid in the Arbitrator's April 4, 2016 Decision, including **$38,153.07** for TTD and maintenance, **$357.43** for TPD, and **$3,002.40** for other benefits, for a total credit of **$41,512.90**.

Respondent was given a credit under Section 8(j) of the Act per the Arbitrator's prior decision.

ORDER

Respondent shall pay all reasonable and necessary medical services, incurred up to date, and related to Petitioner's contact dermatitis, pursuant to the medical fee schedule and as outlined in PX 2, PX 3, and RX 1 as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner PPD benefits of $253.00 per week for 175 weeks, because the injuries sustained caused a 35% loss of use of the person as provided in Section 8(d)2 of the Act.

Penalties and fees shall not be awarded as the Arbitrator notes that the Respondent's actions in this case were not unreasonable, vexatious, or without good cause.

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

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

MARCH 3, 2023

Signature of Arbitrator

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Christopher Johnson,	)	
	)	
Petitioner,	)	
v.	)	
	)	Case No. 11WC41652
Greyhound,	)	13WC23566
	)	
Respondent.	)	

PROCEDURAL BACKGROUND

This matter is being heard on a remand. This case was initially heard by Arbitrator Donald Steffenson on April 4, 2016. Arbitrator Steffenson denied all benefits and found that no causal connection existed between Petitioner's current condition of ill-being and the May 29, 2011, accident. (Arbitrator's Exhibit "AX" 2) Petitioner appealed this decision to the Commission.

On April 13, 2018, the Commission partially reversed the Arbitration decision and found that Petitioner suffered from an occupational disease, contact dermatitis, which stemmed from a work-related exposure. *Id*. However, the Commission denied the Petitioner's demand for vocational rehabilitation and maintenance benefits, finding that he failed to prove he was entitled to such benefits pursuant to the Act. *Id*. The Circuit Court affirmed the Commission's decision. Petitioner appealed to the Appellate Court.

On January 17, 2020, the Appellate Court found that the appeal was interlocutory and concluded that neither the Circuit Court, nor the Appellate Court had jurisdiction to consider Petitioner's appeals. The Appellate Court vacated the Circuit Court's Order and remanded the case back to the Commission. The Commission remanded the case to the Arbitrator for further proceedings to determine the issue of permanency. The parties presented for hearing on the issues of temporary total compensation, permanency, and penalties and fees, on January 11, 2023, before Arbitrator Antara Nath Rivera on Petitioner's Request for Hearing. (AX 1)

FINDINGS OF FACT

Petitioner's testimony

Christopher Johnson ("Petitioner") is a 60 year-old-male who testified that he was diagnosed with contact dermatitis, after being exposed to waste from a bus as a result of a work-related accident. (Transcript "T." 40; 53) Petitioner testified that he was exposed to waste and chemicals, on May 29, 2011, when he pulled the nozzle from the Greyhound bus he was working on. (T. 53; 59) He testified that the nozzle from the bus was held on by duct tape and not properly secured. *Id*. Petitioner testified that when he originally got splashed with the chemicals, the burn was on his ankle. (T. 21) Petitioner testified that his contact dermatitis, which he experienced from this work-related exposure, spread from his ankle to his face, behind his ears, and inside his nostril. *Id*. Petitioner testified that he also had contact dermatitis on his right shoulder, in his buttocks, in the shaft of his penis, and on his hands, specifically the small finger on his right hand. (T. 20-21) Petitioner testified that his symptoms included severe itching, rashes, burning, and dry skin. (T. 19) Petitioner testified that his pain was at a 4 out of 10, while testifying at the hearing. (T. 22) Petitioner testified that he has never experienced a day where his discomfort/pain level was 0; it would be 2 on a regular day. *Id*.

Petitioner testified that he wore cotton dress pants, a cotton dress shirt, and vinyl gloves, to the hearing, because he was not allergic to cotton. (T. 17-18) Petitioner testified that he was not feeling well, at the hearing, and stated that he was experiencing an upset stomach and sinus headache. (T. 18) Petitioner testified that his forehead and eyes were burning. (T. 19) Petitioner testified that he had dry skin in his nose as well as having difficulty breathing. *Id*. He testified that he takes spray medications and lays down to feel better. *Id*.

Petitioner testified that "just about everything" caused him to experience contact dermatitis pain and discomfort. (T. 23) Petitioner testified that he wears gloves in the house and wears a mask if he encountered anyone cleaning with solvents. *Id*. Petitioner testified that other household objects were a concern as well, including cooking utensils, stainless steel, and air fresheners. (T. 24) Petitioner also testified that he cannot have canned goods stored in stainless steel and must know what ingredients are in everything he eats. *Id*. Petitioner testified that he has to eat organic foods to ensure the antibiotics in the meat will not make him sick. (T. 30)

Petitioner testified that he suffered from insomnia since the work accident. (T. 25) He testified that his sleeping habits are different every day and that he usually goes to sleep when the sun comes up. (T. 29) He testified that he did not fall asleep until 3:00am the night before the hearing. *Id*. Petitioner also testified that he gets sick from smells from Lysol. Id. He testified that he had to go outside once because he got nauseous. *Id.* Petitioner testified that he recently became sick at a Thanksgiving dinner, when he experienced dizziness, difficulty breathing, and itching all over. (T. 25-26) Petitioner testified that breathing has become difficult as well. (T. 27) Petitioner testified that his doctors told him to deal with his symptoms as much as he could, but if he felt his throat was closing and couldn't swallow, he was to call 911. (T. 27)

Petitioner testified that he experiences panic attacks with accompanying shortness of breath, rapid heartbeat, nausea, dizziness and throat closing as a result of the contact dermatitis. (T. 65) Petitioner testified that he feels anxiety as a result of his condition as well as knowledge that his immune system changed permanently. *Id*. Petitioner testified that the reason being is that things that did not bother him before do bother him now and will for the rest of his life. *Id*.

Petitioner testified that he had been prescribed ointments since 2016 and while it makes him feel better temporarily, it does not take away the pain. (T. 27-28) Petitioner described itching and burning that is present every day, which affects his sleep severely (T. 28) Petitioner also testified that that his marriage has been affected by this. (T. 29) He testified that his wife gives him a heads up when she is cleaning so that he can go outside. (T. 29-30) Petitioner testified that even if he's in the store, and smells chemicals, he has to leave to go outside because he needs to get air. (T. 31) He also testified that he was concerned with a possible severe allergic reaction from the chair he was sitting on in the trial room because he could have a severe allergic reaction to the metal on it. (T. 32) Petitioner testified that he was not supposed to touch keys or keep change in his pocket. *Id.* Petitioner testified that he would break out when using a metal shaving razor and experienced burning because the contact dermatitis moved to his face. (T. 34)

Petitioner testified that he does not receive "active medical care" for his contact dermatitis, nor does he have plans to see any in the future, because he was told there was nothing they could do and that he had to live with this condition. (T. 35) Petitioner testified that his physician told him to put Vaseline in his nose for the nasal issues but that made it hard to breathe. *Id*. Petitioner also testified that he the doctors advised him that to go the emergency room when and if he had problems breathing or chest pains. (T. 40) Petitioner testified that there was no cure for his condition. *Id*.

The Petitioner testified that the only restriction he was given by his doctor was to wear gloves in the workplace (T. 57; 62-63) Petitioner testified that after the 2011 work accident, he went back to work and used vinyl gloves. (T. 60) He testified that, despite wearing vinyl gloves, he still had an allergic reaction. (T. 61; 70) Petitioner testified that he told his manager, Dave Ortega, about the allergic reaction. *Id*. Petitioner testified that in order to return to work again, he was told to go to Respondent's physician and get cleared. (T. 62) Petitioner testified that he wasn't cleared because he was given additional restrictions which were to avoid four chemicals: cobalt, chloride, carba mix, nickel sulfate, and thiuram mix. (T. 63) Petitioner testified that when he wears vinyl gloves now, it helps a little but not much because he still gets allergic reactions. (T. 70) Petitioner testified that he cannot wear rubber gloves because it would be dangerous for him. *Id*. Petitioner testified that he was currently suffering from an active allergic reaction on his small finger of his right hand[1]. (T. 21)

[1] At the hearing, Petitioner took three photographs of his left and right hands and submitted them into evidence. (PX 6)

Petitioner testified that he had not worked since the April 4, 2016, hearing. (T.17) Petitioner testified that he applied for and obtained Social Security Disability benefits as a result of his contact dermatitis. (T. 35-36) Petitioner testified that his highest level of education is high school. (T. 38-39) Petitioner's work history has consistently been a laborer type job. (Petitioner's Exhibit ("PX" 5) Petitioner testified that he spoke to Edward Pagella and Susan Entenberg, both vocational rehabilitation experts. (T. 36-37) Records indicated that Petitioner reported that his wage was $11.50 per hour in 2008. (PX 1 at 6) Petitioner testified that he applied for jobs, but did not apply to remote jobs. (T. 59)

Summary of Medical Records

Petitioner testified that his primary care physician is Dr. Prabhakar Parikh, that one of his dermatologists was Dr. Kastytis Jucas, and that he was diagnosed with contact dermatitis by Dr. Mary Martini. (T. 53-54) Petitioner testified that he has not sought treatment from Dr. Jucas nor Dr. Martini since 2016. (T. 54) Petitioner testified that he received treatment from Dr. Parikh for contact dermatitis, hypertension, reflux disorder, high cholesterol, and other illnesses, like COVID after 2016. (T. 55)

On February 2, 2018, Dr. Parikh diagnosed Petitioner with allergic rhinitis. (PX 2 at 13) Petitioner was advised to take Zyrtec and Robitussin DM instructed to follow up with his dermatologist. *Id*. Medical records confirmed that Petitioner was allergic to carbamates, thiuram, cobalt, nickel, mixed dialkyl thioureas, and latex/natural rubber, and that his reaction was noted to be a skin rash on the contact area. (PX 2 at 14)

On August 15, 2018, Petitioner returned to Dr. Parikh for an allergic reaction/rash on his nose, face, and behind both ears, which had been present for 5 days. (PX 2 at 20-24) Petitioner reported burning and itching sensations. *Id*. Petitioner also complained of a headache, stuffy nose, and chest pain. *Id*. Dr. Parikh noted some redness around the nose and hyperpigmented rashes behind the ears. *Id*. Petitioner was diagnosed with idiopathic urticaria and prescribed cetirizine and hydrocortisone cream and was instructed to follow up with the dermatologist if his condition worsened. *Id*.

On April 10, 2019, Petitioner presented to Dr. Parikh. (PX 2 at 25-30) Petitioner complained of a sensation of burning skin around his nose, forehead, and ears for a few days and itching on the face. *Id*. Dr. Parikh noted that there was scattered hyperpigmented rash on his face with some scaly skin. *Id*. Dr. Parikh diagnosed Petitioner with idiopathic urticaria. *Id*. Petitioner was prescribed Hydrocortisone cream, Zyrtec, and Ranitidine. *Id*. Petitioner was referred to see a dermatologist if his condition failed to improve in two weeks. *Id*.

On September 4, 2019, Petitioner returned to Dr. Parikh with complaints of a cough, congestion, runny nose, and sneezing for the prior two weeks. (PX 2 at 31-36) Dr. Parikh addressed Petitioner's diagnosis of allergic rhinitis/bronchitis and advised Petitioner to take Zyrtec, Robitussin DM, and Cetirizine. *Id*. Petitioner was also given Ranitidine HCl for idiopathic urticaria and referred to a dermatologist. *Id.*

On March 18, 2020, Petitioner presented to Dr. Parikh for sinus congestion, headache, and a nosebleed. (PX 2 at 37-42) Dr. Parikh diagnosed Petitioner with epistaxis, or dry nose, and recommended he apply Vaseline and use a humidifier and again advised to see a dermatologist. *Id*.

On January 7, 2021, Petitioner presented to Dr. Parikh for his annual check-up. (PX 2 at 55-60) Petitioner complained of sinus pressure and stuffiness, burning in his eyes, upset stomach. *Id.* Petitioner was diagnosed with allergic rhinitis and advised to take Claritin, Flonase, and Robitussin DM. (PX 2 at 61-67)

Petitioner testified that he tried to get in touch with Dr. Martini as well as Dr. Jucas, both dermatologists, with no luck. (T. 56) Petitioner testified that he has not seen any dermatologists or allergists. (T. 56-57)

Testimony of Susan Entenberg

Ms. Entenberg testified that she has been a certified vocational rehabilitation counselor for 45 years and is currently licensed by the State of Illinois as a Licensed Clinical Professional Counselor. (T. 73-74; PX 5) Ms. Entenberg testified that, in the area workers' compensation, she handles predominantly Petitioner's cases. (T. 75)

Ms. Entenberg testified that, after evaluating Petitioner, she opined that there was no reasonable stable labor market for Petitioner. (T. 77) Ms. Entenberg testified that she concluded this based on a combination of his age of 60, his high school education, his work history, his transferrable skills, his lack of computer skills and office skills, and his medical limitations. (T. 77-80) Ms. Entenberg opined that Petitioner did not have transferrable skills because a bus cleaner which was considered an unskilled job. (T. 78) Ms. Entenberg also testified that Petitioner's other jobs were maintenance types of jobs such as cleaning, painting, assembly, and mail sorting were considered low end semi-skilled jobs with no transferable skills "especially give the limitations that he has." (T. 79) Ms. Entenberg testified that Petitioner lacks technology skills as witnessed by her when she set up a zoom call with Petitioner. (T. 79-80) She testified that she "worked with him quite awhile trying to get him on to it. And he just wasn't able to do it." (T. 80)

Ms. Entenberg testified that she reviewed the opinions of Edward Pagella, however, did not rely on his opinions. (T. 81) Ms. Entenberg testified that she relied on Petitioner's medical records, the treating physician's restrictions, and the transferrable skills analysis that was done by Genex. *Id*. Ms. Entenberg testified that she disagreed with Genex when they opined that Petitioner had skills in customer service and leadership. (T. 81-82)

Ms. Entenberg also testified that, in 2013, Petitioner would have been 10 years younger, and that it would have been easier for him to find a job at that time based on his age. (T. 84) Ms. Entenberg

testified that Petitioner did demonstrate an ability to find work on his own based on his past employment. (T. 99) Ms. Entenberg testified that Petitioner did not mention looking for other employment. (T. 84) Ms. Entenberg testified that that there wasn't a physician who had stated the Petitioner was unable to go back to work because of the allergens. (T. 92)

Ms. Entenberg testified that she is familiar with ADA accommodations. (T. 93) Ms. Entenberg testified that when it comes to getting time off from work, there cannot be an undue burden placed on the employer to provide reasonable accommodations. (T. 93-94) Ms. Entenberg testified that when Petitioner travels on trains and buses, he avoided metals and fragrances by wearing masks and gloves. (T. 96) Ms. Entenberg testified that Petitioner said while Petitioner does not know how to type, he can use internet and basic email. (T. 96-97) Ms. Entenberg testified that while Petitioner worked for Xerox, in the 1980's, most of that training and work experience is obsolete in this day and age. (T. 98) Ms. Entenberg opined that Petitioner demonstrated the ability to find employment as he was employed in the past and worked. (T. 99)

CONCLUSIONS OF LAW

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

Decisions of an Arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e) The burden of proof is on a claimant to establish the elements of his right to compensation, and unless the evidence considered in its entirety supports a finding that the injury resulted from a cause connected with the employment, there is no right to recover. *Board of Trustees v. Industrial Commission,* 44 Ill. 2d 214 (1969)

Credibility is the quality of a witness which renders his evidence worthy of belief. The Arbitrator, whose province it is to evaluate witness credibility, evaluates the demeanor of the witness and any external inconsistencies with his testimony. Where a claimant's testimony is inconsistent with his actual behavior and conduct, the Commission has held that an award cannot stand. *McDonald v. Industrial Commission,* 39 Ill. 2d 396 (1968); *Swift v. Industrial Commission,* 52 Ill. 2d 490 (1972)

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

In the case at hand, Arbitrator Nath Rivera observed Petitioner during the hearing and finds him be a credible witness. Petitioner was calm, well-mannered, composed, and spoke clearly. The Arbitrator

compared Petitioner's testimony with the totality of the evidence submitted and did not find any material contradictions that would deem the witness unreliable.

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

The Arbitrator finds that the medical treatment and services provided through April 11, 2022, which pertained to contact dermatitis, were reasonable, necessary and related to the May 29, 2011, incident. The Arbitrator notes that the issue of an award of medical bills was reserved by Respondent in its defenses for the payment of medical bills by the group health carrier. (AX 1 line 7)

Thus, the Arbitrator finds that Respondent shall pay all reasonable and necessary medical services, incurred up to date, and related to Petitioner's contact dermatitis, pursuant to the medical fee schedule and as outlined in PX 2, PX 3, and Respondent's Exhibit ("RX") 1 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:

Evidence pertaining to the record made in the instant proceedings as well as the first arbitration demonstrate that as of April 4, 2016, Petitioner was at maximum medical improvement. As a consequence thereof, the Arbitrator finds that no award for temporary total disability benefits is appropriate.

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

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

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

be explained in a written order.

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

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that Petitioner was employed as a bus cleaner/service worker for Greyhound Lines at the time of the accident. (PX 2) The Arbitrator notes that Petitioner's employment with Respondent was terminated in 2013. As such, the Arbitrator gives greater weight to this factor.

With regard to subsection (iii) of §8.1b(b), the age of the employee at the time of the injury, the Arbitrator notes that Petitioner was 49 years old at the time of the accident. (AX 1, line 6) As such, the Arbitrator gives lesser weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that Petitioner's earnings in 2008 was $11.50, but that there was no additional evidence presented about future earning capacity. The Arbitrator notes that Petitioner has not returned to work nor presented evidence that he, himself, applied for jobs which could accommodate his restrictions. (T. 59) (PX 1) The Arbitrator gives lesser 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 contact dermatitis, after being exposed to waste from a bus as a result of a work-related accident. (AX 2; T. 40; 53) The Arbitrator notes that Petitioner testified that his contact dermatitis spread from his ankle to his face, behind his ears, and inside his nostril. (T. 18) Petitioner testified that his forehead and eyes burned, that he had dry skin in his nose, and that he had difficulty breathing. (T. 19) The Arbitrator notes that Petitioner testified that he had contact dermatitis on his right shoulder, in his buttocks, in the shaft of his penis, and on his hands, specifically the small finger on his right hand. (T. 20-21) During the hearing, the Arbitrator observed small dark area of skin, noted over the small finger of the right hand. (PX 6) The Arbitrator notes that Petitioner experienced physical and mental debilitations, limitations, and pain for the last few years as a result of the contact dermatitis. (T. 65; PX 2)

The Arbitrator further notes that while Dr. Parikh diagnosed Petitioner with rhinitis, Dr. Parikh repeatedly instructed Petitioner to follow up with his dermatologist if his condition worsened. (PX 2) The Arbitrator notes that while Petitioner testified that there was no cure for his condition, Petitioner testified that he does not receive "active medical care" for his contact dermatitis, nor does he have plans to see any in the future, because he was told there was nothing they could do and that he had to live with this condition. (T. 35) The Arbitrator notes that Petitioner previously presented to dermatologists, Dr. Martini and Dr. Jucas. The Arbitrator notes that while Petitioner testified that he "tried to get in touch

with Dr. Jucas" there is no evidence Petitioner followed up with a dermatologist per Dr. Parikh's instructions that he go to a dermatologist if his condition got worse. Therefore, the Arbitrator gives greater weight to this factor.

While the Arbitrator heard the testimony of Ms. Entenberg, the Arbitrator noted that Petitioner failed to present evidence of Petitioner's own efforts to find a job that would accommodate his restriction. Thus, the Arbitrator finds that Petitioner failed to prove he falls into the "odd-lot" category of permanent and total disability as set forth in Section 8(f) of the Act.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Respondent shall pay Petitioner PPD benefits of $253.00 per week for 175 weeks, because the injuries sustained caused a 35% loss of use of the person as provided in Section 8(d)2 of the Act.

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

The Arbitrator notes that the Respondent's actions in this case were not unreasonable, vexatious, or without good cause and, therefore, penalties and fees shall not be awarded.

It is so ordered:

Arbitrator Antara Nath Rivera

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC010410
Case Name	Christopher Johnson v. Coca Cola
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0050
Number of Pages of Decision	17
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Thomas C Rich
Respondent Attorney	Jay Lory

DATE FILED: 1/26/2024

/s/Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF)
JEFFERSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CHRISTOPHER JOHNSON,

Petitioner,

vs. NO: 22 WC 10410

COCA COLA HEARTLAND,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, the reasonableness and necessity of the medical treatment and expenses, prospective medical treatment, and temporary total disability benefits, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. 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 10, 2023, is hereby affirmed and adopted.

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

January 26, 2024

O: 1-11-24
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	22WC010410
Case Name	Christopher Johnson v. Coca Cola
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	14
Decision Issued By	Maureen Pulia, Arbitrator

Petitioner Attorney	Thomas Rich
Respondent Attorney	Jay Lory

DATE FILED: 4/10/2023

THE INTEREST RATE FOR THE WEEK OF APRIL 4, 2023 4.70%

/s/Maureen Pulia, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

CHRISTOPHER JOHNSON,
Employee/Petitioner

v.

COCA COLA HEARTLAND,
Employer/Respondent

Case # **22** WC **10410**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen Pulia**, Arbitrator of the Commission, in the city of **Mount Vernon**, on **3/16/23**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ 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, **1/5/22**, 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 $**53,224.03**; the average weekly wage was $**1,023.54**.

On the date of accident, Petitioner was **53** 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 $**35,405.63** for TTD benefits paid before 11/16/22, $**00.00** for TPD, $**00.00** for maintenance, and $**00.00** for other benefits, for a total credit of $**35,405.63**.

Respondent is entitled to a credit of $**00.00** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $682.36/week for 16-2/7 weeks, commencing 11/17/22 through 3/16/23, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $35,405.63 for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services from 1/5/22 through 3/16/23 related to petitioner's lumbar spine, as provided in Sections 8(a) and 8.2 of the Act.

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

Respondent shall pay reasonable and necessary medical services for petitioner's post-operative treatment in the form of physical therapy and follow-up treatment by Dr. Gornet for his lumbar spine, as provided in Sections 8(a) and 8.2 of the Act.

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

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

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

Signature of Arbitrator

April 10, 2023

ICArbDec19(b)

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 53 year old account manager, sustained an accidental injury to his low back that arose out of and in the course of his employment by respondent on 1/5/22. As an account manager petitioner sells display programs to stores. He also orders product between delivery times, helps with merchandising, and helps drivers with unloading cases of soft drinks.

On 1/5/22 petitioner was finishing up at a Kroger store, when he walked into the back room to check products, so that he would not over order. His product was in one column with groceries in the column to the left, and Pepsi products were in the column to the right. As a result, he could not see the pallets his product was on. In order to see the pallets petitioner moved one small stand, and then another smaller one. Petitioner then had to move 2 full shopping carts full of Gatorade. As he yanked a shopping cart full of Gatorade with his right arm, he felt immediate pain in his low back radiating to his feet, and numbness.

That same day petitioner presented to Dr. Martin Moffett, a chiropractor. Petitioner had previously treated with Dr. Moffett from 3/10/21 through 9/3/21 for sore muscles and sciatica. Petitioner testified that he was working a lot during the period of COVID to keep up with extra merchandising needed in the stores. As a result, he periodically had adjustments, heat, and electrical stimulation with Dr. Moffett from 3/10/21 through 9/3/21. Petitioner stated that treatment during this period helped him keep up with the extra merchandising he had to do.

Petitioner testified that he was doing fine after 9/3/21 until the injury on 1/5/22. Petitioner testified that in December of 2021 he even walked an entire parade and handed out samples of soft drinks along the route. He denied having any problems in his low back from 9/3/21 through 1/4/22.

Petitioner treated with Dr. Moffett on 17 different occasions between 1/5/22 through 2/8/22. On 1/5/22 petitioner presented for treatment of his sacroiliac, lumbar and thoracic spine, as well as his right hip and leg. He gave a consistent history of the injury. He complained of aching, tingling, weakness, stiffness, soreness, shooting pain, sharp pain, pinching, and numbness. He rated his pain at an 8/10. Dr. Moffett examined petitioner and assessed intervertebral disc disorders with myelopathy in the lumbar region; segmental and somatic dysfunction of the lumbar region; stiffness of the right hip, NEC; segmental and somatic dysfunction of the thoracic region; and contracture of muscles at multiple sites. Dr. Moffett's treatment plan included ultrasound, electrical stimulation, lumbar decompression, therapeutic exercises, manual therapy and mobilization, myofascial release, ice and heat, mechanical traction, trigger point therapy, and cold laser therapy. Dr. Moffett took petitioner off work for 2 weeks.

By 1/10/22 petitioner's condition had not improved, and was a little worse with a lot of weakness down both his legs. Dr. Moffett ordered an MRI of the lumbar spine. On 1/11/22 Dr. Moffett noted no real improvement and referred petitioner back to his primary care doctor for pain relief medication. On 1/14/22 petitioner noted that he was getting by with pain medication and treatment. He reported that it was taking the edge off his discomfort.

On 1/26/22 petitioner underwent an MRI of the lumbar spine. The impression was broad based posterior and left paracentral herniation of L5-S1 disc with annular fissure causing mild narrowing of the central canal and mild to moderate narrowing of neural foramina bilaterally, left worse than right; mild to moderate facetal arthropathy at L5-S1; mild ligamentum flavum thickening at L5-S1; broad based posterior herniation of L4-L5 disc causing mild narrowing of the central canal; mild facetal arthropathy and ligamentum flavum thickening at L4-L5 adding to spinal canal and neural foraminal stenosis; bilateral paracentral and foraminal protrusion of L3-L4 disc causing mild narrowing of the central canal and neural foramina, bilaterally; mild facetal arthropathy at L3-L4; diffuse bulge at L2-L3 disc causing mild narrowing of the central canal and neural foramina, bilaterally; and, mild facetal arthroplasty at L2-L3.

On 1/28/22 Dr. Moffett went over the MRI report with petitioner and referred him to Dr. Matthew Gornet for a surgical consult. On 1/31/22 petitioner told Dr. Moffett that his pain was steady but he got some relief from his therapy and treatments. On 2/2/22 Dr. Moffett wanted to continue with therapy and rehab to help control petitioner's pain and discomfort, but would halt the spinal manipulation until after he saw Dr. Gornet. When petitioner last saw Dr. Moffett on 2/8/22 his pain was still at a 6/10.

On 3/2/22 petitioner underwent a Section 12 examination performed by Dr. Donald deGrange, at the request of the respondent. Petitioner provided a consistent history of the injury on 1/5/22 and his symptoms. He reported an immediate onset of severe back pain radiating to the buttock and down his legs. He thought he strained his low back and returned to Dr. Moffett. He underwent chiropractic treatment with no relief for about two months. Petitioner gave a history of a prior lifting injury 20 years ago while working for Pepsi, for which he underwent physical therapy that resolved his symptoms. Petitioner denied any injuries to his lumbar spine since then, until the injury on 1/5/22. Following an examination and record review, Dr. deGrange's diagnosis was L4-L5, L5-S1 HNP with severe high-grade stenosis and neurogenic claudication. Based on his findings, as well as petitioner's accident history, Dr. deGrange opined that the injury on 1/5/22 either caused or aggravated a preexisting asymptomatic condition primarily at L4-L5. He further opined that the injury on 1/5/22 was the cause of petitioner's ongoing clinical condition, resultant disability, and need for further treatment. Dr. deGrange

noted that petitioner's examination was free of any embellishment or apparent exaggeration. Dr. deGrange recommended L4 and L5 laminectomies with a decompression and discectomies. He saw no need for fusions or artificial disc. Dr. deGrange was of the opinion petitioner could return to sedentary light duty work with a 10 pound lifting restriction, and no repetitive lifting, twisting, or prolonged standing and walking. He was also of the opinion that due to petitioner's balance issues and poor sensitivity in his feet due to the severe compression, he should not work above ground level. Petitioner mentioned he had seen Dr. Moffett a couple years ago (2016) for a neck issue.

On 3/21/22 petitioner presented to Dr. Gornet for his low back pain, radiating pain to his bilateral buttocks, bilateral hips (right worse than left), and lower extremities. He reported that his feet were numb. Petitioner provided a consistent history of the accident, and treatment with Dr. Moffett. Petitioner reported that his chiropractic treatment provided temporary relief of his symptoms. He stated that he was off work. Petitioner gave a history of a back injury 20 years ago, that was treated with chiropractic treatment and physical therapy, and resolved. He also reported that he saw his primary care physician in June of 2021 for low back pain, but his current pain was much worse than the pain he had in June 2021. He noted that no diagnostic studies were done in June 2021. Petitioner's pain was worse with prolonged sitting and standing, and repetitive bending. He noted that a change in position will ease up his pain a bit.

Dr. Gornet reviewed petitioner's x-rays, and ordered a new MRI. The MRI impression was central broad based protrusions at L3-L4, L4-L5, and L5-S1 with posterior element hypertrophy at all three levels; moderate to severe L4-L5 central stenosis, and milder L5-S1 and L3-L4 central canal stenoses are present; and, severe left greater than right L5-S1, moderate to severe bilateral L4-L5, and moderate L3-L4 foraminal stenoses. Following his review of the diagnostic tests and physical examination, Dr. Gornet assessed some spinal stenosis due to facet hypertrophy at L4-L5, an acute tear at L5-S1, and a disc protrusion. Dr. Gornet ordered medial branch blocks and radio frequency ablations (RFA). If not better, he recommended an epidural steroid injection (ESI) for L5-S1 and L4-L5. He continued petitioner off work. Dr. Gornet was of the opinion that petitioner's current need for treatment was causally related to the injury on 1/5/22.

On 4/11/22 Dr. deGrange drafted an addendum report after reviewing the MRI of 3/21/22. He found it identical in quality to the prior MRI, and offered no new information, not previously available. Dr. deGrange noted that his prior opinions remained unchanged. He was also of the opinion that the medial branch blocks, RAFs, and ESI were not reasonable and necessary.

Petitioner underwent physical therapy, chiropractic care, an ESI at L5-S1 (5/24/22), as well as medial branch blocks (4/19/22) and RFAs at L4-L5 and L5-S1 (4/26/22, 5/3/22), bilaterally.

On 6/16/22 petitioner followed up with Dr. Gornet. He reported that his back pain was better, but his legs were not. He stated that he was miserable and wanted to move forward with surgery. They discussed the recommended surgery. Petitioner was continued off work.

On 8/18/22 petitioner returned to Dr. Gornet complaining of ongoing low back pain radiating through the buttocks, hips, and legs to his calves. He also reported that his legs were weak. Petitioner indicated that he would like to proceed with surgery. Dr. Gornet had some x-rays and a CT scan of the lumbar spine performed that day. Based on petitioner's subjective and objective findings, Dr. Gornet recommended an AP fusion at L4-L5 and L5-S1, that would be done in a staged manner. Dr. Gornet continued petitioner off work.

On 9/13/22 Dr. deGrange drafted a 2nd addendum report after reviewing additional records from Dr. Moffett from 2016, and 3/10/21 through 9/3/21. Dr. deGrange was of the opinion that petitioner's complaints during that period were the same as he made to Dr. Moffett after the injury on 1/5/22. Based on these records Dr. deGrange found petitioner to be unreliable. Dr. deGrange rescinded his previous comments regarding causation and opined that petitioner sustained a temporary aggravation of a preexisting ongoing condition, which would have run its course in 4 weeks. Dr. deGrange was of the opinion that petitioner sustained a strain as a result of the injury on 1/5/22, that would have resolved in 4 weeks, and any ongoing symptoms, diagnostic studies and treatments would not be causally related to the injury on 1/5/22.

On 10/3/22 petitioner followed up with Dr. Gornet. His complaints remained essentially the same. He was miserable and wanted to undergo the recommended surgery. Dr. Gornet noted mild weakness in EHL function bilaterally at L4-L5, and decreased sensation in the L5 dermatome in the anterolateral calf. Dr. Gornet reiterated his recommendation for surgery.

On 10/26/22 petitioner underwent an anterior decompression at L4-L5 and L5-S1; anterior lumbar fusion at L5-S1; and, anterior lumbar fusion at L4-L5, performed by Dr. Gornet. His post-operative diagnosis was discogenic low back pain with radiculopathy and stenosis. On 10/28/22 petitioner underwent bilateral laminotomies and foraminotomies at L4-L5 and L5-S1, and posterior fusion from L4-S1 with local autograph and Medtronic fixation. Petitioner followed-up with Dr. Gornet post-operatively.

On 11/10/22 petitioner followed up with Dr. Gornet. Petitioner reported that his left leg already felt much improved. Dr. Gornet was of the opinion that some of petitioner' s left leg pain was really related to the anterior exposure more than it was residual from the posterior decompression. Petitioner reported

that his stride and gait were already improved, as well as his back pain. Dr. Gornet continued petitioner off work.

On 12/8/22 petitioner returned to Dr. Gornet. Dr. Gornet noted that he was doing exceedingly well. Petitioner noted that he continued to feel a dramatic difference in both his low back and leg symptoms. He did report that he still had some numbness and tingling down his left leg, which Dr. Gornet explained was fairly typical, and often related to the exposure itself. Petitioner and his wife told Dr. Gornet that the surgery had been life changing. Petitioner was continued off work.

Dr. Gornet also reviewed chiropractic records before and after the accident (6/24/16-9/13/21), as well as an addendum from Dr. deGrange dated 9/13/22. Dr. Gornet noted a significant increase in petitioner's symptoms on 1/5/22, as compared to his last visit before the accident on 9/13/21. He noted that on 9/13/21 petitioner rated his pain at a 3/10, and on 1/5/22 rated it at an 8/10. Dr. Gornet was of the opinion that these records clearly show a documented difference in his pain and intensity following the work related injury on 1/5/22.

On 2/2/23 the evidence deposition of Dr. Donald deGrange, an orthopedic surgeon fellowship trained in spinal surgery, was taken on behalf of respondent. Dr. deGrange changed his opinion that petitioner would have been back to baseline 4 weeks after the injury, to 8 weeks after the injury, or the first couple days of March 2022. He opined petitioner would have been at maximum medical improvement 8 weeks out from the injury on 1/5/22. Dr. deGrange opined that the surgeries Dr. Gornet performed on petitioner were not causally related to the work injury, because all petitioner sustained was a lumbar strain. Dr. deGrange was of the opinion, regardless of causation, that petitioner did not require a fusion, because petitioner had no indications for a fusion, but rather had indications for a laminectomy.

On cross examination, Dr. deGrange testified that the IME's he performs are generally at the request of the respondent. Dr. deGrange testified that he assessed an acute herniation at L4-L5 based on petitioner's history that he did not have any symptoms or treatment leading up to January of 2022. He also noted a herniation at L5-S1 that looked more chronic, due to the bone spurs and disc osteophyte complex. Dr. deGrange was of the opinion that the mechanism of injury described to him by petitioner, would not be consistent with the pathology he saw on the MRIs he reviewed. He testified that this opinion was based on the fact that he did not have a complete and accurate medical history. Dr. deGrange was of the opinion that Dr. Moffett's report in 2016 showed petitioner was hurting from head to toe, with no designation of the extent to which body part was bothering him. Dr. deGrange testified that in all the records he reviewed of Dr. Moffett before the injury on 1/5/22 he never saw any indication that Dr. Moffett ordered an MRI or restricted petitioner from work. Dr. deGrange saw no records of

treatment for petitioner's low back between June of 2016 and 3/10/21. Dr. deGrange also noted that when he examined petitioner, he did not have any problems with his neck, thoracic spine and shoulders. Dr. deGrange agreed that it is possible when petitioner treated with Dr. Moffett prior to 1/5/22 that his low back pain was not the chief source of his pain symptoms or complaints, although low back complaints were consistently noted in the records. Dr. deGrange also testified that he had records for petitioner from Dr. deGrange dated 8/17/21 and 9/3/21, with his complaints on 9/3/21 only being rated as a 3/10, and noticeable 30% of the time. Dr. deGrange testified that he did not know if petitioner had burning in his low back radiating down his bilateral legs, and numbness in his bilateral feet between 9/3/21 and 1/5/22, but agreed that they were consistent with the pathology he observed on the MRIs.

On 2/6/23 petitioner last followed up with Dr. Gornet. He noted that he was doing well. Dr. Gornet was reluctant to push petitioner into physical therapy at that time. He wanted to wait 6 more weeks. He wanted to begin physical therapy on 3/20/23. He also wanted petitioner to follow-up in 3 months for follow up x-rays and CT. Petitioner was continued off work. His next follow-up was scheduled for 5/8/23.

On 2/28/23 the evidence deposition of Dr. Gornet was taken on behalf of the respondent. Dr. Gornet is an orthopedic surgeon devoted to spine surgery. Dr. Gornet testified that petitioner told him that when he was examined by Dr. deGrange, Dr. deGrange recommended surgery, at least verbally. Dr. Gornet was of the opinion that the mechanism of injury, as well as his symptoms and physical exam findings, were consistent with a lumbar spine injury. Dr. Gornet opined that the injury on 1/5/22 caused a disc injury at L4-L5 and L5-S1, aggravated his preexisting facet arthropathy at L4-L5 and L5-S1 on the left, and aggravated his preexisting stenosis, particularly at L4-L5. He was also of the opinion that there is no indication that petitioner had to be off work, or had significant treatment on his low back in the near term leading up to the incident on 1/5/22. Dr. Gornet opined that the petitioner's symptoms and requirement for treatment, including surgery at L4, were all related to his work injury on 1/5/22.

Dr. Gornet agreed with Dr. deGrange's opinion that petitioner's disc herniation at L4-L5 seen on the MRI was acute, but did not agree with Dr. deGrange as to the herniation at L5-S1. Dr. deGrange was of the opinion that this appeared more chronic, but Dr. Gornet was of the opinion that the annular tear, on the right, looked acute. Dr. Gornet was of the opinion that Dr. deGrange's recommended surgery ignored petitioner's disc problem at L5-S1, the facet joint, or the structural problem at L4-L5 or L5-S1. Dr. Gornet testified that he reordered the MRI of the lumbar spine in March of 2022, because when he first saw the petitioner the MRI he had performed at Cedar Court was of a horrible quality. Dr. Gornet opined that the medial branch blocks were reasonable and necessary because a lot of his pain was structural back

pain, and they did help him. He testified that he was trying to do as much as he could to fix petitioner without having to perform a large fusion, if possible. Dr. Gornet opined that petitioner's treatment to date had been reasonable and necessary and related to the work injury on 1/5/22, and that the treatment he was further recommending in the form of physical therapy and follow-up visits, was also reasonable and necessary and related to the injury on 1/5/22.

On cross-examination Dr. Gornet was of the opinion that when petitioner was seeing Dr. Moffett between March and September of 2021, although he had complaints to the low back with radicular pain into his lower extremities, he was not having the same significant issues he had after the injury on 1/5/22, and was able to continue working full duty at that time despite undergoing chiropractic treatment. Dr. Gornet opined that petitioner did not sustain a temporary aggravation of a preexisting condition in his low back on 1/5/22, because there is no indication it was temporary. He was of the opinion that petitioner had significant impairment and disability after the injury, and even Dr. deGrange called the herniation at L4-L5 acute. Dr. Gornet testified that the medial branch block and RAFs were to help petitioner's back pain, and they did help his back pain. However, the ESI was to help the leg pain and it did not. Dr. Gornet opined that he delayed petitioner's post-operative physical therapy due to the fact that the cage had shifted and he wanted to make sure it was more consolidated before beginning petitioner in physical therapy and on any light duty, so that petitioner does not do something that could shift the cage, and cause greater problems for him. Dr. Gornet was of the opinion that if the next time he sees petitioner, the CT scan looks good, he would absolutely consider light duty.

Respondent offered into evidence the medical records of Dr. Moffett from 3/10/21-7/21/21. During this period petitioner was seen on 6 separate occasions: 3/10/21, 3/17/21, 3/24/21, 4/5/21, 7/16/21, and 7/21/21. He treated for the same body parts he treated for after the injury on 1/5/21. His pain level on these visits rated from 6-7/10.

Petitioner testified that he is scheduled to start physical therapy on 3/20/23, and his ultimate goal is to get back to full duty work. He testified that currently he was doing a lot better. He noted that he still has some numbness and tingling in his legs and feet that was resolving, and should totally resolve over time.

Petitioner testified that he was in a motor vehicle accident on 8/12/21, when he was parked and struck by a drunk driver in a parking lot. He denied any low back pain or increase in any existing low back pain. He stated that his complaints were to his neck.

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

The parties offered two causal connections opinions. Petitioner offered the causal connection opinion of Dr. Gornet, and respondent offered the causal connection opinion of Dr. deGrange.

Dr. deGrange initially diagnosed an L4-L5, L5-S1 HNP with severe high grade stenosis and neurogenic claudication. Based on his findings and petitioner's accident history, he opined that the injury on 1/5/22 either caused or aggravated a preexisting asymptomatic condition primarily at L4-L5, and opined that the injury on 1/5/22 was the cause of petitioner's ongoing clinical condition, resultant disability and need for further treatment. Petitioner had only mentioned his treatment with Moffit for his neck in 2016.

Dr. deGrange then reviewed the records of Dr. Moffet from 2016, and from 3/10/21 through 9/3/21. He was of the opinion that petitioner's complaints during that period were the same as he made to Dr. Moffett after the injury on 1/5/22. Based on these records, Dr. deGrange rescinded his previous casual connection opinion, and opined that petitioner sustained a temporary aggravation of a preexisting ongoing condition, which would have run its course in 4 weeks. He was of the opinion that petitioner only sustained a strain as a result of the injury on 1/5/22, that would have resolved in 4 weeks.

Dr. Gornet opined that the injury on 1/5/22 caused a disc injury at L4-L5 and L5-S1, aggravated his preexisting facet arthropathy at L4-L5 and L5-S1 on the left, and aggravated his preexisting stenosis, particularly at L4-L5. Dr. Gornet was also of the opinion that there is no indication that petitioner had to be off work, or had any significant treatment on his low back in the near term leading up to the incident on 1/5/22. Dr. Gornet noted that even Dr. deGrange was of the opinion that petitioner's disc herniation at L4-L5 as seen on the MRI was acute. Dr. Gornet as of the opinion that although petitioner underwent chiropractic treatment for his back between March and September of 2021, and had complaints to the low back with radicular pain into his lower extremities, he was not having the same significant issues he had after the injury on 1/5/22, and was able to continue working full duty. Dr. Gornet opined that petitioner did not sustain a temporary aggravation of a preexisting condition in his low back on 1/5/22, because there is no indication that it was temporary.

The medical records of Dr. Moffett from 3/10/21-7/21/21 show that during this period petitioner was only seen on 6 separate occasions: 3/10/21, 3/17/21, 3/24/21, 4/5/21, 7/16/21, and 7/21/21. During this period petitioner treated for the same body parts he treated for after the injury on 1/5/21. His pain level on these visits rated from 6-7/10. Dr. deGrange also had records of Dr. Moffett from 8/17/21 and 9/3/21, that show petitioner's complaints on 9/3/21 were only a 3/10. There are no chiropractic records,

or any other records for treatment between 9/4/21 and 1/4/22. At no time during this period did Dr. Moffett take petitioner off work or order an MRI of the lumbar spine.

Following the injury on 1/5/22 petitioner returned to Moffett, and between 1/5/22 and 2/8/22 petitioner saw Dr. Moffett 17 times, nearly three times the total number of visits petitioner had between 3/10/21-7/21/21. The arbitrator finds it significant that despite this unusually high number of visits to Dr. Moffett in such a short period with no relief, that Dr. Moffett took petitioner off work, had an MRI of the lumbar spine performed, and referred petitioner to Dr. Gornet for a surgical consultation. The arbitrator notes that Dr. Moffett had done none of these things when he saw petitioner on those 6 occasions between 3/10/21-7/21/21, or on 8/17/21 and 9/3/21.

Although the arbitrator does find the petitioner was less than truthful with Dr. deGrange when he failed to mention his treatment with Dr. Moffett from March of 2021 through September of 2021, the arbitrator finds this not change the fact that petitioner's condition after the injury on 1/5/22 was far worse than his condition in 2021. The arbitrator finds it significant that despite this omission, that Dr. deGrange opined that petitioner's herniation at L4-L5 was acute. The arbitrator also finds it significant that petitioner did not obtain any lasting or significant relief from this treatment until after he underwent the fusion surgery performed by Dr. Gornet on 10/26/22, which afterwards he felt a dramatic difference in both his leg symptoms and low back, and reported that 'the surgery had been life changing.'

Based on the above, as well as the credible evidence, the arbitrator finds the opinions of Dr. Gornet more persuasive than those of Dr. deGrange, and finds the petitioner's current condition of ill-being as it relates to his lumbar spine is causally related to the injury he sustained on 1/5/22.

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

Having found the petitioner's current condition of ill-being as it relates to his lumbar spine is causally related to the injury he sustained on 1/5/22, the arbitrator finds the medical services that were provided to petitioner from 1/5/22 through 3/16/23, were reasonable and necessary to cure or relieve petitioner from the effects of the injury he sustained on 1/5/22.

Although Dr. deGrange recommended L4 and L5 laminectomies with a decompression and discectomies, the arbitrator, based on the outcomes of petitioner's fusion surgery, does not find the fusion surgery performed by Dr. Gornet on 10/26/22 was not reasonable and necessary to cure or relieve petitioner from the effects of the injury he sustained on 1/5/22. On 4/1/22 Dr. deGrange also opined that the medial branch blocks, RAFs and ESI performed by Dr. Gornet were not reasonable and necessary. Again, the arbitrator finds Dr. Gornet's opinion that the medial branch blocks and RAFs were reasonable

and necessary because a lot of petitioner's pain was structural back pain persuasive, given that they helped petitioner. The arbitrator also finds the fact that the ESI Dr. Gornet performed in an attempt to relieve petitioner's leg pain did not work, not a reason to find that this treatment was not reasonable and necessary, given the fact that this treatment was performed in an attempt to do as much as possible to fix petitioner without having to perform a large fusion, if possible.

Based on the above, the arbitrator finds the respondent shall pay reasonable and necessary medical services from 1/5/22 through 3/16/23 related to petitioner's lumbar spine, as provided in Sections 8(a) and 8.2 of the Act.

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

K. IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE?

Having found the petitioner's current condition of ill-being as it relates to his lumbar spine is causally related to the injury he sustained on 1/5/22, and the medical services that were provided to petitioner from 1/5/22 through 3/16/23, were reasonable and necessary to cure or relieve petitioner from the effects of the injury he sustained on 1/5/22, the arbitrator finds the petitioner is entitled to the post-operative treatment in the form of physical therapy and follow-up treatment for his lumbar spine by Dr. Gornet.

Respondent shall pay reasonable and necessary medical services for petitioner's post-operative treatment in the form of physical therapy and follow-up treatment by Dr. Gornet for his lumbar spine, as provided in Sections 8(a) and 8.2 of the Act.

L. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?

Having found the petitioner's current condition of ill-being as it relates to his lumbar spine is causally related to the injury he sustained on 1/5/22, and the medical services that were provided to petitioner from 1/5/22 through 3/16/23, were reasonable and necessary to cure or relieve petitioner from the effects of the injury he sustained on 1/5/22, the arbitrator finds the petitioner is entitled to temporary total disability benefits from 11/23/22 through 3/16/23. The parties stipulated that temporary total disability benefits have been paid through 11/22/22.

Respondent shall pay Petitioner temporary total disability benefits of $682.36/week for 16-2/7 weeks, commencing 11/17/22 through 3/16/23, as provided in Section 8(b) of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	10WC035618
Case Name	Ernestine Chris Jackson v. State of Illinois - State of Illinois – Illinois State University
Consolidated Cases	10WC041066; 10WC041067; 10WC041571;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0051
Number of Pages of Decision	11
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	William Trimble
Respondent Attorney	Kayla Koyne

DATE FILED: 1/26/2024

/s/ Christopher Harris, 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

ERNESTINE CHRIS JACKSON,

Petitioner,

vs. NO: 10 WC 35618

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, causal connection, medical expenses and permanent partial disability (PPD) benefits, and being advised of the facts and law, affirms the Arbitrator's Decision denying this claim, a copy of which is attached hereto and made a part hereof. The Commission, however, does not adopt the Arbitrator's reasoning as further discussed below.

This claim proceeded to arbitration hearing on a consolidated basis with claim numbers 10 WC 41066, 10 WC 41067 and 10 WC 41571. Separate decisions have been issued for each claim number. During the hearing, the parties confirmed on the record that this was a single case for repetitive injury to the left hand and arm with four disputed dates of injury and Petitioner was only requesting one award from these four claims.

In this claim, 10 WC 35618, the Arbitrator determined that Petitioner failed to meet her burden of proof by a preponderance of the evidence that she sustained accidental injury on May 31, 2010 which arose out of and in the course of her employment with Respondent. The Arbitrator further found that Petitioner's current condition of ill-being was not causally related to the alleged May 31, 2010 work accident. The Commission affirms the Arbitrator's Decision with respect to accident and causal connection in this claim, but does not adopt the Arbitrator's reasoning. Rather, the Commission finds that Petitioner's repetitive trauma injury manifested itself on May 25, 2010, the subject of claim number 10 WC 41067. The Commission's findings and conclusions with respect to Petitioner's claimed work accident on May 25, 2010 will be provided in the separate decision specific to claim number 10 WC 41067.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 18, 2023 is hereby affirmed to the extent stated above.

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.

January 26, 2024

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

CAH/pm
O: 12/7/23
052

/s/ *Marc Parker*
Marc Parker

SPECIAL CONCURRENCE

I agree with the Majority's conclusion denying Petitioner's claim for worker's compensation benefits under 10 WC 35618. However, I would have affirmed and adopted the Arbitrator's Decision in its entirety.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	10WC035618
Case Name	JACKSON, ERNESTINE CHRIS v. STATE OF ILLINOIS - ILLINOIS STATE UNIVERSITY
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	Kurt Carlson, Arbitrator

Petitioner Attorney	William Trimble
Respondent Attorney	Christina Smith

DATE FILED: 1/18/2023

THE INTEREST RATE FOR THE WEEK OF JANUARY 18, 2023 4.68%

/s/ Kurt Carlson, Arbitrator
Signature

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

January 18, 2023

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation Commission

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

☐ 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

ERNESTINE CHRIS JACKSON
Employee/Petitioner

v.

STATE OF ILLINOIS – ILLINOIS STATE UNIVERSITY
Employer/Respondent

Case # **10** WC **035618**

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 Kurt Carlson, Arbitrator of the Commission, in the city of **Bloomington**, on **11-29-22**. 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 **05-31-10**, 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 $ **27,027.64**; the average weekly wage was $ **519.76**.

On the date of accident, Petitioner was **57** 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** 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 she sustained an accidental injury which arose out of and in the course of her employment and thus shall be barred from recovery. Claim 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.

Kurt A. Carlson

Arbitrator

JANUARY 18, 2023

FINDINGS OF FACT

On November 29, 2022, this matter was heard in Bloomington, Illinois and was presented as four consolidated cases: 10WC035618; 10WC041066; 10WC041067; and 10WC041571. Nevertheless, the parties agreed: this is a single case for repetitive injury to the left hand and arm, with four disputed dates of injury. While it may be true that all pleadings allege bilateral hand and arm injury , the testimony of Petitioner and the medical evidence were limited to the left hand and arm.

Prior right arm and hand settlement

The Arbitrator notes that Petitioner previously brought case 02 WC 031926 against Respondent. From the records of the IWCC, this case was settled for 20% of the right arm and 7.5% of the right hand.

Petitioner's work history with ISU

Petitioner began working for Respondent ("ISU") in 1999 in an office/secretarial position.

In 2008, she transitioned to working for the Department of Special Education. In that position, she worked for around fifteen professors inside the office, and about thirty outside of the office. Due to staffing cuts, she testified that she did the job of two or three people. She prepared various materials including class syllabi and class notes. Although her job included general office and clerical tasks such as copying, more than 75% of her day was spent typing. Her average weekly wage was about $525.00.

Petitioner described the physical layout of the area where she worked, stating that her computer and keyboard were not on a desk but were on a table, and that the height was such that her hands and elbows were in a compressed angle. At hearing, Petitioner demonstrated the posture and position that she was forced to use to type. The Arbitrator observed that this position required a bend of approximately 45 degrees for the wrist and 60 degrees for the elbow. Petitioner testified that after she complained that her keyboard was in an awkward position, Human Resources came out and did a study and subsequently placed a tray for her keyboard at a lower level than the height of the table. The Arbitrator notes that none of the above were ever related to her treating physicians.

Respondent agreed that Petitioner gave notice of her work injuries.

Petitioner's Medical Treatment

On February 10, 2010, Petitioner saw family practitioner Dr. Regina Powers at OSF, complaining of chronic arthritis in her hands and knees. Dr. Powers' notes state, "she does a fair amount of typing but that is difficult with her arthritis. When her hands are in pain, she can't keep up. She feels that she is on the verge of being fired." (PX 1, p. 5)

On February 19, 2010, Petitioner had a pacemaker implantation for unrelated cardiac issues.

A week later, Petitioner followed up with Dr. Powers February 26, 2010. The treatment records stated "She continues to fight with her arthritis. She states it affects her back, knees and hands." She reports seeking disability and will send us paperwork for that…." (PX 1, p.4)

Petitioner had been seeking a handicapped placard for her knees since 2005.

On April 8, 2010, Dr. Powers catalogued the Petitioner's overall medical condition stating that Petitioner had a myriad of issues including: hypertension, cardiac (pacemaker insertion), dryness to eyes, obesity, arthritis to her back, knees, feet, hands, fatigue/anemia, and GERD. (PX 1 p.3)

On May 25, 2010, Petitioner underwent an EMG/NCV that showed severe ulnar neuropathy on the left. There were additional bilateral neuropathies median neuropathies at the wrists, right greater than left. (PX #2 p.9)

No surgery was prescribed at this time. Petitioner never lost any time from work.

Petitioner retires from ISU in 2010

On May 31, 2010, Petitioner "retired" from ISU at the age of 58. Shortly thereafter, she filed these four workers' compensation claims against ISU alleging the same, "left and right hands and other parts of the body." As stated earlier, Petitioner's testimony was limited to her left arm and hand.

Petitioner testified that she later was awarded Social Security Disability and then obtained a new, part-time job that included customer service over the phone which included some data-entry. Petitioner told her cardiologist that she "uses her left hand for using a telephone for a number of hours during the day." (PX #1 p.41)

Three-year medical treatment gap!

On April 8, 2013, Petitioner sought medical treatment with Dr. Lawrence Li, who noted the earlier EMG/NCV. He wrote that the left carpal tunnel syndrome was clinically not the problem, instead it was the left elbow nerve entrapment. (PX #3) Petitioner was prescribed surgery but deferred. There is no history of Petitioner's old work duties in Dr. Li's medical records, nor is there any statement of causal connection.

On September 17, 2014, while treating with Dr. Herman Dick, Petitioner underwent a cervical CT-Scan. Dr. Dick wrote that Petitioner's new symptoms of hand numbness could be from severe stenosis at C5-C6. (PX#4 p.61)

On February 22, 2016, Petitioner was seen at McLean County Orthopedics by Dr. Jerome Oakey. He assessed her with left hand dysfunction which was "likely caused by her ongoing compression of the ulnar nerve." (PX 5, p. 8)

On March 30, 2016, Petitioner saw Dr. Craig Carmichael at McLean County Orthopedics who performed another EMG. (PX 5, pp. 13-14) He noted that Petitioner complained of severe weakness in the left hand as well as numbness in the fourth and fifth digit and felt that pressing down on her wrist aggravated the condition. He noted severe ulnar neuropathy affecting the left hand and moderate to severe bilateral median neuropathies:

> On EMG today, there is a severe ulnar neuropathy affecting the left hand and affecting the superficial branch of the ulnar nerve more than the deep branch although it is affecting both significantly. It is difficult to definitively localize the lesion due to the extreme severity of the denervation of the ADM and also by the patient's large arm size. Overall, this appears more likely located at the wrist than at the elbow given a lack of

> decrement across the elbow in amplitude or conduction velocity along the ulnar nerve when measured at the FDI. In addition, there does appear to be a relatively normal dorsal ulnar cutaneous sensory nerve response at the left hand, and the distal latency of the ulnar nerve to the FDI appears mildly prolonged on the left wrist compared to the right. In addition, there are moderate to severe median neuropathies at both wrists that are worse on the right than the left. (PX 5, p. 5)

Testimony of Treating Orthopedic Surgeon Dr. Lawrence Li

Dr. Lawrence Li was deposed on August 4, 2022. (PX #6)

Dr. Li first saw Petitioner on April 8, 2013, three years after she left her job at ISU. (PX 6, p. 5) She presented with pain in her neck radiating down both arms into her hands. She had an EMG/NCV done in 2010 that showed severe nerve slowing, and more recently had suffered an inability to adduct her left small finger (PX 6, p. 6)

Dr. Lawrence Li testified that the EMG/NCV study was indicative of nerve compression, resulting in symptoms such as numbness, tingling, loss of strength, and pain. Dr. Li testified that nerve compression was consistent with the inability to adduct the left small finger. (PX 7, p. 7) His examination of Petitioner found a positive Tinel's test at the elbow, left interossi atrophy, and a positive Wartenberg sign, meaning she could not adduct the small finger. Overall, Petitioner had normal range of motion but abnormal nerve function. (PX 7, p. 7)

Finally that day, Dr. Lawrence Li diagnosed Petitioner with severe left cubital tunnel syndrome and left carpal tunnel syndrome and recommended left cubital tunnel release and transmission of the ulnar nerve as well as left carpal tunnel release. (PX 6, p. 8)

Dr. Lawrence Li testified that although Petitioner did not have the surgery, the condition was so severe that it would not go away on its own, and she still needs it. (PX 6, p. 9)

Dr. Lawrence Li testified that if Petitioner had an office job where the position of the desk required Petitioner to flex or extend her wrist more than 30 degrees or flex her elbow greater than 60 degrees, on a repetitive basis it would be sufficient to cause or aggravate the conditions he observed in Petitioner, carpal and cubital tunnel syndrome. (PX 6, pp. 9-11)

On cross-examination, Dr. Li clarified that he had only seen EMG/NCV for the left side. He also testified that Petitioner had symptoms on both sides, but that the left was worse. (PX 6 p. 12) He testified that if someone were to bend their wrist for twenty-five to thirty-three percent of an eight-hour day, it would be sufficient to cause or aggravate the conditions he observed in Petitioner, carpal and cubital tunnel syndrome. (PX 6, p. 16) He testified that this was regardless of the type of typing or the number of keystrokes. (PX 6, pp. 16-17)

Dr. Lawrence Li testified that although there is a significant number of carpal tunnel cases where there is not a known medical cause, if Petitioner had an office job where the position of the desk required Petitioner to flex or extend her wrist more than 30 degrees or flex her elbow greater than 60 degrees, on a repetitive basis, her job would be causal or contributory to her condition. (PX 6, p. 19)

In answer to the question of why Petitioner would not have bilateral symptomology, Dr. Li clarified that she did in fact have bilateral symptomology, she was just worse on the left than on the right, and therefore he was focused on the left. (PX 6, p. 19)

He testified that he recommended surgery, but that Petitioner did not think it would help her, so she declined. (PX 6, p. 20)

CONCLUSIONS OF LAW

With regard 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 facts must be closely examined in a repetitive injury case to ensure a fair result for both the faithful employee and the employer. *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 71 (2006). Compensation is allowable where an injury is not sudden but gradual, so long as it is linked to the claimant's work. *Durand*, 224 Ill. 2d at 66 (citing *Peoria County Belwood Nursing Home v. Industrial Comm'n,* 115 Ill. 2d 524, 529 (1987)). The Illinois Supreme Court went on to highlight that "[t]o deny an employee benefits for a work-related injury that is not the result of a sudden mishap * * * penalizes an employee who faithfully performs job duties despite bodily discomfort and damage." *Durand,* 224 Ill. 2d at 66 (citing *Peoria County*, 115 Ill. 2d at 529-30).

In these cases, it should be noted that Petitioner never lost any time from work and filed her claims only after she left ISU. Ms. Jackson testified that she spent more than 75% of her day typing at keyboard and both wrists and her elbows remained at bent at 45 degrees for the wrists and 60 degrees for the elbows, this history was related over a decade after the alleged occurrence and never to any treating physicians. At a result, it has little or no credibility.

Instead, Petitioner's testimony seemed a tailored fit to match Dr. Li's clinical theory of causal connection, which offered as a hypothetical by Jackson's attorney. While it is true that Dr. Lawrence Li testified that work duties would be sufficient to cause or aggravate the carpal and cubital tunnel, Petitioner never related them to Dr. Li in 2013. In fact, Petitioner's complaints on April 8, 2013, indicate that she had neck pain radiating down both arms into hands. (PX #3) Dr. Li did not have the benefit of reviewing all the medical records submitted into evidence. Finally, Petitioner saw Dr. Lawrence Li on one occasion. To characterize him as a treater is technically correct, but there was no longstanding doctor/patient relationship here.

The Arbitrator notes that Respondent did not introduce any expert testimony or other evidence to contradict the testimony of Dr. Lawrence Li, but also acknowledges that would be extremely difficult to contradict Petitioner's description of her work duties twelve years later.

Based on the entire record, additionally noting the paucity of treatment and lengthy time periods of no treatment whatsoever, the Arbitrator finds that Petitioner failed to sustain her burden of proving she suffered injuries to her left arm and hand because of repetitive or specific traumas on any of alleged injury dates with Respondent.

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

Despite having a prior carpal tunnel and cubital tunnel claims, Petitioner failed to give a clear history of her work duties to her medical providers, never lost any time from work as the result of her medical condition, nor did she treat on a regular basis for them. Perhaps the most compelling medical evidence in the matter is on September 17, 2014, when Dr. Herman Dick wrote that her new symptoms of hand numbness could be from her severe neck stenosis at C5 C6. (PX #4 p.61) This is corroborated by Petitioner's bilateral findings (PX #2 p.9) and her complaints to Dr. Li that the pain originated from her neck downward. (PX #3)

As stated earlier, the Arbitrator finds that the treating medical records fail to corroborate much of any of Petitioner's testimony regarding causal connection. The best snippet in the medical records is in Dr. Powers records where Petitioner stated that she does a "fair amount of typing." But it bears repeating, there is no lost time, there is no sustained medical treatment and the treatment gaps are frequent and lengthy. If Petitioner quit her job with ISU, it appears that she did so because of her arthritic knees, not her hands. And her hand condition may very well originate from her neck because of cervical stenosis.

The Arbitrator finds that neither the Petitioner's nor Dr. Li's testimony is credible and Petitioner's current condition of ill-being is not causally related to the injury.

With regard to issue G, What were Petitioner's earnings? The Arbitrator finds as follows:

Respondent introduced wage statements into evidence, but in finding no accident nor credible causation above, a determination of the Petitioner's AWW is not necessary.

With regard to issue J, Were the medical services that were provided to Petitioner reasonable and necessary? The Arbitrator finds as follows:

Consistent with the above findings above, Respondent is not liable for medical services provided to Petitioner under The Illinois Workers' Compensation Act.

With regard to issue L, What is the nature and extent of the injury? The Arbitrator finds as follows:

Consistent with above, no permanency is awarded for these claims.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	10WC041066
Case Name	Ernestine Chris Jackson v. State of Illinois - Illinois State University
Consolidated Cases	10WC035618; 10WC041067; 10WC041571;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0052
Number of Pages of Decision	11
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	William Trimble
Respondent Attorney	Kayla Koyne

DATE FILED: 1/26/2024

/s/Christopher Harris, 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

ERNESTINE CHRIS JACKSON,

Petitioner,

vs. NO: 10 WC 41066

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, causal connection, medical expenses and permanent partial disability (PPD) benefits, and being advised of the facts and law, affirms the Arbitrator's Decision denying this claim, a copy of which is attached hereto and made a part hereof. The Commission, however, does not adopt the Arbitrator's reasoning as further discussed below.

This claim proceeded to arbitration hearing on a consolidated basis with claim numbers 10 WC 35618, 10 WC 41067 and 10 WC 41571. Separate decisions have been issued for each claim number. During the hearing, the parties confirmed on the record that this was a single case for repetitive injury to the left hand and arm with four disputed dates of injury and Petitioner was only requesting one award from these four claims.

In this claim, 10 WC 41066, the Arbitrator determined that Petitioner failed to meet her burden of proof by a preponderance of the evidence that she sustained accidental injury on February 10, 2010 which arose out of and in the course of her employment with Respondent. The Arbitrator further found that Petitioner's current condition of ill-being was not causally related to the alleged February 10, 2010 work accident. The Commission affirms the Arbitrator's Decision with respect to accident and causal connection in this claim, but does not adopt the Arbitrator's reasoning. Rather, the Commission finds that Petitioner's repetitive trauma injury manifested itself on May 25, 2010, the subject of claim number 10 WC 41067. The Commission's findings and conclusions with respect to Petitioner's claimed work accident on May 25, 2010 will be provided in the separate decision specific to claim number 10 WC 41067.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 18, 2023 is hereby affirmed to the extent stated above.

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.

January 26, 2024

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

CAH/pm
O: 12/7/23
052

/s/ *Marc Parker*
Marc Parker

SPECIAL CONCURRENCE

I agree with the Majority's conclusion denying Petitioner's claim for worker's compensation benefits under 10 WC 41066. However, I would have affirmed and adopted the Arbitrator's Decision in its entirety.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	10WC041066
Case Name	JACKSON, ERNESTINE CHRIS v. STATE OF ILLINOIS - ILLINOIS STATE UNIVERSITY
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	Kurt Carlson, Arbitrator

Petitioner Attorney	William Trimble
Respondent Attorney	Christina Smith

DATE FILED: 1/18/2023

THE INTEREST RATE FOR THE WEEK OF JANUARY 18, 2023 4.68%

/s/ Kurt Carlson, Arbitrator
Signature

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

January 18, 2023

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation Commission

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

- ☐ 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

ERNESTINE CHRIS JACKSON
Employee/Petitioner

v.

STATE OF ILLINOIS – ILLINOIS STATE UNIVERSITY
Employer/Respondent

Case # **10** WC **041066**

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 Kurt Carlson, Arbitrator of the Commission, in the city of **Bloomington**, on **11-29-22**. 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 **02-10-10**, 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 $ **27,027.64**; the average weekly wage was $ **519.76**.

On the date of accident, Petitioner was **57** 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** 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 she sustained an accidental injury which arose out of and in the course of her employment and thus shall be barred from recovery. Claim 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.

Kurt A. Carlson

Arbitrator

JANUARY 18, 2023

FINDINGS OF FACT

On November 29, 2022, this matter was heard in Bloomington, Illinois and was presented as four consolidated cases: 10WC035618; 10WC041066; 10WC041067; and 10WC041571. Nevertheless, the parties agreed: this is a single case for repetitive injury to the left hand and arm, with four disputed dates of injury. While it may be true that all pleadings allege bilateral hand and arm injury , the testimony of Petitioner and the medical evidence were limited to the left hand and arm.

Prior right arm and hand settlement

The Arbitrator notes that Petitioner previously brought case 02 WC 031926 against Respondent. From the records of the IWCC, this case was settled for 20% of the right arm and 7.5% of the right hand.

Petitioner's work history with ISU

Petitioner began working for Respondent ("ISU") in 1999 in an office/secretarial position.

In 2008, she transitioned to working for the Department of Special Education. In that position, she worked for around fifteen professors inside the office, and about thirty outside of the office. Due to staffing cuts, she testified that she did the job of two or three people. She prepared various materials including class syllabi and class notes. Although her job included general office and clerical tasks such as copying, more than 75% of her day was spent typing. Her average weekly wage was about $525.00.

Petitioner described the physical layout of the area where she worked, stating that her computer and keyboard were not on a desk but were on a table, and that the height was such that her hands and elbows were in a compressed angle. At hearing, Petitioner demonstrated the posture and position that she was forced to use to type. The Arbitrator observed that this position required a bend of approximately 45 degrees for the wrist and 60 degrees for the elbow. Petitioner testified that after she complained that her keyboard was in an awkward position, Human Resources came out and did a study and subsequently placed a tray for her keyboard at a lower level than the height of the table. The Arbitrator notes that none of the above were ever related to her treating physicians.

Respondent agreed that Petitioner gave notice of her work injuries.

Petitioner's Medical Treatment

On February 10, 2010, Petitioner saw family practitioner Dr. Regina Powers at OSF, complaining of chronic arthritis in her hands and knees. Dr. Powers' notes state, "she does a fair amount of typing but that is difficult with her arthritis. When her hands are in pain, she can't keep up. She feels that she is on the verge of being fired." (PX 1, p. 5)

On February 19, 2010, Petitioner had a pacemaker implantation for unrelated cardiac issues.

A week later, Petitioner followed up with Dr. Powers February 26, 2010. The treatment records stated "She continues to fight with her arthritis. She states it affects her back, knees and hands." She reports seeking disability and will send us paperwork for that…." (PX 1, p.4)

Petitioner had been seeking a handicapped placard for her knees since 2005.

On April 8, 2010, Dr. Powers catalogued the Petitioner's overall medical condition stating that Petitioner had a myriad of issues including: hypertension, cardiac (pacemaker insertion), dryness to eyes, obesity, arthritis to her back, knees, feet, hands, fatigue/anemia, and GERD. (PX 1 p.3)

On May 25, 2010, Petitioner underwent an EMG/NCV that showed severe ulnar neuropathy on the left. There were additional bilateral neuropathies median neuropathies at the wrists, right greater than left. (PX #2 p.9)

No surgery was prescribed at this time. Petitioner never lost any time from work.

Petitioner retires from ISU in 2010

On May 31, 2010, Petitioner "retired" from ISU at the age of 58. Shortly thereafter, she filed these four workers' compensation claims against ISU alleging the same, "left and right hands and other parts of the body." As stated earlier, Petitioner's testimony was limited to her left arm and hand.

Petitioner testified that she later was awarded Social Security Disability and then obtained a new, part-time job that included customer service over the phone which included some data-entry. Petitioner told her cardiologist that she "uses her left hand for using a telephone for a number of hours during the day." (PX #1 p.41)

Three-year medical treatment gap!

On April 8, 2013, Petitioner sought medical treatment with Dr. Lawrence Li, who noted the earlier EMG/NCV. He wrote that the left carpal tunnel syndrome was clinically not the problem, instead it was the left elbow nerve entrapment. (PX #3) Petitioner was prescribed surgery but deferred. There is no history of Petitioner's old work duties in Dr. Li's medical records, nor is there any statement of causal connection.

On September 17, 2014, while treating with Dr. Herman Dick, Petitioner underwent a cervical CT-Scan. Dr. Dick wrote that Petitioner's new symptoms of hand numbness could be from severe stenosis at C5-C6. (PX#4 p.61)

On February 22, 2016, Petitioner was seen at McLean County Orthopedics by Dr. Jerome Oakey. He assessed her with left hand dysfunction which was "likely caused by her ongoing compression of the ulnar nerve." (PX 5, p. 8)

On March 30, 2016, Petitioner saw Dr. Craig Carmichael at McLean County Orthopedics who performed another EMG. (PX 5, pp. 13-14) He noted that Petitioner complained of severe weakness in the left hand as well as numbness in the fourth and fifth digit and felt that pressing down on her wrist aggravated the condition. He noted severe ulnar neuropathy affecting the left hand and moderate to severe bilateral median neuropathies:

> On EMG today, there is a severe ulnar neuropathy affecting the left hand and affecting the superficial branch of the ulnar nerve more than the deep branch although it is affecting both significantly. It is difficult to definitively localize the lesion due to the extreme severity of the denervation of the ADM and also by the patient's large arm size. Overall, this appears more likely located at the wrist than at the elbow given a lack of

> decrement across the elbow in amplitude or conduction velocity along the ulnar nerve when measured at the FDI. In addition, there does appear to be a relatively normal dorsal ulnar cutaneous sensory nerve response at the left hand, and the distal latency of the ulnar nerve to the FDI appears mildly prolonged on the left wrist compared to the right. In addition, there are moderate to severe median neuropathies at both wrists that are worse on the right than the left. (PX 5, p. 5)

Testimony of Treating Orthopedic Surgeon Dr. Lawrence Li

Dr. Lawrence Li was deposed on August 4, 2022. (PX #6)

Dr. Li first saw Petitioner on April 8, 2013, three years after she left her job at ISU. (PX 6, p. 5) She presented with pain in her neck radiating down both arms into her hands. She had an EMG/NCV done in 2010 that showed severe nerve slowing, and more recently had suffered an inability to adduct her left small finger (PX 6, p. 6)

Dr. Lawrence Li testified that the EMG/NCV study was indicative of nerve compression, resulting in symptoms such as numbness, tingling, loss of strength, and pain. Dr. Li testified that nerve compression was consistent with the inability to adduct the left small finger. (PX 7, p. 7) His examination of Petitioner found a positive Tinel's test at the elbow, left interossi atrophy, and a positive Wartenberg sign, meaning she could not adduct the small finger. Overall, Petitioner had normal range of motion but abnormal nerve function. (PX 7, p. 7)

Finally that day, Dr. Lawrence Li diagnosed Petitioner with severe left cubital tunnel syndrome and left carpal tunnel syndrome and recommended left cubital tunnel release and transmission of the ulnar nerve as well as left carpal tunnel release. (PX 6, p. 8)

Dr. Lawrence Li testified that although Petitioner did not have the surgery, the condition was so severe that it would not go away on its own, and she still needs it. (PX 6, p. 9)

Dr. Lawrence Li testified that if Petitioner had an office job where the position of the desk required Petitioner to flex or extend her wrist more than 30 degrees or flex her elbow greater than 60 degrees, on a repetitive basis it would be sufficient to cause or aggravate the conditions he observed in Petitioner, carpal and cubital tunnel syndrome. (PX 6, pp. 9-11)

On cross-examination, Dr. Li clarified that he had only seen EMG/NCV for the left side. He also testified that Petitioner had symptoms on both sides, but that the left was worse. (PX 6 p. 12) He testified that if someone were to bend their wrist for twenty-five to thirty-three percent of an eight-hour day, it would be sufficient to cause or aggravate the conditions he observed in Petitioner, carpal and cubital tunnel syndrome. (PX 6, p. 16) He testified that this was regardless of the type of typing or the number of keystrokes. (PX 6, pp. 16-17)

Dr. Lawrence Li testified that although there is a significant number of carpal tunnel cases where there is not a known medical cause, if Petitioner had an office job where the position of the desk required Petitioner to flex or extend her wrist more than 30 degrees or flex her elbow greater than 60 degrees, on a repetitive basis, her job would be causal or contributory to her condition. (PX 6, p. 19)

In answer to the question of why Petitioner would not have bilateral symptomology, Dr. Li clarified that she did in fact have bilateral symptomology, she was just worse on the left than on the right, and therefore he was focused on the left. (PX 6, p. 19)

He testified that he recommended surgery, but that Petitioner did not think it would help her, so she declined. (PX 6, p. 20)

CONCLUSIONS OF LAW

With regard 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 facts must be closely examined in a repetitive injury case to ensure a fair result for both the faithful employee and the employer. *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 71 (2006). Compensation is allowable where an injury is not sudden but gradual, so long as it is linked to the claimant's work. *Durand*, 224 Ill. 2d at 66 (citing *Peoria County Belwood Nursing Home v. Industrial Comm'n,* 115 Ill. 2d 524, 529 (1987)). The Illinois Supreme Court went on to highlight that "[t]o deny an employee benefits for a work-related injury that is not the result of a sudden mishap * * * penalizes an employee who faithfully performs job duties despite bodily discomfort and damage." *Durand,* 224 Ill. 2d at 66 (citing *Peoria County*, 115 Ill. 2d at 529-30).

In these cases, it should be noted that Petitioner never lost any time from work and filed her claims only after she left ISU. Ms. Jackson testified that she spent more than 75% of her day typing at keyboard and both wrists and her elbows remained at bent at 45 degrees for the wrists and 60 degrees for the elbows, this history was related over a decade after the alleged occurrence and never to any treating physicians. At a result, it has little or no credibility.

Instead, Petitioner's testimony seemed a tailored fit to match Dr. Li's clinical theory of causal connection, which offered as a hypothetical by Jackson's attorney. While it is true that Dr. Lawrence Li testified that work duties would be sufficient to cause or aggravate the carpal and cubital tunnel, Petitioner never related them to Dr. Li in 2013. In fact, Petitioner's complaints on April 8, 2013, indicate that she had neck pain radiating down both arms into hands. (PX #3) Dr. Li did not have the benefit of reviewing all the medical records submitted into evidence. Finally, Petitioner saw Dr. Lawrence Li on one occasion. To characterize him as a treater is technically correct, but there was no longstanding doctor/patient relationship here.

The Arbitrator notes that Respondent did not introduce any expert testimony or other evidence to contradict the testimony of Dr. Lawrence Li, but also acknowledges that would be extremely difficult to contradict Petitioner's description of her work duties twelve years later.

Based on the entire record, additionally noting the paucity of treatment and lengthy time periods of no treatment whatsoever, the Arbitrator finds that Petitioner failed to sustain her burden of proving she suffered injuries to her left arm and hand because of repetitive or specific traumas on any of alleged injury dates with Respondent.

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

Despite having a prior carpal tunnel and cubital tunnel claims, Petitioner failed to give a clear history of her work duties to her medical providers, never lost any time from work as the result of her medical condition, nor did she treat on a regular basis for them. Perhaps the most compelling medical evidence in the matter is on September 17, 2014, when Dr. Herman Dick wrote that her new symptoms of hand numbness could be from her severe neck stenosis at C5 C6. (PX #4 p.61) This is corroborated by Petitioner's bilateral findings (PX #2 p.9) and her complaints to Dr. Li that the pain originated from her neck downward. (PX #3)

As stated earlier, the Arbitrator finds that the treating medical records fail to corroborate much of any of Petitioner's testimony regarding causal connection. The best snippet in the medical records is in Dr. Powers records where Petitioner stated that she does a "fair amount of typing." But it bears repeating, there is no lost time, there is no sustained medical treatment and the treatment gaps are frequent and lengthy. If Petitioner quit her job with ISU, it appears that she did so because of her arthritic knees, not her hands. And her hand condition may very well originate from her neck because of cervical stenosis.

The Arbitrator finds that neither the Petitioner's nor Dr. Li's testimony is credible and Petitioner's current condition of ill-being is not causally related to the injury.

With regard to issue G, What were Petitioner's earnings? The Arbitrator finds as follows:

Respondent introduced wage statements into evidence, but in finding no accident nor credible causation above, a determination of the Petitioner's AWW is not necessary.

With regard to issue J, Were the medical services that were provided to Petitioner reasonable and necessary? The Arbitrator finds as follows:

Consistent with the above findings above, Respondent is not liable for medical services provided to Petitioner under The Illinois Workers' Compensation Act.

With regard to issue L, What is the nature and extent of the injury? The Arbitrator finds as follows:

Consistent with above, no permanency is awarded for these claims.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	10WC041067
Case Name	Ernestine Chris Jackson v. State of Illinois - Illinois State University
Consolidated Cases	10WC035618; 10WC041066 10WC041571;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0053
Number of Pages of Decision	20
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	William Trimble
Respondent Attorney	Kayla Koyne

DATE FILED: 1/26/2024

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ERNESTINE CHRIS JACKSON,

Petitioner,

vs. NO: 10 WC 41067

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, causal connection, medical expenses and permanent partial disability (PPD) benefits, and being advised of the facts and law, reverses the Decision of the Arbitrator.

This claim proceeded to arbitration hearing on a consolidated basis with claim numbers 10 WC 35618, 10 WC 41066 and 10 WC 41571. Separate decisions have been issued for each claim number. At hearing, the parties confirmed that this was a single case for repetitive injury to the left hand and arm with four disputed dates of injury and Petitioner was only requesting one award from these four claims.

For the reasons stated below, the Commission finds that Petitioner's work-related, repetitive trauma injuries to her left hand and arm manifested on May 25, 2010, the accident date alleged in 10 WC 41067, and any award for worker's compensation benefits will be made under this claim number.

FINDINGS OF FACT

Job Duties

Petitioner began working for Respondent in 1999 as a clerk and in June 2008, her job title changed to administrative clerk. She remained in this position through her retirement on May 31, 2010. (T.7-8; T.15). Petitioner's job duties as an administrative clerk included bookkeeping, ordering supplies, answering phones and xeroxing. She also typed checks, letters, various syllabi,

course documents and papers. Petitioner additionally collated thousands of paper and she described her work as hectic. (T.9; T.24-25). She testified that she worked for professors in the Department of Special Education. There were 15 professors within the office and about 30 outside the office. (T.30).

By February 2010, Petitioner was spending the entire work day, or 7.5 hours, in front of computer screens with most of her day typing and she rarely took breaks. (T.9-10). Petitioner worked at an L-shaped table with a keyboard placed in front of two computer screens. (T.10). She testified that her workload increased in 2010 due to a reduction of workers in the office from five people to only Petitioner. (T.10-11; T.21-22). Petitioner also described typing with her elbows scrunched into her body like a T-rex with her wrists bent down towards the keyboard about 45 to 50 degrees. (T.11-12).

Petitioner testified that as she worked from 2008 through 2010, she noticed increased pain, stiffness and deformity in her fingers on the left hand which caused her to miss certain keys while typing. (T.12-13). Respondent provided her with a hand brace in 2008 which she wore on her left hand up until a year prior to arbitration. (T.19-20). Respondent also provided Petitioner with a keyboard tray in 2010 so she could type at a lower position. (T.13-14). The keyboard tray did not alleviate her symptoms. (T.25).

Petitioner further testified that two years after retiring on May 31, 2010, she got a part-time, remote position offered through Social Security. She was not required to use her hands a lot and instead used a headset to speak on the phone. Petitioner stated that it was a customer service position with some data entry involved. (T.30-32). Petitioner worked in this position for approximately six months. (T.32).

As of the date of arbitration, Petitioner was receiving social security benefits and a small pension from Respondent. (T.32-33). She testified that she had applied for social security disability benefits in 2010 for her lower back. (T.33).

Medical Evidence

Petitioner's Exhibit 1 are the medical records prior to May 25, 2010 from OSF Medical Group, the office of Petitioner's primary care physician, Dr. Powers. The exhibit documented Petitioner's treatment for various unrelated issues including chest pain, shortness of breath, hypertension, follow-up care for a pacemaker procedure, arthritis, GERD and anemia.

Pertinent records included an August 13, 2007 visit note which indicated that Petitioner's joints on her left hand were swollen. She reported aching pain and that her symptoms had been ongoing for two months. Petitioner was referred to rheumatology. On September 12, 2007, Petitioner was evaluated by Dr. Radden who noted that Petitioner had a history of carpal tunnel syndrome that was diagnosed in 2003 and cubital tunnel syndrome status post nerve surgery also in 2003. Petitioner reported worsening pain in her hands as well as her back, knees and ankles. She also had swelling in her hands. Under "Social History," the notes indicated that Petitioner typed on a computer all day at work and that she had been doing this for many years. Labs also indicated a negative rheumatoid factor. Petitioner was assessed with polyarthralgia involving her back,

hands, knees and feet. The visit note stated that Petitioner's symptoms were most consistent with degenerative joint disease. Dr. Radden recommended water exercises, range-of-motion exercises and some anti-inflammatory foods. (PX1).

A June 30, 2008 visit note from Dr. Powers' office stated that Petitioner was noticing pain in her right arm and that years ago, she had had an EMG/NCV study that revealed carpal tunnel. The visit note further stated that Petitioner had undergone therapy and her hands seemed better. She was not having any numbness or tingling but at times would note that her right arm would bother her. Petitioner recalled no recent injury or trauma to the area and no activities where she had to use her arm more. Examination revealed good range of motion of her wrists, elbows and shoulders. There were no treatment recommendations listed in the visit note. (PX1).

Petitioner returned to Dr. Powers on February 10, 2010 due to pain in her hands. The visit note stated that Petitioner continued to fight with her arthritis that was affecting her back, neck, knees and hands. The visit note further indicated that Petitioner was experiencing tightness in her chest, high blood pressure and she admitted stress could be a factor. Petitioner reported that she worked for Respondent doing the job of two to three people. "She does a fair amount of typing but that is difficult with her arthritis. When her hands are in pain, she can't keep up." (T.14; PX1). Examination revealed some arthritic nodules in her hands. Dr. Powers prescribed Ultram for the arthritis. (PX1).

Petitioner next followed-up with Dr. Powers on February 26, 2010. The visit note again stated that Petitioner continued to fight with her arthritis that was affecting her back, knees and hands. Dr. Powers prescribed Darvocet for Petitioner's osteoarthritis. On April 8, 2010, Petitioner reported pain in her feet and hands with no indication what was causing Petitioner's pain in her hands. Dr. Powers discussed a possible trial of oral steroids to help with Petitioner's symptoms in her hands. The visit note also stated that Petitioner had been pursing disability but had decided instead to retire from her job. (PX1).

Following Petitioner's April 8, 2010 visit with Dr. Powers, she completed an EMG/NVC study with Dr. Fang Li on May 25, 2010 at McLean County Neurology. (T.15; PX2). Dr. Powers was the referring physician. The history stated that Petitioner had a history of right cubital tunnel release and that she "presented with left ulnar numbness and left hand weakness for 2 years. She also has significant pain in the left hand and elbow." (PX2). The EMG/NCV findings indicated severe ulnar neuropathy at the left wrist and that a superimposed ulnar neuropathy at the left elbow could not be excluded. Petitioner also had bilateral median neuropathies at the wrists (carpal tunnel syndrome), worse on the right, and chronic C6-7 radiculopathies on both sides. (PX2).

There are no further medical records in evidence between May 25, 2010 and Petitioner's April 8, 2013 appointment with Dr. Lawrence Li at the Orthopedic & Shoulder Center. (T.16; PX3). Petitioner reported pain in her neck that radiated down both arms into her hands. She also reported numbness and tingling in both hands for many years. The visit note stated that the 2010 EMG/NCV study showed severe nerve slowing and "[r]ecently had inability to adduct Left small finger and had repeat EMG/NCV study. Had Right Cubital Tunnel Release and anterior transposition of Ulnar Nerve in 2004." (PX3). This was Petitioner's only visit with Dr. Li.

Dr. Li's evidence deposition was taken on August 4, 2022. He is a board-certified orthopedic surgeon. (PX6, pg. 5). He testified that the nerve slowing was indicative of compression of the nerve. "And when the nerve is compressed, it doesn't function normally, and that results in symptoms such as numbness, tingling, loss of strength, pain." (PX6, pgs. 6-7). Dr. Li agreed that the nerve slowing was consistent with Petitioner's inability to adduct the left small finger. (PX6, pg. 7).

Dr. Li testified regarding Petitioner's April 8, 2013 examination findings. He noted that Petitioner had a positive Tinel's test at the left elbow. She also had left interossei atrophy and a positive Wartenberg sign, "which means that she cannot a-d-duct her small finger." (PX3; PX6, pg. 7). Petitioner also had normal range of motion but abnormal nerve function. (PX6, pg. 7). According to the April 8, 2013 visit note, Dr. Li had relied on Dr. Dick's verbal report regarding an updated EMG/NCV study. This updated study was not in evidence. Dr. Li testified that the written report was later faxed to his office and "showed she had advanced left ulnar neuropathy at the elbow and left carpal tunnel entrapment." (PX3; PX6, pgs. 7-8). Dr. Li's April 8, 2013 visit note additionally stated that Petitioner's diagnoses were chronic severe left ulnar nerve entrapment of the elbow with severe involvement and left carpal tunnel syndrome "by EMG/NCV study but clinically not the problem." (PX3).

Dr. Li testified that the recent EMG/NCV study was consistent with his examination findings and he confirmed his diagnoses of severe left cubital tunnel syndrome and left carpal tunnel syndrome. He recommended a left cubital tunnel release and transmission of the ulnar nerve as well as a left carpal tunnel release. (PX6, pg. 8). Dr. Li's plan as stated in the April 8, 2013 visit note was: "I explained that the treatment decisions are based on a complex relationship which is affected by the history, physical findings, current symptoms, imaging studies, other diagnostic studies. The overall impact from this collective data was examined and specific treatment recommendations were discussed with patient . . ." (PX3). Petitioner decided not to proceed with surgery "because of unpredictability of surgery due to chronicity of symptoms." (PX3).

With respect to causal connection, Petitioner's attorney asked Dr. Li a hypothetical question during his deposition. He asked whether Petitioner's job duties of typing at a computer and mousing at a high desk for most of the work day could have caused or aggravated Petitioner's condition in the left upper extremity, Dr. Li responded:

> So if the position of the desk resulted in her having to bend the elbow more, bend the wrist more or extend the wrist more than normal, and to a position for the wrist greater than 30 degrees, either with flexion or extension, and greater than 60 degrees at the elbow on a repetitive basis, then yes. (PX6, pgs. 9-11; pg. 18).

During cross-examination, Dr. Li testified that Petitioner reported having symptoms in both hands with the left worse than the right. Although he incorrectly testified that Petitioner was right-handed, he stated that hand dominance would not explain why one hand was more symptomatic than the other. "[P]eople aren't symmetrical, and that's probably the reason. (PX6, pgs. 12-13).

Dr. Li further acknowledged that the only information he had regarding Petitioner's job duties was what Petitioner's attorney provided during his deposition. (PX6, pgs. 14-15). He also agreed that the period of time and frequency of bending the wrist or elbow were important factors to consider. (PX6, pgs. 15-16). "My threshold would be if someone worked eight hours a day, I would say 25 to 33 percent of the time, they spend, you know, with their wrist in certain positions, with strenuous positions. So that would be about two-and-a-half hours." (PX6, pg. 16). Dr. Li did not believe it mattered if the typing involved a Word document or a database and he did not believe the number of keystrokes mattered. (PX6, pg. 17).

With respect to co-morbidities, Dr. Li testified that Petitioner did not have diabetes or hypothyroidism and he did not know her BMI. However, Petitioner's age could be a co-morbidity. (PX6, pg. 17). He also stated that an individual could develop symptoms of carpal tunnel syndrome and cubital tunnel syndrome without a specific cause but that that was not the case for Petitioner. (PX6, pg. 18). Dr. Li offered no opinion on Petitioner's ability to work. (PX6, pg. 20.).

Petitioner additionally consulted with Dr. Dick at McLean County Neurology on September 23, 2013. (T.16; PX4). He treated Petitioner for head, neck and other issues through 2014 but had also recommended an EMG/NCV study of the left upper extremity for chronic left ulnar neuropathy. Examination findings during an August 22, 2014 visit for neck pain and headaches included no progressive weakness, numbness, tingling or clumsiness in Petitioner's limbs although the report did not indicate what limbs were affected. Strength was also full bilaterally with wrist extension and hand grip. Petitioner followed-up with Dr. Dick again on September 17, 2014 and reported recent symptoms of increased numbness in the hands. Dr. Dick noted no history of any progressive weakness in the arms and legs, no swelling in the extremities and stated: "Patient having new symptoms of hand numbness which could be from the severe cervical stenosis at C5 C6." (PX4). He recommended further studies to determine next steps related to the cervical spine. (PX4).

Petitioner testified that she did not proceed with any cervical spine treatment following her appointment with Dr. Dick and the next time she sought treatment for her hands and arms was on February 22, 2016 with Dr. Oakey at McLean County Orthopedics. (T.16-17; PX5). The history stated that Petitioner was seen a few years ago due to her small finger moving further from her other fingers and now her ring finger was doing the same. Petitioner was having difficulty using her left hand which was her dominant hand. She also had numbness in her small finger and a lump in her left thumb over the A1 pulley. Petitioner reported no specific event for her condition. (PX5).

Examination revealed decreased sensation at the ulnar nerve distribution bilaterally, as well as tenderness, a palpable node and triggering at the A1 pulley. Froment's and Wartenberg signs were present on the left with interossei atrophy. (PX5). X-rays of the left hand revealed diffuse degenerative joint disease most notably at the base of the thumb. Dr. Oakey administered a trigger finger injection into the tendon sheath at the appointment. (T.17; PX5). He diagnosed her with left hand dysfunction likely caused by her ongoing compression of the ulnar nerve. The visit note further stated: "When I had seen her in 2011 we discussed a cubital tunnel and carpal tunnel on the left that she never had performed, she saw Dr. Li following evaluation with me." (PX5). The medical records from Dr. Oakey's office did not have the 2011 visit note. Dr. Oakey recommended an EMG of the bilateral upper extremities. (PX5).

On March 30, 2016, Petitioner saw Dr. Carmichael at McLean County Orthopedics. (T.17; PX5). Dr. Carmichael noted that Petitioner had been dealing with progressive left hand dysfunction for several years. She complained of severe weakness in the left hand and numbness in the fourth and fifth digits. Pressing down on her wrist aggravated her symptoms. Petitioner completed an EMG/NCV study on March 30, 2016 which revealed severe ulnar neuropathy affecting the left hand and affecting the superficial branch of the ulnar nerve more than the deep branch although it was affecting both significantly. Dr. Carmichael stated that overall, it appeared that the lesion was more likely located at the wrist than in the elbow based on the results of the EMG/NCV study. The plan was for Petitioner to follow-up with Dr. Oakey. (PX5).

Petitioner's Exhibit 4, the Advocate Medical Group records, contained additional, unrelated imaging and other test reports for the heart, knees, lumbar spine and chest from May 2017 through October 2019. Within that timeframe, Petitioner completed x-rays of the left hand on January 18, 2018. The report stated that Petitioner had left hand pain and pain along the fourth and fifth digits with no known injury. The findings included mild to moderate osteoarthritic change affecting the interphalangeal joints, most pronounced within the small finger and distal interphalangeal joint of the long finger. Petitioner also had mild osteoarthritic change affecting the first metacarpal phalangeal joint. There was no acute fracture or malalignment noted. X-rays of the right hand were also completed on January 18, 2018 and the findings were relatively symmetric according to the report. Dr. Singh had ordered the x-rays. (PX4). Petitioner testified that Dr. Singh had evaluated her and agreed with Dr. Li that there were no further treatment recommendations to improve the deformity in her fingers. (T.17; PX4). During arbitration, Petitioner demonstrated that her fingers were falling, she could not hold them together or straighten them out. (T.27).

Petitioner testified at arbitration that she had not had surgery and was not undergoing treatment for her left hand or arm. (T.17; T.21). She testified that her left hand hurt all the time, her fingers were deformed and crooked and they were numb every morning. Petitioner also testified that the way she writes has changed and her hand was weak. She stated that she is left-handed and could no longer hold anything with her left hand. Petitioner also walked with a walker and had to hold the walker with three fingers or two fingers and the thumb. (T.18). Petitioner additionally had spasms in her hand. "[M]y hands will bend like it's clutching something although I'm not clutching anything, and it will stay like that, and it's very painful when you get that spasm and your fingers are like a claw." (T.18-19). Petitioner also took Norco for her back but the medication also helped with the pain in her hands. (T.19-21).

CONCLUSIONS OF LAW

In this claim, 10 WC 41067, the Arbitrator determined that Petitioner failed to meet her burden of proof by a preponderance of the evidence that she sustained accidental injury on May 25, 2010 which arose out of and in the course of her employment with Respondent. The Arbitrator further found that Petitioner's current condition of ill-being was not causally related to the alleged May 25, 2010 work accident. Petitioner's claim for worker's compensation benefits was denied.

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 first finds no genuine dispute between the parties with respect to Petitioner's increased typing duties for Respondent from 2008 through 2010, and that by February 2010, Petitioner was spending most of her work day typing. The Commission further finds no genuine dispute related to Petitioner's diagnoses of left cubital tunnel syndrome and left carpal tunnel syndrome, both of which were confirmed by EMG/NCV studies as early as 2010. The issue remains whether Petitioner's conditions in her left hand and arm are causally related to her repetitive typing duties for Respondent.

"[A]n employee who alleges injury based on repetitive trauma must still meet the same standard of proof as other claimants alleging an accidental injury. There must be a showing that the injury is work related and not the result of a normal degenerative aging process." *Peoria County Belwood Nursing Home v. Indus. Comm'n*, 115 Ill. 2d 524, 530 (1987). In repetitive-trauma cases, "the claimant generally relies on medical testimony establishing a causal connection between the work performed and claimant's disability." *Nunn v. Indus. Comm'n*, 157 Ill. App. 3d 470, 477 (1987).

The Commission notes that Petitioner's prior medical records pertained to many unrelated conditions, but as early as 2007, Petitioner was presenting with left hand swelling and pain. Petitioner's physicians at that time had considered arthritis, degenerative joint disease, had ruled out rheumatism, but also documented that Petitioner typed on a computer all day at work and that she had been doing this for many years. Petitioner's treatment related to her hands resumed in February 2010. The visit notes again documented Petitioner's job duties for Respondent, including "doing the job of 2-3 people" due to cuts, as well as doing "a fair amount of typing" that was difficult with her arthritis.

The medical records further demonstrated that Dr. Powers, Petitioner's primary care physician, referred Petitioner to Dr. Fang Li for an EMG/NCV study. Petitioner completed the study on May 25, 2010 which revealed severe ulnar neuropathy at the left wrist and a superimposed ulnar neuropathy at the left elbow. The history recorded on the EMG/NCV report indicated that Petitioner had been having left ulnar numbness and left hand weakness for two years and that she had significant pain in the left hand and elbow.

The Commission finds that the evidence thus far is consistent with Petitioner's testimony regarding her job duties for Respondent from 2008 through 2010 and her left upper extremity symptoms and complaints. The Commission additionally finds that the gaps in treatment for the left upper extremity after the May 2010 EMG/NCV study are not fatal to Petitioner's claim. From 2010 through 2018, Petitioner continued to treat for other unrelated conditions involving the heart, knees, lumbar spine and chest. However, within that period, Petitioner also sought treatment for her left upper extremity complaints.

Dr. Lawrence Li evaluated Petitioner on April 8, 2013. He testified that the 2010 EMG/NCV study showed nerve slowing consistent with Petitioner's inability to adduct her left small finger and that a recent EMG/NCV study was consistent with his examination findings and Petitioner's diagnoses of severe left cubital tunnel syndrome and left carpal tunnel syndrome. Dr. Li recommended left cubital tunnel and left carpal tunnel surgeries. Dr. Dick further evaluated Petitioner in 2014 and assessed her with left ulnar neuropathy. Dr. Oakey's February 22, 2016 visit note stated that he had seen Petitioner in 2011 and they had discussed cubital tunnel and carpal tunnel surgeries on the left. In 2016, Dr. Oakey diagnosed Petitioner with left hand dysfunction likely caused by her ongoing compression of the ulnar nerve. Dr. Carmichael then saw Petitioner in March 2016 and noted that Petitioner had been dealing with progressive left hand dysfunction for several years. The most recent EMG/NCV study in evidence, dated March 30, 2016, again revealed severe ulnar neuropathy affecting the left hand and affecting the superficial branch of the ulnar nerve more than the deep branch although it was affecting both significantly.

The Commission additionally notes the evidence in the medical records related to the cervical spine and finds that this evidence does not undermine Petitioner's claim. The February 2010 medical records indicated that Petitioner had some arthritic pain in her neck. However, in May 2010, when Dr. Powers referred Petitioner for the EMG/NCV study, there was no evidence of any neck complaints. Instead, Dr. Powers referred Petitioner for the study due to complaints of left wrist, hand and elbow pain. On April 8, 2013, Petitioner reported to Dr. Lawrence Li that she had pain in her neck that radiated down both arms into her hands, but she also reported numbness and tingling in both hands for many years. Dr. Li had relied in part on the May 25, 2010 EMG/NCV findings which also revealed evidence of cervical radiculopathy. Nonetheless, Dr. Li's diagnoses and treatment recommendations for Petitioner were related to the left upper extremity and not the cervical spine.

In 2014, Dr. Dick stated that Petitioner had new symptoms of hand numbness which could be related to cervical stenosis at C5-6. However, the Commission finds that neither Dr. Dick nor any physician testified with respect to this relationship between Petitioner's cervical issues and diagnoses of left cubital tunnel syndrome and left carpal tunnel syndrome. Moreover, as of Dr. Li's deposition on August 4, 2022, Dr. Li maintained that Petitioner had severe left cubital tunnel syndrome and left carpal tunnel syndrome which necessitated surgical intervention.

The Commission notes that Dr. Lawrence Li provided the sole causation opinion in this claim. The Commission further notes that Dr. Li's April 8, 2013 visit note did not indicate that Petitioner had informed him about her job duties on that date, and Dr. Li admitted at his deposition that they did not discuss her job duties during that appointment. Dr. Li confirmed that his causation opinion was based on the hypothetical question provided at his deposition.

Noting the foregoing, the Commission finds that Dr. Li's opinions remain persuasive, unrebutted and consistent with Petitioner's testimony. Petitioner's attorney's hypothetical question paralleled Petitioner's testimony of typing at a computer and mousing at a high desk for most of the work day. Based on this question, Dr. Li agreed that Petitioner's job duties could be a causative factor in her condition of ill-being in the left hand and arm if the position of her desk resulted in her having to bend the elbow more, bend the wrist more, extend the wrist to a position greater than

30 degrees and greater than 60 degrees at the elbow on a repetitive basis. Dr. Li further added that spending about two-and-a-half hours in an eight-hour day with the wrist in this strenuous position was an important factor.

Here, Petitioner's unrebutted testimony was that she noticed increased symptoms in her left hand as she worked in her new position as an administrative clerk from 2008 through 2010. Her workload increased in 2010 and she spent most of her 7.5-hour workday typing, with her elbows scrunched into her body like a T-rex, and with her wrists bent down towards the keyboard about 45 to 50 degrees. The Commission finds that Petitioner's testimony regarding her increased typing duties and timeline of symptoms in the left upper extremity were corroborated by the medical records. Furthermore, Dr. Li testified to specific movements and positions of the wrist and elbow as well as the timeframe necessary for Petitioner's typing duties to become contributory to her condition. Petitioner testified regarding the position of her left arm and demonstrated the posture and position at the arbitration hearing. The Arbitrator observed that Petitioner had to bend approximately 45 degrees for the wrist and 60 degrees for the elbow. The Commission finds Petitioner's testimony consistent with the criteria set by Dr. Li.

The Commission additionally finds that Petitioner's physicians were consistent with their findings of neuropathy in the left elbow and wrist throughout the years. Dr. Li had also attributed Petitioner's finger deformity to evidence of nerve slowing noted on the 2010 EMG/NCV study.

Accordingly, the Commission finds that Petitioner proved by a preponderance of the evidence that her repetitive duties for Respondent were a cause in her left cubital tunnel syndrome and left carpal tunnel syndrome and that her conditions manifested on May 25, 2010, the date of the EMG/NCV study. The Commission therefore reverses the Arbitrator's Decision.

Based on the Commission's finding of accident and causal connection in favor of Petitioner, the Commission awards the following reasonable and necessary medical bills related to Petitioner's May 25, 2010 work injury and as detailed in Petitioner's Exhibit 8:

1) McLean County Orthopedics
Dates of Service: 2/22/2016 and 3/30/2016: $2,604.50

2) Orthopedic and Shoulder Center
Date of Service: 4/8/2013: $283.97

3) McLean County Neurology
Dates of Service: 5/25/2010 and 9/23/2013: $2,745.14

TOTAL: $5,633.61

The Commission next addresses Petitioner's award of PPD benefits. Petitioner's work-related injury pre-dated September 1, 2011. As such, the Commission need not consider the five factors under Section 8.1b of the Act in assessing permanent partial disability. Petitioner was diagnosed with left cubital tunnel syndrome and left carpal tunnel syndrome as a result of her repetitive work duties for Respondent. As of the arbitration date, Petitioner had not proceeded with

the left cubital tunnel release and transmission of the ulnar nerve and the left carpal tunnel release recommended by Dr. Li. She continues to experience pain, weakness and spasms in her left hand, numbness in her fingers and she has difficulty holding onto her walker. She also testified that her fingers were deformed and crooked which affected her writing. The Commission thus finds that Petitioner sustained seven-and-a-half percent (7.5%) loss of use of the left arm and seven-and-a-half percent (7.5%) loss of use of the left hand as a result of her work-related repetitive trauma injuries.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed on January 18, 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 $5,633.61, as evidenced in Petitioner's Exhibit 8 and pursuant to Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner permanent partial disability benefits of $311.86 per week for 34.35 weeks because the injuries sustained caused seven-and-a-half percent (7.5%) loss of use of the left arm (18.975 weeks) and seven-and-a-half percent (7.5%) loss of use of the left hand (15.375 weeks) pursuant to Section 8(e) of the Act.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all other 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.

January 26, 2024

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

CAH/pm
O: 12/7/23
052

/s/ *Marc Parker*
Marc Parker

DISSENT

I respectfully dissent from the Majority's opinion and would affirm the Arbitrator's well-reasoned Decision in this claim as well as add the following:

Dr. Li's causal connection opinion relies on incomplete medical evidence, and what is offered is insufficiently thorough to be credibly relied upon. Dr. Li did not address whether the

nearly three-year gap in treatment, from Petitioner's 2010 EMG/NCV study to his 2013 evaluation, may have affected his causation opinion – especially given that the medical evidence as of March 2010 onward revealed an outright absence of any information regarding Petitioner's job duties for Respondent or that Petitioner attributed her condition of ill-being in the left upper extremity to her typing duties.

Further, Dr. Li's April 8, 2013 visit note stated that in recommending surgical intervention, Dr. Li had considered Petitioner's "complex relationship which is affected by the history, physical findings, current symptoms, imaging studies, other diagnostic studies." (PX3). However, Dr. Li did not testify as to the extent that Petitioner's complex medical history, versus her job duties for Respondent, may have contributed to her left cubital tunnel syndrome and left carpal tunnel syndrome and need for surgery. What Dr. Li did confirm at his deposition was that he did not know what Petitioner's job duties were at the time he evaluated her in 2013 or whether she was even working at that time.

Petitioner additionally described this unique position of typing and that her fingers were deformed. While Dr. Li attributed Petitioner's inability to adduct her left small finger to evidence of nerve slowing noted on the 2010 EMG/NCV study, he did not address Petitioner's actual testimony with regard to her fingers falling over, being crooked, bent and like a claw. He did not clarify whether these symptoms were typical in patients with cubital and carpal tunnel syndrome. Overall, there were many questions that Dr. Li did not answer.

Based on the above, the preponderance of the evidence does not support a finding that Petitioner's current condition of ill-being related to left cubital tunnel syndrome and left carpal tunnel syndrome was the result of her repetitive duties for Respondent. I therefore dissent from the Majority's Decision.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	10WC041067
Case Name	JACKSON, ERNESTINE CHRIS v. STATE OF ILLINOIS - ILLINOIS STATE UNIVERSITY
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	Kurt Carlson, Arbitrator

Petitioner Attorney	William Trimble
Respondent Attorney	Christina Smith

DATE FILED: 1/18/2023

THE INTEREST RATE FOR THE WEEK OF JANUARY 18, 2023 4.68%

/s/ Kurt Carlson, Arbitrator
Signature

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

January 18, 2023

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation Commission

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

☐ 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

ERNESTINE CHRIS JACKSON
Employee/Petitioner

v.

STATE OF ILLINOIS – ILLINOIS STATE UNIVERSITY
Employer/Respondent

Case # **10** WC **041067**

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 Kurt Carlson, Arbitrator of the Commission, in the city of **Bloomington**, on **11-29-22**. 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 **05-25-10**, 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 $ **27,027.64**; the average weekly wage was $ **519.76**.

On the date of accident, Petitioner was **57** 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** 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 she sustained an accidental injury which arose out of and in the course of her employment and thus shall be barred from recovery. Claim 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.

Kurt A. Carlson

Arbitrator

JANUARY 18, 2023

FINDINGS OF FACT

On November 29, 2022, this matter was heard in Bloomington, Illinois and was presented as four consolidated cases: 10WC035618; 10WC041066; 10WC041067; and 10WC041571. Nevertheless, the parties agreed: this is a single case for repetitive injury to the left hand and arm, with four disputed dates of injury. While it may be true that all pleadings allege bilateral hand and arm injury , the testimony of Petitioner and the medical evidence were limited to the left hand and arm.

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Petitioner began working for Respondent ("ISU") in 1999 in an office/secretarial position.

In 2008, she transitioned to working for the Department of Special Education. In that position, she worked for around fifteen professors inside the office, and about thirty outside of the office. Due to staffing cuts, she testified that she did the job of two or three people. She prepared various materials including class syllabi and class notes. Although her job included general office and clerical tasks such as copying, more than 75% of her day was spent typing. Her average weekly wage was about $525.00.

Petitioner described the physical layout of the area where she worked, stating that her computer and keyboard were not on a desk but were on a table, and that the height was such that her hands and elbows were in a compressed angle. At hearing, Petitioner demonstrated the posture and position that she was forced to use to type. The Arbitrator observed that this position required a bend of approximately 45 degrees for the wrist and 60 degrees for the elbow. Petitioner testified that after she complained that her keyboard was in an awkward position, Human Resources came out and did a study and subsequently placed a tray for her keyboard at a lower level than the height of the table. The Arbitrator notes that none of the above were ever related to her treating physicians.

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Petitioner had been seeking a handicapped placard for her knees since 2005.

On April 8, 2010, Dr. Powers catalogued the Petitioner's overall medical condition stating that Petitioner had a myriad of issues including: hypertension, cardiac (pacemaker insertion), dryness to eyes, obesity, arthritis to her back, knees, feet, hands, fatigue/anemia, and GERD. (PX 1 p.3)

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No surgery was prescribed at this time. Petitioner never lost any time from work.

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Petitioner testified that she later was awarded Social Security Disability and then obtained a new, part-time job that included customer service over the phone which included some data-entry. Petitioner told her cardiologist that she "uses her left hand for using a telephone for a number of hours during the day." (PX #1 p.41)

Three-year medical treatment gap!

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On February 22, 2016, Petitioner was seen at McLean County Orthopedics by Dr. Jerome Oakey. He assessed her with left hand dysfunction which was "likely caused by her ongoing compression of the ulnar nerve." (PX 5, p. 8)

On March 30, 2016, Petitioner saw Dr. Craig Carmichael at McLean County Orthopedics who performed another EMG. (PX 5, pp. 13-14) He noted that Petitioner complained of severe weakness in the left hand as well as numbness in the fourth and fifth digit and felt that pressing down on her wrist aggravated the condition. He noted severe ulnar neuropathy affecting the left hand and moderate to severe bilateral median neuropathies:

> On EMG today, there is a severe ulnar neuropathy affecting the left hand and affecting the superficial branch of the ulnar nerve more than the deep branch although it is affecting both significantly. It is difficult to definitively localize the lesion due to the extreme severity of the denervation of the ADM and also by the patient's large arm size. Overall, this appears more likely located at the wrist than at the elbow given a lack of

> decrement across the elbow in amplitude or conduction velocity along the ulnar nerve when measured at the FDI. In addition, there does appear to be a relatively normal dorsal ulnar cutaneous sensory nerve response at the left hand, and the distal latency of the ulnar nerve to the FDI appears mildly prolonged on the left wrist compared to the right. In addition, there are moderate to severe median neuropathies at both wrists that are worse on the right than the left. (PX 5, p. 5)

Testimony of Treating Orthopedic Surgeon Dr. Lawrence Li

Dr. Lawrence Li was deposed on August 4, 2022. (PX #6)

Dr. Li first saw Petitioner on April 8, 2013, three years after she left her job at ISU. (PX 6, p. 5) She presented with pain in her neck radiating down both arms into her hands. She had an EMG/NCV done in 2010 that showed severe nerve slowing, and more recently had suffered an inability to adduct her left small finger (PX 6, p. 6)

Dr. Lawrence Li testified that the EMG/NCV study was indicative of nerve compression, resulting in symptoms such as numbness, tingling, loss of strength, and pain. Dr. Li testified that nerve compression was consistent with the inability to adduct the left small finger. (PX 7, p. 7) His examination of Petitioner found a positive Tinel's test at the elbow, left interossi atrophy, and a positive Wartenberg sign, meaning she could not adduct the small finger. Overall, Petitioner had normal range of motion but abnormal nerve function. (PX 7, p. 7)

Finally that day, Dr. Lawrence Li diagnosed Petitioner with severe left cubital tunnel syndrome and left carpal tunnel syndrome and recommended left cubital tunnel release and transmission of the ulnar nerve as well as left carpal tunnel release. (PX 6, p. 8)

Dr. Lawrence Li testified that although Petitioner did not have the surgery, the condition was so severe that it would not go away on its own, and she still needs it. (PX 6, p. 9)

Dr. Lawrence Li testified that if Petitioner had an office job where the position of the desk required Petitioner to flex or extend her wrist more than 30 degrees or flex her elbow greater than 60 degrees, on a repetitive basis it would be sufficient to cause or aggravate the conditions he observed in Petitioner, carpal and cubital tunnel syndrome. (PX 6, pp. 9-11)

On cross-examination, Dr. Li clarified that he had only seen EMG/NCV for the left side. He also testified that Petitioner had symptoms on both sides, but that the left was worse. (PX 6 p. 12) He testified that if someone were to bend their wrist for twenty-five to thirty-three percent of an eight-hour day, it would be sufficient to cause or aggravate the conditions he observed in Petitioner, carpal and cubital tunnel syndrome. (PX 6, p. 16) He testified that this was regardless of the type of typing or the number of keystrokes. (PX 6, pp. 16-17)

Dr. Lawrence Li testified that although there is a significant number of carpal tunnel cases where there is not a known medical cause, if Petitioner had an office job where the position of the desk required Petitioner to flex or extend her wrist more than 30 degrees or flex her elbow greater than 60 degrees, on a repetitive basis, her job would be causal or contributory to her condition. (PX 6, p. 19)

In answer to the question of why Petitioner would not have bilateral symptomology, Dr. Li clarified that she did in fact have bilateral symptomology, she was just worse on the left than on the right, and therefore he was focused on the left. (PX 6, p. 19)

He testified that he recommended surgery, but that Petitioner did not think it would help her, so she declined. (PX 6, p. 20)

CONCLUSIONS OF LAW

With regard 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 facts must be closely examined in a repetitive injury case to ensure a fair result for both the faithful employee and the employer. *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 71 (2006). Compensation is allowable where an injury is not sudden but gradual, so long as it is linked to the claimant's work. *Durand*, 224 Ill. 2d at 66 (citing *Peoria County Belwood Nursing Home v. Industrial Comm'n,* 115 Ill. 2d 524, 529 (1987)). The Illinois Supreme Court went on to highlight that "[t]o deny an employee benefits for a work-related injury that is not the result of a sudden mishap * * * penalizes an employee who faithfully performs job duties despite bodily discomfort and damage." *Durand,* 224 Ill. 2d at 66 (citing *Peoria County*, 115 Ill. 2d at 529-30).

In these cases, it should be noted that Petitioner never lost any time from work and filed her claims only after she left ISU. Ms. Jackson testified that she spent more than 75% of her day typing at keyboard and both wrists and her elbows remained at bent at 45 degrees for the wrists and 60 degrees for the elbows, this history was related over a decade after the alleged occurrence and never to any treating physicians. At a result, it has little or no credibility.

Instead, Petitioner's testimony seemed a tailored fit to match Dr. Li's clinical theory of causal connection, which offered as a hypothetical by Jackson's attorney. While it is true that Dr. Lawrence Li testified that work duties would be sufficient to cause or aggravate the carpal and cubital tunnel, Petitioner never related them to Dr. Li in 2013. In fact, Petitioner's complaints on April 8, 2013, indicate that she had neck pain radiating down both arms into hands. (PX #3) Dr. Li did not have the benefit of reviewing all the medical records submitted into evidence. Finally, Petitioner saw Dr. Lawrence Li on one occasion. To characterize him as a treater is technically correct, but there was no longstanding doctor/patient relationship here.

The Arbitrator notes that Respondent did not introduce any expert testimony or other evidence to contradict the testimony of Dr. Lawrence Li, but also acknowledges that would be extremely difficult to contradict Petitioner's description of her work duties twelve years later.

Based on the entire record, additionally noting the paucity of treatment and lengthy time periods of no treatment whatsoever, the Arbitrator finds that Petitioner failed to sustain her burden of proving she suffered injuries to her left arm and hand because of repetitive or specific traumas on any of alleged injury dates with Respondent.

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

Despite having a prior carpal tunnel and cubital tunnel claims, Petitioner failed to give a clear history of her work duties to her medical providers, never lost any time from work as the result of her medical condition, nor did she treat on a regular basis for them. Perhaps the most compelling medical evidence in the matter is on September 17, 2014, when Dr. Herman Dick wrote that her new symptoms of hand numbness could be from her severe neck stenosis at C5 C6. (PX #4 p.61) This is corroborated by Petitioner's bilateral findings (PX #2 p.9) and her complaints to Dr. Li that the pain originated from her neck downward. (PX #3)

As stated earlier, the Arbitrator finds that the treating medical records fail to corroborate much of any of Petitioner's testimony regarding causal connection. The best snippet in the medical records is in Dr. Powers records where Petitioner stated that she does a "fair amount of typing." But it bears repeating, there is no lost time, there is no sustained medical treatment and the treatment gaps are frequent and lengthy. If Petitioner quit her job with ISU, it appears that she did so because of her arthritic knees, not her hands. And her hand condition may very well originate from her neck because of cervical stenosis.

The Arbitrator finds that neither the Petitioner's nor Dr. Li's testimony is credible and Petitioner's current condition of ill-being is not causally related to the injury.

With regard to issue G, What were Petitioner's earnings? The Arbitrator finds as follows:

Respondent introduced wage statements into evidence, but in finding no accident nor credible causation above, a determination of the Petitioner's AWW is not necessary.

With regard to issue J, Were the medical services that were provided to Petitioner reasonable and necessary? The Arbitrator finds as follows:

Consistent with the above findings above, Respondent is not liable for medical services provided to Petitioner under The Illinois Workers' Compensation Act.

With regard to issue L, What is the nature and extent of the injury? The Arbitrator finds as follows:

Consistent with above, no permanency is awarded for these claims.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	10WC041571
Case Name	Ernestine Chris Jackson v. State of Illinois - Illinois State University
Consolidated Cases	10WC035618; 10WC041066; 10WC041067;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0054
Number of Pages of Decision	11
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	William Trimble
Respondent Attorney	Kayla Koyne

DATE FILED: 1/26/2024

/s/Christopher Harris, 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

ERNESTINE CHRIS JACKSON,

Petitioner,

vs. NO: 10 WC 41571

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, causal connection, medical expenses and permanent partial disability (PPD) benefits, and being advised of the facts and law, affirms the Arbitrator's Decision denying this claim, a copy of which is attached hereto and made a part hereof. The Commission, however, does not adopt the Arbitrator's reasoning as further discussed below.

This claim proceeded to arbitration hearing on a consolidated basis with claim numbers 10 WC 35618, 10 WC 41066 and 10 WC 41067. Separate decisions have been issued for each claim number. During the hearing, the parties confirmed on the record that this was a single case for repetitive injury to the left hand and arm with four disputed dates of injury and Petitioner was only requesting one award from these four claims.

In this claim, 10 WC 41571, the Arbitrator determined that Petitioner failed to meet her burden of proof by a preponderance of the evidence that she sustained accidental injury on June 30, 2008 which arose out of and in the course of her employment with Respondent. The Arbitrator further found that Petitioner's current condition of ill-being was not causally related to the alleged June 30, 2008 work accident. The Commission affirms the Arbitrator's Decision with respect to accident and causal connection in this claim, but does not adopt the Arbitrator's reasoning. Rather, the Commission finds that Petitioner's repetitive trauma injury manifested itself on May 25, 2010, the subject of claim number 10 WC 41067. The Commission's findings and conclusions with respect to Petitioner's claimed work accident on May 25, 2010 will be provided in the separate decision specific to claim number 10 WC 41067.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 18, 2023 is hereby affirmed to the extent stated above.

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.

January 26, 2024

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

CAH/pm
O: 12/7/23
052

/s/ *Marc Parker*
Marc Parker

SPECIAL CONCURRENCE

I agree with the Majority's conclusion denying Petitioner's claim for worker's compensation benefits under 10 WC 41571. However, I would have affirmed and adopted the Arbitrator's Decision in its entirety.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	10WC041571
Case Name	JACKSON, ERNESTINE CHRIS v. STATE OF ILLINOIS - ILLINOIS STATE UNIVERSITY
Consolidated Cases	
Proceeding Type	
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Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	Kurt Carlson, Arbitrator

Petitioner Attorney	William Trimble
Respondent Attorney	Christina Smith

DATE FILED: 1/18/2023

THE INTEREST RATE FOR THE WEEK OF JANUARY 18, 2023 4.68%

/s/ Kurt Carlson, Arbitrator
Signature

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

January 18, 2023

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation Commission

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

☐ 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

ERNESTINE CHRIS JACKSON
Employee/Petitioner

v.

STATE OF ILLINOIS – ILLINOIS STATE UNIVERSITY
Employer/Respondent

Case # **10** WC **041571**

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 Kurt Carlson, Arbitrator of the Commission, in the city of **Bloomington**, on **11-29-22**. 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 **06-30-08**, 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 $ **27,027.64**; the average weekly wage was $ **519.76**.

On the date of accident, Petitioner was **57** 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** 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 she sustained an accidental injury which arose out of and in the course of her employment and thus shall be barred from recovery. Claim 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.

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Dr. Lawrence Li testified that the EMG/NCV study was indicative of nerve compression, resulting in symptoms such as numbness, tingling, loss of strength, and pain. Dr. Li testified that nerve compression was consistent with the inability to adduct the left small finger. (PX 7, p. 7) His examination of Petitioner found a positive Tinel's test at the elbow, left interossi atrophy, and a positive Wartenberg sign, meaning she could not adduct the small finger. Overall, Petitioner had normal range of motion but abnormal nerve function. (PX 7, p. 7)

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He testified that he recommended surgery, but that Petitioner did not think it would help her, so she declined. (PX 6, p. 20)

CONCLUSIONS OF LAW

With regard 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 facts must be closely examined in a repetitive injury case to ensure a fair result for both the faithful employee and the employer. *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 71 (2006). Compensation is allowable where an injury is not sudden but gradual, so long as it is linked to the claimant's work. *Durand*, 224 Ill. 2d at 66 (citing *Peoria County Belwood Nursing Home v. Industrial Comm'n,* 115 Ill. 2d 524, 529 (1987)). The Illinois Supreme Court went on to highlight that "[t]o deny an employee benefits for a work-related injury that is not the result of a sudden mishap * * * penalizes an employee who faithfully performs job duties despite bodily discomfort and damage." *Durand,* 224 Ill. 2d at 66 (citing *Peoria County*, 115 Ill. 2d at 529-30).

In these cases, it should be noted that Petitioner never lost any time from work and filed her claims only after she left ISU. Ms. Jackson testified that she spent more than 75% of her day typing at keyboard and both wrists and her elbows remained at bent at 45 degrees for the wrists and 60 degrees for the elbows, this history was related over a decade after the alleged occurrence and never to any treating physicians. At a result, it has little or no credibility.

Instead, Petitioner's testimony seemed a tailored fit to match Dr. Li's clinical theory of causal connection, which offered as a hypothetical by Jackson's attorney. While it is true that Dr. Lawrence Li testified that work duties would be sufficient to cause or aggravate the carpal and cubital tunnel, Petitioner never related them to Dr. Li in 2013. In fact, Petitioner's complaints on April 8, 2013, indicate that she had neck pain radiating down both arms into hands. (PX #3) Dr. Li did not have the benefit of reviewing all the medical records submitted into evidence. Finally, Petitioner saw Dr. Lawrence Li on one occasion. To characterize him as a treater is technically correct, but there was no longstanding doctor/patient relationship here.

The Arbitrator notes that Respondent did not introduce any expert testimony or other evidence to contradict the testimony of Dr. Lawrence Li, but also acknowledges that would be extremely difficult to contradict Petitioner's description of her work duties twelve years later.

Based on the entire record, additionally noting the paucity of treatment and lengthy time periods of no treatment whatsoever, the Arbitrator finds that Petitioner failed to sustain her burden of proving she suffered injuries to her left arm and hand because of repetitive or specific traumas on any of alleged injury dates with Respondent.

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

Despite having a prior carpal tunnel and cubital tunnel claims, Petitioner failed to give a clear history of her work duties to her medical providers, never lost any time from work as the result of her medical condition, nor did she treat on a regular basis for them. Perhaps the most compelling medical evidence in the matter is on September 17, 2014, when Dr. Herman Dick wrote that her new symptoms of hand numbness could be from her severe neck stenosis at C5 C6. (PX #4 p.61) This is corroborated by Petitioner's bilateral findings (PX #2 p.9) and her complaints to Dr. Li that the pain originated from her neck downward. (PX #3)

As stated earlier, the Arbitrator finds that the treating medical records fail to corroborate much of any of Petitioner's testimony regarding causal connection. The best snippet in the medical records is in Dr. Powers records where Petitioner stated that she does a "fair amount of typing." But it bears repeating, there is no lost time, there is no sustained medical treatment and the treatment gaps are frequent and lengthy. If Petitioner quit her job with ISU, it appears that she did so because of her arthritic knees, not her hands. And her hand condition may very well originate from her neck because of cervical stenosis.

The Arbitrator finds that neither the Petitioner's nor Dr. Li's testimony is credible and Petitioner's current condition of ill-being is not causally related to the injury.

With regard to issue G, What were Petitioner's earnings? The Arbitrator finds as follows:

Respondent introduced wage statements into evidence, but in finding no accident nor credible causation above, a determination of the Petitioner's AWW is not necessary.

With regard to issue J, Were the medical services that were provided to Petitioner reasonable and necessary? The Arbitrator finds as follows:

Consistent with the above findings above, Respondent is not liable for medical services provided to Petitioner under The Illinois Workers' Compensation Act.

With regard to issue L, What is the nature and extent of the injury? The Arbitrator finds as follows:

Consistent with above, no permanency is awarded for these claims.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC016589
Case Name	Tiffany S Lewis v. University of Illinois Hospital & Health Sciences System
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0055
Number of Pages of Decision	17
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	John Powers
Respondent Attorney	Brad Antonacci

DATE FILED: 1/26/2024

/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

TIFFANY S. LEWIS,

Petitioner,

vs. NO: 17 WC 16589

UNIVERSITY OF ILLINOIS HOSPITAL,

Respondent.

DECISION AND OPINION ON REVIEW

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

The 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 and through a strictly employment-related risk analysis pursuant to *McAllister v. Ill. Workers' Comp. Comm'n*, 2020 IL 124848.

Petitioner herein worked as a customer service specialist/team lead for Respondent. Her work desk was in the front lobby registration area for the radiology department. Petitioner testified that she injured her back on May 24, 2017 after moving a 150-pound safe that had been delivered to the lobby area of the radiology department. Ms. Munoz, Respondent's assistant director of clinical support services at the time, confirmed that the safe had been purchased to store payments and that the safe belonged underneath the registration desk where Petitioner worked.

The Commission notes the contrasting testimony between Petitioner and Ms. Munoz with respect to whether Petitioner was instructed to move the safe and the events leading up to Petitioner's injury. There is no dispute, however, that Ms. Munoz informed Petitioner as to the purpose of the safe and that the safe belonged underneath the registration desk. Petitioner then moved the safe to its intended location.

The Commission finds that even if Petitioner was not instructed by Ms. Munoz to move the safe, her injury was employer-related. The safe had been delivered and placed in the middle of the lobby in front of Petitioner's desk area. Petitioner described this area as a waiting room for patients who typically arrived using canes, walkers, wheelchairs, crutches or arrived on gurneys. Petitioner testified that she moved the box to the previously indicated location beneath her desk because she believed it was a hazard for the box to be in the area that was reserved for patients. Ms. Munoz confirmed that Respondent did not have any rules prohibiting employees from moving deliveries and Petitioner was never disciplined for moving the safe. The Commission therefore finds that the preponderance of the evidence supports a finding that Petitioner's act of moving the safe was one which the Respondent should have reasonably expected Petitioner to perform incidental to her job duties.

The Commission next modifies the Arbitrator's award of medical expenses to correct the discrepancy with respect to the referenced Exhibit numbers in the Decision. The Commission awards the reasonable, necessary and related medical bills detailed in Petitioner's Exhibits 4 and 5, namely the outstanding charge for Associated Medical Center of Illinois in the amount of $22,179.81 and the outstanding charge for Premium Healthcare Solutions in the amount of $2,836.00. Respondent shall pay the awarded medical bills pursuant to Sections 8(a) and 8.2 of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 7, 2023 is hereby modified as stated and otherwise affirmed and adopted.

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

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

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

January 26, 2024

CAH/pm
O: 12/21/23
052

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

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

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC016589
Case Name	Tiffany S Lewis v. University of Illinois Hospital & Health Sciences System
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	14
Decision Issued By	Antara Nath Rivera, Arbitrator

Petitioner Attorney	John Powers
Respondent Attorney	Brad Antonacci

DATE FILED: 4/7/2023

THE INTEREST RATE FOR THE WEEK OF APRIL 4, 2023 4.70%

/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

TIFFANY LEWIS
Employee/Petitioner

v.

UNIVERSITY OF ILLINOIS HOSPITAL & HEALTH SCIENCE SYSTEM
Employer/Respondent

Case # **17** WC **016589**

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 **Antara Nath Rivera**, Arbitrator of the Commission, in the city of **Chicago**, on **February 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. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **May 24, 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 $**31,941.00**; the average weekly wage was $**614.25**.

On the date of accident, Petitioner was **29** years of age, ***single*** with **0** dependent children.

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

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

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

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

ORDER

Respondent shall pay all reasonable and necessary medical services, incurred through July 27, 2017, pursuant to the medical fee schedule and as outlined in PX 1, PX 2, PX 3, RX 1, and RX 2 as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $409.50/week for 4-4/7 weeks, commencing May 25, 2017, through June 25, 2017, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner PPD benefits of $368.55 per week for 5 weeks, because the injuries sustained caused the 1% 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.

Signature of Arbitrator

APRIL 7, 2023

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Tiffany S. Lewis, Petitioner,	)	
	)	Case No. 17WC016589
v.	)	
University of Illinois Hospital & Health Science System, Respondent.	)	

This matter proceeded to hearing on February 9, 2023, in Chicago, Illinois before Arbitrator Antara Nath Rivera on Petitioner's Request for Hearing. Issues in dispute include accident, causal connection, medical bills, temporary total disability ("TTD"), and nature and extent. (Arbitrator's Exhibit "AX" 1)

FINDINGS OF FACT

Job Duties

Tiffany S. Lewis ("Petitioner") was employed by University of Illinois Hospital and Health Science System ("Respondent") as a Customer Service Specialist in the radiology department. (Transcript "T." 10) Petitioner testified that her job duties included registering patients at her desk, verifying correct orders were on file, verifying insurance authorizations and referrals, scheduling appointments, and calling patients to confirm appointments. (T. 11, 50) Petitioner testified that she worked at the front lobby desk facing the lobby *Id.* Petitioner testified that her job duties did not involve manual labor and that it was essentially sedentary work. (T. 12, 31, 50) Petitioner testified that her job duties did not involve moving large boxes or safes. (T. 12, 56-57)

Accident

Petitioner testified that on May 23, 2017, a delivery person delivered a large box, to the radiology department, and placed the box in the lobby area. (T. 12, 27) Petitioner testified that the safe measured 18.5' by 12.5", measuring its length and width (T. 61) Petitioner described the location of the box as approximately six to seven feet from the front of her desk, with a space of six to seven feet for patients to walk to get in front of Petitioners' desk. (T. 15-17, 33)

Petitioner testified that she called her director, Karina Munoz, via video phone to notify her of the delivery. (T. 12-13) Petitioner testified that she was informed by Ms. Munoz that the safe was for the

radiology department and that Ms. Munoz instructed Petitioner to push it under her desk. *Id.* Petitioner testified she did not move the box on May 23, 2017, because she did not feel like it was her responsibility. (T. 15) Petitioner testified that the box was approximately six to seven feet away from where she sat. (T. 17)

Petitioner testified that when she returned to work the next day at 7:00am, on May 24, 2017, the box was in the same location. (T. 18) Petitioner testified that she attempted to move the box herself, but it would not budge. *Id*. Petitioner testified that her coworker got up to help and the box still did not budge. *Id*. Petitioner testified that her coworker sat back down, and that Petitioner continued to attempt to move the box, and was able to get the box under her desk, as she was instructed the previous day. (T. 19) She testified that she was extremely exhausted, afterward, and that her back felt "loose." *Id.* She testified that while working that morning, her back started tightening up and started to feel painful.

Petitioner testified that she wasn't aware of any directives via email with instructions regarding the delivery of the safe and procedures. (T. 30) Petitioner testified that if there was an email sent, she did not recall receiving such an email. *Id*. Petitioner testified that she moved the box because she felt that it "created a hazard from the positioning." (T. 34) Petitioner further testified that patients come in wheelchairs, on gurneys, and walking with a cane or crutches. (T. 17) Petitioner testified that it would have been a hazard to leave it there. (T. 18)

Medical Treatment

Petitioner testified that she sought medical treatment at Respondent's employee health department, during her lunch break. (T. 20) The records indicated that Petitioner reported a history of injuring her low back while moving a 150-pound safe and experiencing stiffness. (Petitioner's Exhibit "PX" 1) Petitioner was diagnosed as having a low back strain and instructed to remain off work. *Id*.

On, May 25, 2017, Petitioner returned to Respondent's employee health department. *Id*. The records indicated that she felt somewhat better when she went to sleep but woke up with worse pain, spasm, and stiffness. *Id*. Petitioner was diagnosed with low back strain and Petitioner remain off work until May 30, 2017. *Id*.

On May 26, 2017, Petitioner began treating at American Medical Centers of Illinois ("AMCI") with primary complaints of neck, upper back and low back pain. (PX 2, pg. 1) Ashley Daliege, D.C., examined Petitioner. Petitioner reported having a lumbar strain in 2008 for which she completed a course of physical therapy and did well for several years until January 2017 when she received less than a month of physical therapy for sciatic pain that resolved by the end of January 2017. (PX 2, pg. 1, 7) Chiropractor Daliege diagnosed cervical, thoracic, and lumbar sprain. *Id*. X-rays of the lumbar spine thoracic spine, and cervical spine were all negative for fracture or dislocation and revealed no positive findings. (PX 2, pg. 4-6) Chiropractor Daliege opined that the diagnoses were causally related to Petitioner's work

accident. (PX 2, pg. 2) Petitioner remained off work and continued receiving chiropractic care at AMCI and performing home exercises throughout most of June 2017. On June 26, 2017, at her request, Petitioner was released to return to work. (PX 2, pg. 31)

On July 8, 2017, Petitioner underwent an MRI at Molecular Imaging. (PX 3) The MRI revealed 1-2mm diffuse disc protrusions at L4-L5 and L5-S1 with effacement of the thecal sac.

On July 24, 2017, Petitioner presented to Dr. Larry Najera at AMCI for a physiatry and pain management consultation. (PX 2, pg. 47) Dr. Najera diagnosed Petitioner with lumbar radiculitis and lumbar disc herniation. (PX 2) Dr. Najera recommended nerve testing to verify radiculopathy along with a trial of Gabapentin for neuropathic pain. He recommended EMS/TEMS and that Petitioner discontinue physical therapy. *Id*.

On July 27, 2017, Petitioner underwent an EMG revealing right L4, L5 radiculitis. Dr. Najera recommended Petitioner undergo an epidural corticosteroid injection and continue therapy to maintain strength and motion. (PX 2, pg. 50)

Petitioner testified that after May 24, 2017, the only symptoms she experienced were in her lower back. (T. 38) Dr. Najera noted Petitioner was improving with conservative care and improved subjectively, objectively and functionally. (PX 2) On November 9, 2017, Dr. Najera placed Petitioner at maximum medical improvement ("MMI"). (PX 2 pg. 51)

On September 18, 2017, Petitioner underwent an independent medical exam ("IME") with Dr. Andrew Zelby. (RX 2) Petitioner reported having an occasional dull ache in her neck due to long periods of looking down that went away with neck movement. (RX 2 pg. 1) Petitioner reported a history of back and right leg symptoms. (RX 2 pg. 6) Based on Dr. Zelby's review of Petitioner's medical history and examination of Petitioner, he opined that Petitioner "sustained a soft tissue spinal strain and nothing more." *Id.* He noted that a course of three to four weeks of physical therapy was reasonable for her injury. *Id.* Dr. Zelby also indicated that Petitioner reached MMI by the end of August 2017. *Id.* Dr. Zelby noted that Petitioner's persistent symptoms are inconsistent with his objective medical findings. *Id.* Dr. Zelby opined that Petitioner's prognosis was excellent. *Id.*

Petitioner's Past Medical History

Petitioner testified that she injured her back in 2009 while working at a restaurant after slipping on spilled salad dressing, and she landed on her back. (T. 23; RX 3) Petitioner testified that she underwent approximately one month of physical therapy. (T. 35; RX 3, pg. 008)

Petitioner testified that she sought medical treatment for her back in 2016 and early 2017, with no inciting accident or trauma. (T. 23-24, 38) Petitioner testified that she experienced sharp pains going

down the right side of her leg and learned that the pain was due to a pinched nerve in the small of her back. (T. 24) Petitioner testified that she underwent physical therapy for approximately four months and that the pain resolved January 2017. (T. 24, 38)

Petitioner's Current Condition

Petitioner testified that she still has pain on lower back when carrying heavy groceries or water case. (T. 25) Petitioner also testified that, as part of her current job at Bank of America, she lifts and carries coin boxes to the coin safe. (T. 25-26) Petitioner testified that when she does this, she feels pain in the small of her back. *Id*. Petitioner testified that, as a result, she takes Tylenol or ibuprofen for pain. *Id*.

Testimony of Karina Munoz

Karina Munoz testified that in May 2017, she was the Assistant Director of Clinical Support Services for Respondent. Ms. Munoz testified that she worked for Respondent for three to four years. (T. 48) Ms. Munoz testified that, as part of her job duties, she oversaw the front desk operations for the radiology department. *Id.* Ms. Munoz testified that she knew Petitioner who was her team lead for the registration area. (T. 49) Ms. Munoz testified that Petitioner's job duties were to register patients, schedule and reschedule appointments, verify insurance authorization, and assist coworkers in that area. (T. 50) Ms. Munoz testified that heavy physical labor was not part of Petitioner's job duties. *Id*.

Ms. Munoz testified that, prior to May 24, 2017, she was aware that safes were to be delivered to the departments. *Id*. Ms. Munoz testified that she developed a plan whereby the delivery person was to place the safes underneath the registration desks. (T. 51) Ms. Munoz testified that she emailed this plan to all her team leads, including Petitioner. *Id.*

Ms. Munoz testified that on May 24, 2017, Petitioner called her on the video phone and informed Ms. Munoz that there was a box being delivered. (T. 52-55) Ms. Munoz testified that Petitioner wanted to know if it was for the radiology department. (T. 55) Ms. Munoz testified that she confirmed the box was for their department and told Petitioner that the safe was to be placed underneath the desk. (T. 55) Ms. Munoz testified that she recalled advising the Petitioner that the delivery person was to place the safe underneath the desk. (T. 55-56) Ms. Munoz testified that Petitioner indicated that the delivery person was still present while she was talking with Petitioner. (T. 56) Ms. Munoz testified that Petitioner never mentioned that the delivery person dropped it off and left. *Id*. Ms. Munoz testified that she did not tell Petitioner to move the safe herself, however, did not recall tell Petitioner not to move it. (T. 56)

Ms. Munoz testified that on May 25, 2017, after lunch, Petitioner told her that Petitioner hurt her back moving the safe. (T. 57-58) Ms. Munoz testified that Petitioner told her "[y]ou asked me to move the safe." (T. 58) Ms. Munoz testified that Petitioner also told her that "the safe was just left there and I

couldn't just leave it there." *Id*. Ms. Munoz testified that she told Petitioner that she should have informed Ms. Munoz that the safe was left in the lobby and that Ms. Munoz would have called Respondent's movers to move the safe. (T. 59)

Ms. Munoz testified that, assuming the safe was placed six to seven feet from the reception desk, there would have been enough space for patients to walk up to the front desk to speak with Petitioner. (T. 61) She testified there was of no benefit to the Respondent for Petitioner to move the safe based on the risk of injury and the fact that performing such activities takes Petitioner away from being able to complete her assigned responsibilities. (T. 62) Ms. Munoz testified that the fact that Petitioner called her asking for directions, indicated to her that Petitioner did not read the email she sent about the plan for delivery receipt. (T. 66) Ms. Munoz testified that there was no rule prohibiting Petitioner from moving the safe and that Petitioner was never disciplined for moving the safe. (T. 65)

Deposition of Dr. Andrew Zelby

Dr. Zelby, a neurosurgeon testified via deposition on August 24, 2020. (RX 1) Dr. Zelby testified that following his review of the records, his examination of Petitioner, and after obtaining a history from Petitioner, he diagnosed Petitioner with a lumbar strain as a consequence of the May 24, 2017, work accident. (RX 1 pg. 9; 16) Dr. Zelby testified that he noted Petitioner had a normal spinal examination and normal neurologic examination. (RX 1, pg. 10-11) Dr. Zelby testified that, in reviewing Petitioner's MRI, he noted the disc space heights and signal intensities were all normal, that the spinal alignment was normal, that the L1-2, L2-3 and L3-4 discs were normal, and that, at L4-5 and L5-S1 there was a minuscule disc bulging. (RX 1, pg. 11-14) Dr. Zelby testified that Petitioner had preexisting, minimal degenerative disc disease of the lumbar spine and a spinal strain as a consequence of the reported work injury. (RX 1, pg. 16)

Dr. Zelby testified that Petitioner's persistent symptoms was inconsistent with her objective findings, and her symptoms could not be corroborated with any findings on exam or diagnostic studies. (RX 1, pg. 13) Dr. Zelby testified that there was no medical basis to suggest that there was a relationship between her subjective complaints and any condition of infirmity related to her work injury. (RX 1, pg. 16) Dr. Zelby testified that Petitioner sustained a soft tissue spinal strain. *Id.* Dr. Zelby testified that based on his objective medical findings on exam and her MRI results Petitioner was at MMI by the end of August 2017. (RX 1, pg. 17)

Dr. Zelby testified that Petitioner should have completed physical therapy three to four weeks after the injury and should have transitioned to a home exercise program, particularly given that Petitioner had a history of experiencing the same symptoms just four months prior to her work injury. (RX 1, pg. 16-17) Dr. Zelby testified that Petitioner did not need injections or any additional medical treatment or diagnostic testing. (RX 1, pg. 17) Dr. Zelby testified that there was no medical basis to suggest any permanent injury or disability as a consequence of the injury. *Id.*

CONCLUSIONS OF LAW

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

Decisions of an Arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e) The burden of proof is on a claimant to establish the elements of her right to compensation, and unless the evidence considered in its entirety supports a finding that the injury resulted from a cause connected with the employment, there is no right to recover. *Board of Trustees v. Industrial Commission,* 44 Ill. 2d 214 (1969)

Credibility is the quality of a witness which renders her evidence worthy of belief. The Arbitrator, whose province it is to evaluate witness credibility, evaluates the demeanor of the witness and any external inconsistencies with her testimony. Where a claimant's testimony is inconsistent with her actual behavior and conduct, the Commission has held that an award cannot stand. *McDonald v. Industrial Commission,* 39 Ill. 2d 396 (1968); *Swift v. Industrial Commission,* 52 Ill. 2d 490 (1972)

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

WITH RESPECT TO ISSUE (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 following, the Arbitrator finds that Petitioner sustained an accident on May 24, 2017, arising out of and in the course of her employment with Respondent.

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

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

According to the Act, in order for a claimant to be entitled to Workers' Compensation benefits, the injury must "aris[e] out of" and occur "in the course of" the claimant's employment. *820 ILCS 305/1(d)* (West 2014) Case law interpreting the Act makes it clear that both elements must be present at the time of the accidental injury in order to justify compensation. *Orsini, 117 Ill. 2d at 44-45; Illinois Bell Telephone Co. v. Industrial Comm'n, 131 Ill. 2d 478, 483, 546 N.E.2d 603, 137 Ill. Dec. 658 (1989); Free 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)* A risk is incidental to the employment when it belongs to or is connected with what the employee has to do in fulfilling his or her job duties. *Orsini, 117 Ill. 2d at 45*.

In *Orsini,* the claimant worked as an auto mechanic and during slow periods during the workday was allowed to bring his own personal vehicle into the employer's garage to make repairs. During one such occasion, the claimant was injured while working on his personal vehicle. The Illinois Supreme Court found the claimant's injuries arose from a risk personal to the claimant rather than incidental to his employment as an auto mechanic. The court found the claimant's risk of injury was not in any way increased by the condition of his employer's premises. Therefore, by working on his own personal vehicle, the claimant exposed himself to a danger entirely separate from his job duties and was performing an act of a personal nature solely for his own convenience, which was an act outside any risk connected with his employment.

Under the personal comfort doctrine, injuries sustained by an employee while in the performance of reasonably necessary acts of personal comfort may be found to have occurred 'in the course of' her employment, since they are incidental to the employment. *Chicago Extruded Metals v. Industrial Comm'n*, 77 Ill. 2d 81, 84, 395 N.E.2d 569, 32 Ill. Dec. 339 (1979). The phrase "engaged in something incidental thereto" includes the "personal comfort doctrine" and the "good Samaritan doctrine." An employee, while engaged in work for her employer, may do those things which are necessary to her health and comfort, even though they are personal to herself, and such acts will be considered incidental to the employment and may be found to have occurred in the course of her employment. *Circuit City Stores, Inc. v. Illinois Workers' Compensation Comm'n*, 391 Ill. App. 3d 913, 920-21 (2nd Dist. 2009).

The course of employment is not broken by certain acts relating to the personal comfort of the employee, but if the employee voluntarily and in an unexpected manner exposes herself to a risk outside any reasonable exercise of her job duties, the resultant injury will not be deemed to have occurred within the course of the employment. *Id*. at 16-17. Likewise, the good Samaritan doctrine requires a determination of whether the employee's attempt to render aid could have been expected or foreseen. *Id.* at 20.

In *Hines Interests v. Industrial Comm'n. 191 Ill.Appg.3d 913, 548 N.E.2d 342, 138 Ill.Dec. 929 (1989)*, Illinois law found an injured worker's actions that were reckless and dangerous to still have arisen out of and within the course of his employment. In that case, the claimant, a building engineer, accidentally locked his keys in the employer's basement. His job duties required entering the building's basement between 4:44 PM and 5:05 PM to adjust the building's cooling equipment to avoid damage to the equipment and save his employer energy costs. Because the claimant was concerned about receiving another poor work evaluation that would cost him his job, the claimant chose not to break a glass key box containing an extra set of keys or call his supervisor, who had already left for the day. Instead, the claimant elected to climb inside an industrial mop bucket as a janitor lowered the bucket through a hatchway 20-30 feet above the basement floor using an electric hoist. After lowering the claimant 6 feet, it became apparent this plan would not work. As the janitor and several other people tried pulling the claimant up, the claimant fell to the floor injuring his head and shoulder. The Commission found that although the claimant was using a needlessly dangerous entry into the subbasement, his actions were nonetheless consistent with what his employer wanted him to do as part of a daily routine maintaining the cooling equipment in the basement. Thus, the Commission rejected the employer's argument that the claimant's actions were purely personal.

In this case, the Arbitrator notes that Petitioner's actions were not of a personal nature. Even though moving the safe was not within Petitioner's job duties, Petitioner's injuries, sustained from pushing the safe under her desk and out of the way of patients and customers, arose out of the course of her employment as a team lead at the front lobby desk. The Arbitrator further notes that Petitioner's intent and actions were similar to that of the "good Samaritan doctrine" whereby her actions benefitted Respondent, and the people who entered Respondent's hospital. The Arbitrator notes that unlike *Orsini*, Petitioner's actions were not done for her own benefit. The Arbitrator also notes that Petitioner's actions did not rise to the level of recklessness as illustrated in *Hines*.

The Arbitrator, taking into consideration the categorical requirements, notes that Petitioner testified that Ms. Munoz told her to move the safe and that Petitioner felt that it was her duty to make sure the front area was clear of any obstacles. The Arbitrator notes that the action of moving the safe that Respondent ordered and had delivered to Petitioner's place of employment was not personal to Petitioner. The Arbitrator also notes that while moving the safe was not within Petitioner's job duties, keeping the

area safe and free of hazards for the general public, given their medical needs and conditions, was a part of her duties.

As such, the Arbitrator finds that Petitioner's accident arose out of an in the course of her employment.

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).

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).

The Arbitrator notes that Petitioner was diagnosed with cervical, thoracic, and lumbar sprain. (PX 1; PX 2, pg. 4-6) The Arbitrator notes that chiropractor Daliege opined that the diagnoses were causally related to Petitioner's work accident. (PX 2, pg. 2) The Arbitrator also notes that Dr. Zelby opined Petitioner sustained a soft tissue/lumbar strain as a result of her May 24, 2017, accident. (RX 1, pg. 15-16; RX 2 at 6)

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 her back, is causally related to the May 24, 2017, accident.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL

APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

As the Arbitrator found that Petitioner's current condition of ill-being was causally connected to the work-related accident, the Arbitrator finds that the following medical treatment and services Petitioner received were reasonable and necessary. (PX 1, PX 2, PX 3, PX 4, PX 5, RX 1, and RX 2) The Arbitrator notes that Petitioner incurred $22,179.81 in charges for treatment received at AMCI and $2,836.00 in charges from Premium Healthcare Solutions for her July 9, 2017, MRI. (PX 4; PX 5)

Thus, the Arbitrator finds that Respondent shall pay all reasonable and necessary medical services, incurred through July 27, 2017, pursuant to the medical fee schedule and as outlined in PX 1, PX 2, PX 3, RX 1, and RX 2 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 the Arbitrator found that Petitioner's current condition of ill-being was causally connected to the work-related accident, the Arbitrator finds that Petitioner is entitled to receive TTD benefits. The Arbitrator notes that Petitioner was taken off work from May 25, 2017, through June 25, 2017. (PX 1, pg. 1; PX 2, pg. 31) Thus, the Arbitrator finds that Respondent shall pay Petitioner temporary total disability benefits of $409.50/week for 4-4/7 weeks, commencing May 25, 2017, through June 25, 2017, 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:

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

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

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

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that Petitioner was employed as a customer service specialist in Respondent's radiology department at the time of the accident and she was able to return to work in her prior capacity following said injury. Thus, the Arbitrator gives lesser weight to this factor.

With regard to subsection (iii) of §8.1b(b), the age of the employee at the time of the injury, the Arbitrator notes that Petitioner was 29 years old at the time of the accident. Thus, the Arbitrator gives lesser 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 full duty, that Petitioner returned to her previous line of employment, and is currently in a similar type of employment. Thus, the Arbitrator gives greater weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that as a result of injuries sustained on May 24, 2017, Petitioner received about two months of conservative care. (PX 1; PX 2) The Arbitrator notes that both Petitioner's chiropractor and IME Dr. Zelby diagnosed Petitioner with a lumbar strain as a result of the work accident. (PX 2; RX 1) Therefore, the Arbitrator gives greater weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Respondent shall pay Petitioner PPD benefits of $368.55 per week for 5 weeks, because the injuries sustained caused the 1% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

It is so ordered:

Arbitrator Antara Nath Rivera

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC007176
Case Name	David Crowder (For Rita Crowder Deceased) v. Cedarhurst of Collinsville
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0056
Number of Pages of Decision	27
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Thomas C Rich
Respondent Attorney	Cecil E. Porter, III

DATE FILED: 1/26/2024

/s/Carolyn Doherty, Commissioner

Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DAVID CROWDER (For Rita Crowder, Deceased),

Petitioner,

vs. NO: 21 WC 7176

CEDARHURST OF COLLINSVILLE,

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 evidentiary rulings, accident, occupational disease, causal connection, medical expenses, and permanent disability/death benefits, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, with the changes made below.

While affirming and adopting the Decision of the Arbitrator, the Commission writes additionally to address evidentiary objections raised by Respondent on review, and to change the Decision of the Arbitrator on the issue of occupational disease.

I. Evidentiary Rulings

First, Respondent objects that the Arbitrator failed to rule on the objections it made during Dr. Anthony Shen's deposition testimony. Where the Arbitrator fails to expressly rule on an objection, it may be considered overruled to the extent that the Arbitrator relies upon the testimony. See, *e.g.*, *Partin v. North American Lighting*, Ill. Workers' Comp. Comm'n, No. 18 WC 31962, 22 IWCC 0246 (Jul. 8, 2022). In this case, Dr. Shen, who performed a records review for Petitioner, was a pulmonary critical care physician board-certified in internal medicine and pulmonary medicine. He testified that he had treated COVID-19 patients since April 2020, in the intensive care setting, as well as inpatient and outpatient settings. Dr. Shen was familiar with long-term care facilities like Respondent and sent patients that discharged continuously there. He testified regarding the issues of bed capacity and staffing occurring at

facilities in the area. He was familiar with the history of COVID-19 infections at Respondent's facility. Given this record, the Commission concludes that the Arbitrator did not abuse his discretion in failing to rule on Respondent's objections to Dr. Shen's opinions.

Second, Respondent objects to the Arbitrator's admission of text messages purporting to document discussion between Decedent and other staffers at Respondent's facility regarding compliance with their COVID-19 mitigation protocols. Respondent objects on the grounds that the text messages are hearsay and not business records. The Commission concludes that the admission of the text messages, and the Arbitrator's reliance on one of them was in error and strikes the text messages as admitted in Petitioner's Exhibit 15.

Notwithstanding the exclusion of these messages, there is sufficient evidence in the record which supports Respondent successfully rebutting the Covid-19 presumption. Specifically, Alan Martin, who worked for Respondent in October and November of 2020 as the activities director and front desk concierge, testified that residents were required to wear masks in October and November 2020, but acknowledged that it was harder for memory care patients. Devon Eads, who was the business office manager at Cedarhurst, testified that that residents were asked to wear their masks outside of their living quarters but did not always do so. The Arbitrator could have relied on the testimony of Respondent's witnesses as evidence of non-compliance with the COVID-19 protocols at Respondent's facility without the text messages. Indeed, the text messages, taken at face value, would also support Respondent's contention that it was attempting to mitigate the spread of COVID-19 to the best of its ability.

Occupational Disease

The Commission changes the Decision of the Arbitrator on the issue of occupational disease. Decedent, as a COVID-19 front-line worker under section 1(g) of the Occupational Disease Act (Act), was rebuttably presumed to have contracted COVID-19 arising out of and in the course of the employment and that the injury or disease was causally connected to the hazards or exposures of the employee's front-line worker employment. See 820 ILCS 310/1(g)(1) and (2) (West 2022). The Arbitrator found that Respondent failed to produce sufficient evidence to rebut the presumption under section 1(g)(3) of the Act, which provides:

> "(3) The presumption created in this subsection may be rebutted by evidence, including, but not limited to, the following:
>
> (A) the employee was working from his or her home, on leave from his or her employment, or some combination thereof, for a period of 14 or more consecutive days immediately prior to the employee's injury, occupational disease, or period of incapacity resulted from exposure to COVID-19; or
>
> (B) the employer was engaging in and applying to the fullest extent possible or enforcing to the best of its ability industry-specific workplace sanitation, social distancing, and health and safety practices based on updated guidance issued by the Centers for

> Disease Control and Prevention or Illinois Department of Public Health or was using a combination of administrative controls, engineering controls, or personal protective equipment to reduce the transmission of COVID-19 to all employees for at least 14 consecutive days prior to the employee's injury, occupational disease, or period of incapacity resulting from exposure to COVID-19. For purposes of this subsection, 'updated' means the guidance in effect at least 14 days prior to the COVID-19 diagnosis. For purposes of this subsection, 'personal protective equipment' means industry-specific equipment worn to minimize exposure to hazards that cause illnesses or serious injuries, which may result from contact with biological, chemical, radiological, physical, electrical, mechanical, or other workplace hazards. 'Personal protective equipment' includes, but is not limited to, items such as face coverings, gloves, safety glasses, safety face shields, barriers, shoes, earplugs or muffs, hard hats, respirators, coveralls, vests, and full body suits; or
>
> (C) the employee was exposed to COVID-19 by an alternate source." 820 ILCS 310/1(g)(3) (West 2022).

The Arbitrator also found that, assuming *arguendo* that Respondent had presented sufficient evidence to rebut the statutory presumption, it was more probable than not that the Decedent contracted COVID-19 at Respondent's facility.

Initially, the Commission notes that the statutory COVID-19 presumption is an ordinary presumption, and that the employer need only introduce "some evidence" that the employee's occupation was not the cause of the injury or disease to rebut the presumption. "Some evidence" is defined as sufficient evidence to support a finding that something other than the claimant's occupation caused his condition. See *Johnston v. Illinois Workers' Compensation Commission*, 2017 Il App (2d) 160010WC, ¶ 44. In addition, the amount of evidence required to rebut an ordinary presumption is not determined by any fixed rule. See *id.* ¶ 39.

The first issue is whether Respondent produced some evidence sufficient to rebut the statutory presumption. The Commission concludes that Respondent produced some evidence sufficient to rebut the statutory presumption in this matter pursuant to Section 1(g)(3)(B). Specifically, the Commission concludes that Respondent produced some evidence sufficient to support a finding that Decedent was not infected at work based on Respondent's COVID-19 mitigation efforts. Dr. Weinstein opined that Respondent's COVID-19 prevention policies met or exceeded all state standards for long-term care facilities, even while observing that PPE and distancing policies can be difficult to enforce. Dr. Alfred Habel, who performed a records review for Respondent, agreed that Respondent's protocols minimized the transmission of COVID-19, although they did not eliminate or fully prevent the spread or development of the virus. Dr. Shen, who testified for Petitioner, opined that Respondent's protocols were excellent and he had no criticism of them, though he later added that the best testing protocol would have been daily testing. Regarding the enforcement of these policies, Mr. Martin testified that

residents were required to wear masks in October and November 2020, but acknowledged that it was harder for memory care patients. Ms. Eads similarly stated that residents were asked to wear their masks outside of their living quarters but did not always do so. She stated that they tried to keep the memory care patients quarantined when needed, it was very difficult because redirection with someone who has dementia can be a hard process. Ms. Eads further testified that residents in assisted living could keep their doors open if they wished. In sum, the record indicates that Respondent's policies were generally good, even if not effective, as indicated primarily by the outbreaks in October 2020. However, the statute addresses efforts to reduce, not eliminate, the transmission of COVID-19. Moreover, the statute requires efforts to the best of the employer's ability, not perfection. Accordingly, the Commission concludes that Respondent produced some evidence sufficient to rebut the statutory presumption.

The remaining issue is whether, after Respondent rebutted the presumption, Petitioner proved by a preponderance of the evidence that Decedent contracting COVID-19 arose out of and was in the course of her employment. The Commission finds that Petitioner met this burden of proof. An employee who contracts COVID-19 is not precluded from filing for compensation under this Act, even when the statutory presumption has been rebutted. See 820 ILCS 310/1(g)(9) (West 2022). Section 1(d) of the Act provides:

> "(d) In this Act the term "Occupational Disease" means a disease arising out of and in the course of the employment or which has become aggravated and rendered disabling as a result of the exposure of the employment. Such aggravation shall arise out of a risk peculiar to or increased by the employment and not common to the general public." 820 ILCS 310/1(d) (West 2022).

"Nothing in the statutory language requires proof of a direct causal connection." *Sperling v. Industrial Comm'n*, 129 Ill. 2d 416, 421 (1989). "[A] chain of events suggesting a causal connection may suffice to prove causation even if the etiology of the disease is unknown." *Consolidation Coal Co. v. Industrial Comm'n*, 265 Ill. App. 3d 830, 839 (1994).

In this case, Dr. Shen, based on his familiarity with long-term care facilities such as Respondent's facility, and his treatment of COVID-19 patients, opined that Decedent's work environment was a known risk factor, observing that Cedarhurst had documented numerous COVID-19 cases despite their excellent protocols. Although Dr. Habel did not believe that healthcare workers were at any increased risk in comparison to the public due to added protection afforded by handwashing and wearing PPE, Dr. Weinstein agreed that Decedent was at a greater risk for contracting COVID at work than many members of the general public, though less risk than nurses at the facility at that time. Dr. Weinstein testified that based on her test results, Decedent likely was infected between October 23, 2020, and November 2, 2020, but most likely around October 30, 2020. The Commission observes that Decedent may have been symptomatic as early as November 1, 2020, with an infection date as early as October 27, 2020. Serena Meade, Decedent's supervisor, testified that as of October 27, 2020, the records indicated that four of seven patients in isolation were COVID positive, one employee tested positive scheduled for retesting on October 29, 2020, two employees were at home with flu-like symptoms, four residents had mild symptoms, and one resident passed away at the hospital. Ms.

Meade also testified that that it was possible that Mrs. Crowder had contact with some of those individuals. Mr. Martin and Ms. Eads testified that Decedent spent 10% of her time outside of her office during the pandemic. Ms. Eads also testified that that Decedent had to spend time outside of her office and had to cover for other employees during staffing shortages. Given this record, the Commission concludes that Petitioner proved a causal connection between Decedent's infection and her employment at a facility with documented COVID-19 cases during the period when Decedent was likely infected.

Accordingly, the Commission changes the Arbitrator's Decision per the foregoing and affirms and adopts the of the Decision of the Arbitrator in all other respects.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 30, 2023, is hereby changed to strike the text messages admitted in Petitioner's Exhibit 15. The Decision is also changed with respect to the issue of occupational disease to reflect that Respondent rebutted the presumption found in section 1(g)(3)(B) of the OD Act. In all other respects the Decision of the Arbitrator is affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in Section 8(g) of the Act.

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

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

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

January 26, 2024

o: 1/11/23
CMD/kcb
045

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

/s/ *Marc Parker*
Marc Parker

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC007176
Case Name	David Crowder (For Rita Crowder Deceased) v. Cedarhurst of Collinsville
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	21
Decision Issued By	Edward Lee, Arbitrator

Petitioner Attorney	Thomas C Rich
Respondent Attorney	Cecil E. Porter, III

DATE FILED: 5/30/2023

/s/Edward Lee, Arbitrator

Signature

THE INTEREST RATE FOR THE WEEK OF MAY 23, 2023 5.17%

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
FATAL

DAVID CROWDER, NEXT OF KIN OF RITA CROWDER, DECEASED
Employee/Petitioner

v.

CEDARHURST OF COLLINSVILLE
Employer/Respondent

Case # **21** WC **007176**

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 **Collinsville**, on **March 31, 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 Decedent's employment by Respondent?

D. ☐ What was the date of the accident?

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

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

G. ☐ What were Decedent's earnings?

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

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

J. ☐ Who was dependent on Decedent at the time of death?

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

L. ☒ What compensation for permanent disability, if any, is due?

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

N. ☐ Is Respondent due any credit?

O. ☐ Other _____

FINDINGS

On the date of accident, **November 5, 2020**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

Decedent's death ***is*** causally related to the accident.

In the year preceding the injury, Decedent earned $**83,200.00**; the average weekly wage was $**1,600.00**.

On the date of accident, Decedent was **59** years of age, ***married*** with **1** dependent child.

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

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

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

The Arbitrator finds that Decedent died on **January 2, 2021**, leaving **2 dependent** survivor(s), as provided in Section 7(a) of the Act, including **David Crowder and Jolena Crowder**.

ORDER

Respondent shall pay the reasonable and necessary medical services of outlined in Petitioner's group exhibit related to the treatment of the injury, as provided in §§ 7(f), 8(a), and 8.2 of the Act.

Respondent shall pay death benefits, commencing **January 3, 2021**, of **$1,066.67**/week to the surviving spouse, **David Crowder**, on his or her own behalf and on behalf of the child: **Jolena Crowder**, born **December 28, 2003**, until **$500,000 has been been paid or 25 years ,** whichever is greater, have been paid, because the injury caused the employee's death, as provided in Section 7 of the Act.

If the surviving spouse dies before the maximum benefit level has been reached, and the children herein named still survive, Respondent shall continue to pay benefits until the youngest child reaches 18 years of age; however, if such child is enrolled as a full-time student in an accredited educational institution, payments shall continue until the child reaches 25 years of age. If any child is physically or mentally incapacitated, payments shall continue for the duration of the incapacity. If no children named herein are alive upon the death of the surviving spouse, payments shall cease.

If the surviving spouse remarries, and no children remain eligible, Respondent shall pay the surviving spouse a lump sum equal to two years of compensation benefits; all further rights of the surviving spouse shall be extinguished.

Respondent shall make payments for not less than six years to any eligible child under 18 years of age at the time of death.

Respondent shall pay ***$8,000*** for burial expenses to the surviving spouse or the person(s) incurring the burial expenses, as provided in Section 7(f) of the Act.

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

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

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

Edward Lee_____
Signature of Arbitrator

May 30, 2023

FINDINGS OF FACT

Background

Petitioner is the spouse of the Decedent, Rita Crowder, the Executive Director at Cedarhurst of Collinsville, who died of acquired COVID-19 on January 2, 2021. (T.8-10, 22). Cedarhurst is an assisted living and memory care facility licensed by the State of Illinois as an assisted living community. (T.126) Living units were individual apartments rather than rooms such as in a nursing home facility. (T.129-31)

Petitioner married Mrs. Crowder in 1990, and fathered two children, Elliot (20) and Jolena (19) Crowder. (T.9-10) Mrs. Crowder began feeling ill on November 1, 2020, and exhibited signs of severe fatigue and began sleeping a lot. (T.20) She testified positive with COVID-19 on November 5, 2020. (T.19) She immediately notified her husband and daughter, who tested positive afterward. (T.21) No one in the household began exhibiting any symptoms before Mrs. Crowder. (T.24, 179)

Mr. Crowder, Petitioner on Behalf of Decedent, Mrs. Crowder

At the time of infection, Petitioner and Mrs. Crowder's son, Elliot, was away from home beginning in October of 2020 for basic training for the U.S. Navy. (T.11) Their daughter attended Freeburg High School in hybrid fashion and went to school on some days and worked part-time at the Freeburg Subway. (T.38-40) The school notified parents of any outbreaks at the school. (T.54) No outbreaks were reported in October or November. (T.54) Meanwhile, Petitioner was working in Siemens Manufacturing in Freeburg, Illinois, as a parts kitting person. (T.12-13) He worked at his own desk that was kept six feet apart from others, and social distancing and mask wearing was instituted at the facility. (T.13-14) His employer even rotated lunches to allow employees to maintain the appropriate distance in the break rooms. *Id.* As a result, he had break by himself. (T.33-34) He knew of no one else at his job who had COVID-19 in October. (T.37-38)

Petitioner testified that the members of his household, including his wife "wore masks" and avoided interactions with others as precautions. (T.14, 36, 46) Each family member drove their own vehicle to work. (T.27, 41, 45) He testified that when his wife wasn't at home, she typically was at work. (T.16-17) In addition, she worked additional hours, going in early and coming home late, to complete increased cleaning duties during the pandemic. (T.14-16) The family did have company for Elliot's birthday on June 17, 2020, and Jolena attended an outdoor renaissance fair in October of 2020. (T.47-49, 52; RX35) Mrs. Crowder wore two masks and gloves outside of the home. (T.17) To his knowledge, his wife came into contact with no one in her household or outside of her work who tested positive for COVID-19. (T.19, 23-24) He also knew of no one at his place of employment who tested positive for the illness. (T.37)

Petitioner possessed Mrs. Crowder's corporate cellular phone, which he surrendered to Respondent upon his wife's death, from which messages were introduced as business records

regarding the spread of COVID-19 around the facility. (PX14) One of said messages in the leadership team group message was about "several calls in the last few days about families seeing employees not having their masks up." *Id.* The employee further remarked,

> They are definitely watching us. One was from somebody who visited their family member on the patio and saw somebody walking through the dining room, others saw people without their masks up when they were making deliveries and staff was walking through the area. We're getting blamed right now anyway about bring Covid into the building, so we have to be as diligent as possible to keep our masks up when we're out of our confined offices or spaces where there are residents. I know you know this. Just had to give a reminder! Thank you so much for all you do because I know everybody is stretched to the limit! *Id.*

Jolena Crowder

Jolena testified that she went to school in-person on Mondays and Fridays, and virtually on Tuesdays, Wednesdays, and Thursdays. (T.57) She testified that masks were strictly enforced (T.57-58) There were also glass dividers on the desks of teachers and students, and desks were spread apart from one another. (T.58) At her Subway job, she worked behind the counter making sandwiches and was separated from patrons by the counter, and patrons were not permitted to stay and eat since the sit-down area was closed. (T.58, 63) She wore a mask at her job as well. (T.59) She knew of no one she came into contact with during October or November, other than her mother, who was positive for COVID-19. (T.59-62, 65) She also testified that she has not had COVID since November of 2020. (T.66)

Alan Martin

Mr. Martin worked for Respondent, Cedarhurst of Collinsville in October and November of 2020. (T. 67-68) He was the activities director and front desk concierge. (T.68) He testified that there were active outbreaks of COVID-19 within the confines of the facility in the memory care unit in early October of 2020. (T.68-69) Although residents were required to wear masks when moving about the facility, he acknowledged that it was harder for memory care patients to do so. (T.70) However, he did not believe Mrs. Crowder came into contact with any of these residents because they and the staff that cared for them should have been isolated on the 3rd floor from the rest of the staff and they used a separate entrance on the side of the building. (T.71-72, 79-81, 100) He also stated that Mrs. Crowder had her own private office on the building main floor. (T.77-78)

However, he admitted that COVID spread from the memory care unit to the assisted care unit where Mrs. Crowder worked. (T.73) He testified that one of the assisted living patients had to visit Anderson Hospital, and they contracted the illness and spread it upon return to the facility. (T.73) He could not recall when this occurred, but it could have been in October or November of 2020. (T.73)

On cross-examination, Mr. Martin testified that he had the opportunity to observe Mrs. Crowder's activities during the day since he was stationed right outside of her office. (T.78, 85)

He stated she spent most of her time, approximately 90%, behind her desk. (T.79) He also testified that staff wore N95s with surgical masks over them and full personal protective equipment such as hair coverings and shoe covers within resident living quarters. (T.82) The facility also had protocols such as using walkie-talkies to communicate and using elevators to transfer goods to reduce contamination. (T.81) It was Mrs. Crowder's job to make sure these policies were enforced. (T.82)

Mr. Martin was shown documentation showing residents who tested positive with COVID-19 when Mrs. Crowder was infected. (T.75-76, 90) While many of them were in memory care, two residents were from assisted living. (T.91) He also acknowledged messages showing that residents had left the building and returned under isolation. (T.88) He also acknowledged that one other employee outside of memory care besides Mrs. Crowder tested positive for COVID. (T.94) He was not aware of any specific activities Mrs. Crowder was engaged in outside of Cedarhurst. (T.98)

Serena Meade

Ms. Mead testified that she was the regional director of operations at the time Mrs. Crowder worked for Cedarhurst and supervised her and observed her work in October and November of 2020. (T.101) She also took part in creating and implementing CDC and local authority compliant COVID-19 policies across all of Respondent's facilities. (T.112-16) She too reviewed and was familiar with the tracking sheets showing the results of positive COVID-19 testing at Cedarhurst. (T.103-104) She did not dispute the results of mass testing records and agreed that on October 27, 2020, they showed 4/7 patients in isolation were COVID positive, one employee tested positive scheduled for retesting on October 29th, two employees at home with flu-like symptoms, four residents with mild symptoms, and one facility death.. (T.103-104, 110-11, 117-18) The testing records for October 13, 2020, showed two employees who tested positive with rapid testing, four symptomatic residents who tested positive with rapid testing, and four others with pending results. (T.118) She testified that it was possible that Mrs. Crowder had contact with some of those individuals. (T.118-19)

Ms. Meade testified that Mrs. Crowder was responsible for the overall care and staffing of the facility. (T.104) Mrs. Crowder was also obligated to step outside of her managerial role and provide other services. (T.105) She testified that Mrs. Crowder was also responsible for covering additional shifts or labor needs for staff that wasn't available to work if no substitutes were available. (T.105) She also testified that her duties would also include client contact within the same room. (T.105-106) She testified that during her visits at Cedarhurst that occurred anywhere from once a month to several times a week, she observed Mrs. Crowder having contact with residents in their rooms. (T.107) She testified that it was possible that Mrs. Crowder could have come into contact with a COVID positive resident in October or November. (T.107-108) However, she stated on cross examination that she did not know for certain whether such exposure occurred. (T.117)

Devon Eads

Ms. Eads is an operations specialist for Respondent. (T.121) At the time of Mrs. Crowder's illness, she was a business office manager. (T.121) She was on-site at Cedarhurst in Collinsville and handled duties such as resident relocations, accounting and payroll, and file management. (T.122-23) Her office was located to the left of Mrs. Crowder's. (T.123-24) She testified that Mrs. Crowder spent 10% of her time outside of her office during the pandemic. (T.125) However, she characterized her as social and stated that prior to the outbreak, she would be out of her office approximately 75% to 80% of the time interacting with guests and residents. (T.125)

Ms. Eads testified that when an outbreak occurred on the memory care floor, staff was designated to remain in that area to avoid contaminating other floors and residents. (T.133) Employees were also checked for symptoms upon entry to the facility, and personal protective equipment was provided, including surgical masks, N95s, face shields, gloves, booties, gowns, bonnets, and hand sanitizer. (T.134-35) Protocols were communicated to staff through meeting calls, and residents and their families were given notices through letters, bulletin posts, or the facility's phone application, CareMerge. (T.136-37) She testified that all of the policies and procedures instituted to prevent the spread of COVID were being enforced in November of 2020. (T.138-39) She also testified that she observed Mrs. Crowder following and enforcing those policies. (T.139, 140) She was unaware if Mrs. Crowder came into contact with anyone at Cedarhurst who was COVID positive. (T.140-41)

After Mrs. Crowder became ill, Ms. Eads took over her position and became privy to and took part in the preparation of the spreadsheet showing resident and staff test results. (T.141-42) She acknowledged that it showed positive test dates in October and November of 2020, as well as one positive result in July. (T.142-43) She identified which residents resided in the memory care ward and identified the COVID positive resident in assisted living. (T.144) She resided on the second floor of assisted living. (T.145) The spreadsheet did not have a creation date, but the first positive date for assisted living resident was July 6, 2022. (T.146) Ms. Eads testified that she kept her office open during the day but wore her face mask just when she was outside of her office. (T.148)

On cross-examination, Ms. Eads admitted that although there were lockdown restrictions on who could come in, residents did not stay in their rooms during the entirety of the lockdown. (T.150-51) She testified that residents in assisted living were allowed to walk around during that time and could keep their doors open if they wished. (T.150-51) She also admitted that while they asked residents to wear their masks outside of their living quarters, they did not always do so. (T.151-52) She also admitted that while they tried to keep the memory care patients who were infected quarantined, it was "very difficult to do most days because redirection with someone who has dementia can be a hard process." (T.154) She also confirmed that Mrs. Crowder did have to spend time outside of her office and had to cover for other employees during staffing shortages. (T.152-53) She admitted that due to the airborne nature and the difficulty enforcing mask wearing

among the dementia residents, the disease spread between them and to some staff members. (T.155-56) She acknowledged that the disease spread to staff despite the precautions and protocols to limit same, including Mrs. Crowder. (T.157) She admitted that Mrs. Crowder was not prohibited from going up to the memory care floor, because "It was Rita's building, she wasn't prohibited from doing anything." (T.157)

Ms. Eads testified that of the non-memory care individuals who became infected, Mrs. Crowder was the first to test positive. (T.160) She acknowledged that Mrs. Crowder's office was proximal to the front door where residents travel to and from the hospital must enter and exit. (T.161-62) These residents would also be escorted by EMS staff who do not work for Cedarhurst. (T.162) She admitted that she could not rule out the possibility that Mrs. Crowder visited the memory care unit during October or November, although she believed that she would not have risked contaminating the assisted living segment of the facility. (T.163-64) She also could not say for certain that Mrs. Crowder did not have contact with individuals who visited the third floor memory care units. (T.164)

Angela Keeven

Ms. Keeven was employed as the chief wellness officer at Cedarhurst based out of Clayton, Missouri during the time in question. (T.167-68) She oversaw all of the resident care nursing education and training, quality assurance, and life enrichment for the company. (T.167-68) She took part in the team that collaborated to create Cedarhurst's COVID-19 protocols. (T.170) To the best of her knowledge, these protocols were implemented; but admittedly "some communities were better than others" at doing so. (T.171) She was not physically on site at the facility where Mrs. Crowder worked, but she believed the protocols were followed based on regular conversations she had with Mrs. Crowder. (T.171-73) She stated she had no personal knowledge of whether Mrs. Crowder came into personal contact with any staff or any residents who tested positive on the memory care floor in October or November of 2020 at Cedarhurst. (T.174-75) She had no information to indicate that Mrs. Crowder contracted her illness from anywhere within Cedarhurst. (T.175-76) However, she also had no information or reason to suggest that Mrs. Crowder was exposed to COVID-19 outside of Cedarhurst. (T.177) She admitted she could not say for certain that Mrs. Crowder was not exposed to COVID-19 at the facility in October or November of 2020. (T.177)

Medical Treatment

Mrs. Crowder first sought treatment for her symptoms at the Collinsville MedExpress on November 11, 2020. (PX3) There it was noted she suffered from bilateral pulmonary infiltrates, hypoxia, and respiratory failure as a result of contracting severe COVID-19. *Id.* She was transmitted via Abbot EMS to Belleville Memorial Emergency Room and admitted for treatment; but due to progressive pulmonary deterioration, she was transferred again to Belleville Memorial Hospital and placed on a ventilator. (PX5; PX6) CT scan showed diffuse lung inflammation secondary to pneumonia (pneumonitis), and she was treated with Decadron, Remdesivir, and

convalescent plasma serum from a recovered COVID patient, but this proved ineffective. (PX6) Mrs. Crowder was ultimately intubated on November 28, 2020. *Id.* She rapidly deteriorated further and was transferred the following day to Barnes-Jewish Hospital with hypoxic respiratory failure. (PX7) There, she was placed on life support/ECMO as a result of progressive bacterial pneumonia and pneumonitis as a result of her COVID infection. *Id.* Her condition stabilized temporarily, and she underwent tracheostomy on December 22, 2020; but she subsequently had recurrent complications with bleeding. *Id.* She deteriorated and went into shock, after which she died on January 2, 2021. *Id.*

Report and Deposition of Dr. Alfred Habel

Dr. Habel performed a records review at the request of Respondent and testified that he is board certified in internal medicine, pulmonary medicine, critical care medicine, and sleep medicine. (RX47, p.6) Dr. Habel was hired through an independent medical evaluation company, MES. *Id.* at 26. He also performs IMEs at the request of Exam Workers, Crawford, Genex, and CorVel. *Id.* at 27.

He testified that COVID is an airborne disease transmitted through aerosolized droplets. *Id.* at 12-13. However, he also acknowledged that, "The epidemiology of COVID-19 has been challenging to ascertain with contract tracing being of minimal to no benefit." *Id.* at 14. Dr. Habel testified that the virus' incubation period ranged from 2 to 20 days. *Id.* at 20.

Dr. Habel did not believe that healthcare workers were at any increased risk in comparison to the lay public due to added protection afforded by handwashing and wearing personal protective equipment. *Id.* at 16. He testified that these methods of prevention, along with social distancing, became the standard mitigation recommendations. *Id.* at 18-19. Dr. Habel stated that risk factors do not make it easier for one to contract COVID-19, but they make it easier for one to become ill from COVID-19. *Id.* at 22. Unfortunately, Mrs. Crowder was at an increased risk due to her age and blood sugar levels. *Id.* at 23. Dr. Habel testified that it was impossible to say where Mrs. Crowder obtained her illness. *Id.* at 24.

Dr. Habel agreed that the care provided to Mrs. Crowder was reasonable and necessary to treat her COVID-19. *Id.* at 30. He also agreed her untimely death was directly related to her contraction of the illness. *Id.* He agreed that the protective measures instituted by Respondent minimized the transmission of COVID-19, but did not eliminate or fully prevent the spread or development of the disease; and he acknowledged that vaccination was not an option available at the time. *Id.* at 30-32. He was not familiar with what type of facility Cedarhurst was, the services they provided, or Mrs. Crowder's job title and duties. *Id.* at 32, 34. After being advised that it was a long-term care facility of which she was the executive director, he testified that his opinions would not be any different if she was in direct patient contact or remained in her office in the facility. *Id.* at 35. He continued to believe that it would be impossible to determine that amount of chance for the virus to infect Mrs. Crowder. *Id.* at 35.

Dr. Habel stated in his report that Mrs. Crowder was exposed to COVID before November 5, 2020. *Id.* at 38. He again acknowledged that the exposure date could be as little as two days, but he noted that 80% of individuals test positive within four to five days after exposure. *Id.* at 38. Dr. Habel admitted that the CDC's website states that the moderately or severely immunocompromised can shed replication competent virus beyond 20 days. *Id.* at 39. When asked how long a person can shed the virus, he stated, "It varies much from person to person. As I'm sure you're hearing, patients can have positive tests for weeks after. It's been challenging, very challenging. I've been in practice for 32 years. It's the most bizarre thing I've seen, frustrating for us trying to do the right thing for patients. The answer to your question is I don't think we know that information." *Id.* at 39. He was not provided with any information regarding Mrs. Crowder's work environment or her household's environment and preventative measures. *Id.* at 41-44. He reiterated that he could not conclude that her employment caused her COVID-19 infection, but he also could not conclude that she was exposed to COVID-19 through any alternative source. *Id.* at 41-43. However, he ultimately acknowledged that she had some risk factors for COVID-19 and worked in a risky environment that it made it possible that she contracted the illness from work. *Id.* at 47.

Report and Deposition of Dr. Mitchell Weinstein

Respondent took the deposition of Dr. Mitchell Weinstein who was performed a records review at Respondent's request. (RX48) He focuses his internal medicine practice on infectious diseases and served on St. Joseph Hospital's infection control committee. *Id.* at 8-9, 11. He performed a records review and authored a report dated January 23, 2022, regarding Mrs. Crowder's workers' compensation case. *Id.* at 16. He testified that COVID-19 is a highly infectious disease that "rapidly, within a couple of months . . . spread around the world". *Id.* at 19. He stated it can spread via small aerosol particles that can actually travel further than six feet, but that predominant transmission is by short-distance droplets. *Id.* at 20. Individuals would be safer if separated by at least six feet. *Id.* at 25-26. He also noted, "If you're in public and staying physically away from somebody, you're, in theory, going to be exposed to less particles." *Id.* at 25-26. He testified the virus can also spread to a lesser degree through surface contact. *Id.* at 20. He noted that the best protection against the virus is vaccines, both for preventing transmission and contracting severe disease. *Id.* at 23. These, however, were not available at the time of Mrs. Crowder's illness. *Id.* at 23-24. N95 mask use, hand hygiene, disinfection of high-contact areas, and identification and isolation of sick individuals, especially the asymptomatic, were also important tools in preventing infection. *Id.* at 25-28.

Dr. Weinstein acknowledged that there were a "variety of different recommendations on how frequent testing needs to be done" in order to limit virus spread. *Id.* at 27-28. Antigen testing is less accurate than PCR testing for making a diagnosis. *Id.* at 31, 33. The incubation period is approximately 14 days, and patients tend to test positive one to two days circa their onset of symptoms. *Id.* at 31-32.

Dr. Weinstein lamented Mrs. Crowder's tragic clinical course and agreed that her medical treatment was reasonable and necessary. *Id.* at 34-37. He also agreed that all of her clinical complications were causally related to her COVID-19 diagnosis. *Id.* at 37. He testified that she had preexisting conditions that predisposed her to a more severe course of the illness, such as an elevated body mass index, hypertension, and diabetes. *Id.* at 37-38. However, he acknowledged that her diabetes may have actually been precipitated by her COVID infection. *Id.* at 38-39.

Dr. Weinstein testified that he reviewed the mitigation policies instituted by Cedarhurst and the Illinois Department of Public Health guidelines for long-term care facilities. *Id.* at 40-46. He also reviewed Mrs. Crowder's job description and *Id.* at 43-44. He found Respondent's guidelines to be appropriate and reasonable as may be to prevent transmission amongst staff and residents at that point in time. *Id.* at 45-48. He also reviewed the facility testing results records. *Id.* at 50-53. Upon viewing same, he felt it was somewhat less likely that there was much transmission going on at Respondent's facility during the time Mrs. Crowder fell ill. *Id.* at 53-54. He candidly admitted, however, that there were "some limitations to using that as the entire evaluation as to the exact source of her infection." *Id.* He felt it was probable that she contracted the illness from home. *Id.* at 57-58.

On cross-examination, Dr. Weinstein testified that he was contracted as an independent medical reviewer through a third-party company named MES. *Id.* at 60. Approximately 80% of his reviews were done at the request of defense parties. *Id.* at 62. He did not have the opportunity to speak with Mrs. Crowder, anyone in her household, or any of the employees of Cedarhurst during his review. *Id.* at 67. He knew nothing of the protective measures taken by Mrs. Crowder or her household outside of her employment with Cedarhurst. *Id.* at 67. He knew nothing of activities or hobbies of household members. *Id.* He did not know the extent to which the written policies were adhered by Cedarhurst employees or residents. *Id.* at 69-70. He likewise did not know how much overtime Mrs. Crowder worked or how much time she spent with residents. *Id.* at 99. He did acknowledge based on his experience in working with similar type policies in a hospital setting that "there are occasions when people are not completely adherent. *Id.* at 70. He also agreed that protective measures aren't always 100% effective, especially for a "high- risk" person. *Id.* at 72.

Dr. Weinstein acknowledged that older individuals in long-term facilities were disproportionately impacted by the pandemic, and that employees who worked in such facilities were at a higher risk for contracting the illness, including Cedarhurst. *Id.* at 73-75, 77. He also admitted that personal protective equipment is not 100% effective. *Id.* at 75-76. He also acknowledged that an employee could have tested positive outside of the weekly testing done by Cedarhurst, isolated at home, and therefore not been included in subsequent facility testing records. *Id.* at 80-83. He testified that he would have no way of knowing whether Mrs. Crowder contracted COVID-19 from an employee or resident of Cedarhurst or from someone outside of the facility. *Id.* at 84. He was also asked why Mrs. Crowder did not test positive on November 3rd if she was

contagious on November 2nd, to which he replied her PCR level may have too low or there were issues with the accuracy of the test perhaps due to user error. *Id.* at 85.

Dr. Weinstein said that a person who has contracted COVID-19 may be contagious for 10 days in normal cases or up to 20 days for severe cases. *Id.* at 88-89. He did not consider pre-symptomatic patients to be a significant risk for contagion. *Id.* at 91-92. He admitted, however, that high-risk exposure increases transmission, especially in a high-risk setting during October and November of 2020, when individuals were not vaccinated and lacked immunity. *Id.* at 92. He fully admitted that the absence of an identified exposure did not rule out a work-related transmission, including from an asymptomatic or pre-symptomatic coworker or resident. *Id.* at 93. He stated he was not provided with any details regarding the exposure of Mrs. Crowder's family or when they became symptomatic despite his inquiry for such information. *Id.* at 93-94. He testified that such information would have been helpful in determining who became infected first and where Mrs. Crowder could have been infected. *Id.* at 94. Yet, he found the fact that they tested positive on November 6th "fairly suggestive" that the incubation time between her bringing the disease home and others testing positive seemed to be too short for her to infect them. *Id.* at 95-96. He admitted, however, that it was not impossible. *Id.* at 96-97. He also admitted that there were older COVID positive Cedarhurst cases within the 10 to 20 days prior to Mrs. Crowder's infection, and that she was more than likely at a greater risk for contracting COVID at work than many people in the general public at that time. *Id.* at 98-104. He again acknowledged that it was possible she contracted the illness at work. *Id.* at 105.

Report and Deposition of Dr. Anthony Shen

Dr. Shen is a practicing pulmonary critical care physician and has served as such at Missouri Baptist Hospital since 1986. (PX10, p.4) He has been treating COVID-19 patients that arrived at Missouri Baptist since they first arrived in 2020 in the intensive care unit and the inpatient/outpatient setting. *Id.* at 14-15. He also has performed independent medical reviews, mostly at the request of defense parties and companies such as MES. *Id.* at 6. Dr. Shen testified that he reviewed thousands of pages – an entire copy-paper-box-sized compilation of information. *Id.* at 8. However, he did not have enough information about Mrs. Crowder's exposure at home, so he personally contacted her husband on June 24, 2022. *Id.* at 8. Petitioner provided additional information, which Dr. Shen included in his report. *Id.* at 8-9. He also requested information from counsel to establish as much information as he could about Mrs. Crowder's exposure at different locations. *Id.* at 9. He summarized her exposures in his report, in which he also noted that she was "fastidious" about wearing all of her personal protective equipment. *Id.* at 10; (PX9) He noted that Mr. Crowder denied any exposures to himself or his daughter. (PX9)

Dr. Shen testified that October and November of 2020 were severe months for COVID, and no vaccines were available at the time. (PX10, p.9) He also testified that Mrs. Crowder's work environment was a known risk factor, and Cedarhurst had documented COVID cases despite their program for mitigation. *Id.* at 13. He also noted that PRC testing was not performed daily, and that up to 40% of nascent PCR tests could be negative despite the patient being positive. *Id.* at 13-14.

He testified at the time, it was the best option available and was given emergency use authorization. *Id.* at 15. He testified that the tests were authorized because there was "a scientific foundation to believe they were effective, but they were not validated before use." *Id.* at 15. He also pointed out the fact that this test taken by Mrs. Crowder and others had a disclaimer that "a negative test does not rule out COVID due to factors such as inhibitors to the test, not enough viral specimen on the swab, not enough viral load." *Id.* at 15-16. He testified that while the vast majority of individuals who contract the illness will be symptomatic in three to five days, the incubation period could be 14 days or more. *Id.* at 17-18.

Dr. Shen agreed that Mrs. Crowder died of confirmed COVID-19 complications. *Id.* at 19. He was familiar with long-term care facilities such as Respondent's facility and stated that he in fact "sent patients that discharged continuously there." *Id.* at 20. He testified that such facilities were generally full and had shortage of staff to take care of them. *Id.* at 21. He was aware that patients and employees tested positive at Cedarhurst during October, and since it was in circulation at the facility, he believed Mrs. Crowder was at risk to being exposed in that environment. *Id.* at 21-22. After gathering all the evidence and speaking with Mr. Crowder about household habits, Dr. Shen believed that it was more likely than not that Mrs. Crowder contracted COVID from her place of employment. *Id.* at 22-23.

Dr. Shen stated that Mrs. Crowder's occupation alone put her at an increased risk for exposure to COVID-19. *Id.* at 22-24. When asked why he believed her risk of exposure at work was high, he stated:

> Because she was working in an environment where we know that it was circulating, despite excellent protocols and PPE. We know they failed. They have at least 15 documented cases in this environment following their PPE protocol that occurred. These cases with the 10 patients had to have been transmitted by employees bringing it in. All of these individuals arrived there COVID negative. They could only have caught it from employees bringing it in. *Id.* at 24. At that time, there were virtually no visitors in nursing homes; they were all prohibited as we all saw on national TV, of people trying to see their family members through glass windows. *Id.* at 24-25.

He thus concluded within a reasonable degree of medical certainty that Mrs. Crowder's illness and treatment was causally related to her workplace exposure. *Id.* at 25-26.

On cross-examination, Dr. Shen acknowledged that he was unaware that residents of Cedarhurst could leave the facility as they pleased. *Id.* at 40. However, he testified that this further increased Mrs. Crowder's risk of contracting the illness at work. *Id.* at 47. In contrast, he testified that her husband, Mr. Crowder, worked in a lower-risk environment. *Id.* at 49-50. He agreed that personal protective equipment was not 100% effective in stopping exposure or contraction of COVID-19, and that asymptomatic individuals can transmit the disease. *Id.* at 46-47. He thus remained of the opinion that Mrs. Crowder more likely than not contracted her fatal illness at work. *Id.* at 48-49. While he agreed that Respondent had good protocols, he testified that the best testing

protocol would have been daily testing. *Id.* at 51. Even with such testing, he stated that the environment would not have been pure "because it's a dynamic environment, with people converting in the gaps that are there, with false negatives on people that were missed." *Id.* at 53. He reiterated that it was evident that PPE was not fully effective because there were still positive cases in the facility. *Id.* at 53.

CONCLUSIONS OF LAW

Issue (C): Was Decedent's last exposed to an occupational disease on November 5, 2020, that arose out of and in the course of her employment with Respondent?
Issue (F): Is Decedent's current condition of ill-being causally related to the injury/illness?

It is undisputed that Mrs. Crowder contracted COVID-19 as of November 5, 2020, as evidenced by the diagnosis in her medical records and the results of a positive laboratory test. Whether she contracted the COVID-19 virus from an exposure arising out of and in the course of her employment with Respondent is in dispute.

The claimant in an occupational disease case has the burden of proving that he suffers from an occupational disease and that a causal connection exists between the disease and his employment. *Freeman United Coal Mining Co. v. Illinois Workers' Compensation Comm'n,* 2013 IL App (5th) 120564WC, ¶ 21, 999 N.E.2d 382; *Omron Elecs. v. Illinois Workers' Comp. Comm'n*, 2014 IL App (1st) 130766WC, ¶ 36, 21 N.E.3d 1245, 1253. An occupational disease is a disease arising out of and in the course of employment or which has become aggravated and rendered disabling as a result of the exposure of the employment. 820 Ill. Comp. Stat. Ann. 310/1. In order for an aggravation to be compensable, it must be from a risk peculiar to or increased by the employment and not common to the general public. *Id.* An occupational activity need not be the sole or principal causative factor, as long as it was a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill.2d 193, 205, 797 N.E.2d 665 (2003); *Freeman United Coal Mining Co. v. Indus. Comm'n*, 308 Ill.App.3d 578, 586, 720 N.E.2d 309 (1999).

The Occupational Diseases Act provides:

> 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 need 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. 820 Ill. Comp. Stat. Ann. 310/1.

As the statutory language finds that compensable illness arises automatically with the establishment of causal connection, the Arbitrator considers these issues together.

On June 5, 2020, the Illinois Legislature amended the Occupational Diseases Act (ODA) to provide benefits for certain classes of workers who may have contracted COVID-19 at the workplace. The COVID-19 amendment is contained in paragraph 1(g) of the Act and states:

> In any proceeding before the Commission in which the employee is a COVID-19 first responder or front-line worker as defined in this subsection, if the employee's injury or occupational disease resulted from exposure to and contraction of COVID-19, the exposure and contraction shall be rebuttably presumed to have arisen out of and in the course of the employee's first responder or front-line worker employment and the injury or occupational disease shall be rebuttably presumed to be causally connected to the hazards or exposures of the employee's first responder or front-line worker employment. (emphasis added). 820 ILCS 310/1(g).
>
> > (2) The term "COVID-19 first responder or front-line worker" means: all individuals employed as police, fire personnel, emergency medical technicians, or paramedics; all individuals employed and considered as first responders; all workers for health care providers, including nursing homes and rehabilitation facilities and home care workers; corrections officers; and any individuals employed by essential businesses and operations as defined in Executive Order 2020-10 dated March 20, 2020, as long as individuals employed by essential businesses and operations are required by their employment to encounter members of the general public or to work in employment locations of more than 15 employees. For purposes of this subsection only, an employee's home or place of residence is not a place of employment, except for home care workers. 820 Ill. Comp. Stat. Ann. 310/1(g)
> >
> > (4) The rebuttable presumption created in this subsection applies to all cases tried after June 5, 2020 (the effective date of Public Act 101-633) and in which the diagnosis of COVID-19 was made on or after March 9, 2020 and on or before June 30, 2021 (including the period between December 31, 2020 and the effective date of this amendatory Act of the 101st General Assembly).
> >
> > (6) In order for the presumption created in this subsection to apply at trial, for COVID-19 diagnoses occurring on or before June 15, 2020, an employee must provide a confirmed medical diagnosis by a licensed medical practitioner or a positive laboratory test for COVID-19 or for COVID-19 antibodies; for COVID-19 diagnoses occurring after June 15, 2020, an employee must provide a positive laboratory test for COVID-19 or for COVID-19 antibodies.

Simply stated, exposure and contraction of the COVID-19 virus are presumed to have arisen from the work environment and the occupational disease is presumed to be causally connected to the hazards or exposures of employment. As such, the presumption creates a *prima*

facie case that the injury arose out of and in the course of employment. If not rebutted, Mrs. Crowder is entitled to benefits afforded under the ODA. If rebutted, Mrs. Crowder loses the benefits of the presumption, and must prove her case in the same manner as required under the ODA.

The Arbitrator finds Mrs. Crowder to be a "COVID-19 first responder or front-line worker" as she was employed as an essential worker in a long-term care facility. Mrs. Crowder's date of illness also falls within the period set forth in the Act for which the rebuttable presumption applies.

Respondent may rebut the presumption created by 820 ILCS 310/1(g) by evidence, including, but not limited to, the following:

> (A) the employee was working from his or her home, on leave from his or her employment, or some combination thereof, for a period of 14 or more consecutive days immediately prior to the employee's injury, occupational disease, or period of incapacity resulted from exposure to COVID-19; or
>
> (B) the employer was engaging in and applying to the fullest extent possible or enforcing to the best of its ability industry-specific workplace sanitation, social distancing, and health and safety practices based on updated guidance issued by the Centers for Disease Control and Prevention or Illinois Department of Public Health or was using a combination of administrative controls, engineering controls, or personal protective equipment to reduce the transmission of COVID-19 to all employees for at least 14 consecutive days prior to the employee's injury, occupational disease, or period of incapacity resulting from exposure to COVID-19. For purposes of this subsection, "updated" means the guidance in effect at least 14 days prior to the COVID-19 diagnosis…For purposes of this subsection, "personal protective equipment" includes, but is not limited to, items such as face coverings, gloves, safety glasses, safety face shields, barriers, shoes, earplugs or muffs, hard hats, respirators, coveralls, vests, and full body suits; or
>
> (C) the employee was exposed to COVID-19 by an alternate source. 820 ILCS 310/1(g)(3).

The COVID-19 presumption is an ordinary presumption. Respondent need only introduce "some evidence" that the employee's occupation was not the cause of the injury or disease. The legislation creates a rebuttable presumption similar to the rebuttable presumption that already exists within the ODA. The COVID-19 Amendment to the Illinois Occupational Diseases Act employs established precedent found in *Kevin Johnston v. Illinois Workers' Compensation Commission* to support the addition of this Act. *Johnston v. Illinois Workers' Comp. Comm'n*, 2017 IL App (2d) 160010WC, 80 N.E.3d 573. In *Johnston*, the Appellate court found that in order to rebut the presumption, "some evidence sufficient to support a finding that something other than the claimant's occupation caused his condition" is sufficient. *Id.* In that event, the presumption will cease to operate, and Mrs. Crowder will have to establish, by a preponderance of the evidence, the COVID-19 disease was contracted at her place of employment by introducing evidence at trial

as if the presumption never existed. The presumption merely shifts the burden of production, not the burden of persuasion. It operates in the employee's favor only if the employer provides no evidence to rebut causation.

There was no evidence admitted at trial that Mrs. Crowder was working from home or on leave from Respondent's facility for fourteen (14) days prior to her injury on November 5, 2020. It was undisputed at arbitration that she continued to work her regular hours immediately prior to testing positive for COVID-19. Therefore, Respondent has failed to rebut the presumption under Subsection (g)(3)(A).

No evidence was admitted at trial to show Mrs. Crowder was exposed to COVID-19 by an alternate source. There was no evidence presented that anyone in Mrs. Crowder's household was exposed to COVID-19 with the exception of Mrs. Crowder at her place of employment. (T.37, 59-62, 65) Mrs. Crowder was the first in her family to become symptomatic. (T.24, 179) While both Dr. Weinstein and Dr. Habel found Mrs. Crowder's incubation period particularly short if she began experiencing symptoms on November 4th based on medical records that indicated that she began having sinus-related symptoms on this date, Petitioner and Jolena Crowder testified that Mrs. Crowder actually began feeling ill on November 1, 2020, with signs of severe fatigue and excessive sleeping. (T.20) This is further supported by Dr. Shen's testimony that Petitioner and Jolena Crowder likely contracted COVID-19 from Mrs. Crowder. The Arbitrator finds that Respondent has failed to provide some evidence to rebut the presumption under Subsection (g)(3)(C).

The Arbitrator next considers whether Respondent rebutted the presumption by presenting evidence of its actions to reduce the transmission of COVID-19 in the fourteen (14) days prior to November 5, 2020, pursuant to Subsection (g)(3)(B).

The evidence is clear that the illness was circulating through the facility at the time of Mrs. Crowder's infection, and all experts agreed that personal protective equipment and prevention measures were not 100% effective at stopping the spread of COVID. (RX47; RX48; PX10) Dr. Shen testified that daily testing would have been a better option, but even so testing was not an accurate indicator of community spread since early versions of the test had a high false negativity rate. (PX10, p.13-14) The presumption requires that an employer applies "to the fullest extent possible" and enforces "to the best of its ability" industry-specific safety measures based on CDC or IDPH guidelines. 820 ILCS 310/1(g)(3). The text messages introduced as business records not only established staffing difficulties but also evidence of multiple complaints for masking mandate violations by employees and residents. (PX14) Respondent's employees openly admitted that it was difficult to enforce mask wearing among some of the residents. (T.70, 151-52, 155-56) Residents and staff were even allowed to leave their doors open. (T.148, 150-51) Therefore, Respondent has failed to rebut the presumption under Subsection (g)(3)(B) as the evidence suggests that Respondent did not enforce "to the best of its ability" industry-specific safety measures.

Based on the totality of the evidence, the Arbitrator finds that Respondent failed to rebut the presumption set forth in 820 ILCS 310/1(g)(6). Nevertheless, assuming *arguendo* that Respondent presented sufficient evidence to rebut the presumption, the Arbitrator finds Petitioner has shown a preponderance of evidence that Mrs. Crowder's injury on November 5, 2020 arose out of and in the course of her employment and that her current condition of ill-being is causally related to her injury on said date.

"To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that he/[she] has suffered a disabling injury which arose out of and in the course of his employment." *Sisbro, Inc. v. Industrial Com'n*, 207 Ill.2d 193 (2003).

A disease may be an accidental injury and may be compensable if it is contracted accidently or as a result of an accident. *John Rissman & Son v. Industrial Commission.*, 323 Ill. 459, 154 N.E. 203 (1926); *Permanent Const. Co. v. Industrial Commission*, 380 Ill. 47, 43 N.E.2d 557 (1942). The aggravation of a preexisting condition or disease may be an accidental injury and may be compensable if it meets the requirement that the occurrence be traceable to a definite time, place, and cause. *Riteway Plumbing v. Industrial Commission*, 67 Ill.2d 404, 367 N.E.2d 1294, (1977); *Quaker Oats Co. v. Industrial Commission*, 66 Ill.2d 418, 362 N.E.2d 1045 (1977).

Circumstantial evidence, especially when entirely in favor of the Petitioner, is sufficient to prove causal nexus between an accident and the resulting injury, such as a chain of events showing a claimant's ability to perform manual duties before accident and decreased ability to still perform immediately after accident. *Pulliam Masonry v. Indus. Comm'n*, 77 Ill.2d 469, 397 N.E.2d 834 (1979); *Gano Electric Contracting v. Indus. Comm'n*, 260 Ill.App.3d 92, 96-97, 631 N.E.2d 724 (1994); *International Harvester v. Indus. Comm'n*, 93 Ill.2d 59, 442 N.E.2d 908 (1982).

The Arbitrator finds that Mrs. Crowder's contraction of COVID-19 is more probably than not traceable to her work for Respondent. Her own supervisor, Ms. Meade testified that she witnessed Mrs. Crowder come into contact with staff and residents prior to her diagnosis of COVID-19. The record demonstrates that Mrs. Crowder worked hours in addition to her regular hours to address staff shortages and had to fill in performing work duties outside of her ordinary work duties as executive director. Staff shortages were often the result of staff members being exposed to COVID-19. The record is clear that there were multiple outbreaks of COVID-19 at Respondent's facility, two of which occurred in the 14 days prior to the date that Mrs. Crowder became symptomatic on November 1, 2020. Moreover, on October 27, 2020, only several days before Mrs. Crowder became symptomatic, , 4 out of 7 patients in isolation were COVID positive, one employee tested positive, two employees were at home with flu-like symptoms, four residents had mild symptoms, and one resident died. The evidence is clear that there were multiple cases of COVID-19 in the building that Mrs. Crowder was responsible for running at the time she became infected with the illness. Moreover, residents who were transferred to the hospital by EMS were required to exit the building through the front door, which was feet from Mrs. Crowder's office.

Lastly, no evidence was produced that supported a conclusion that Mrs. Crowder was infected by any source outside of Respondent's facility.

While Respondent sought to establish that Mrs. Crowder would not have entered memory care or been exposed to illness at its facility due to its protocols, the evidence suggests that staff compliance fell short of due diligence, and there was ample opportunity for Mrs. Crowder to come into contact with an airborne virus that was known to exist within the very building she worked.

Each of Respondent's witnesses testified that Mrs. Crowder was responsible for covering any staff shortages, while Petitioner testified that Mrs. Crowder had been forced to work long hours, going in early and coming in late to cover a variety of tasks including cleaning. (T.14-16) The evidence establishes, just as Ms. Eads' stated, it was "[Mrs. Crowder's] building." (T.157) In light of these less-than-ideal circumstances, it is no surprise, Mrs. Crowder fell ill. Given the instances of non-compliance and staffing shortages that she was required to remedy, there is sufficient evidence to conclude that Mrs. Crowder contracted the illness from airborne or surface contact with the virus at Respondent's facility.

Each of the three physician who testified agreed that Mrs. Crowder worked in a high-risk environment. (RX47; RX48; PX10) However, only Dr. Shen spoke with Petitioner to assess Mrs. Crowder's risk of infection outside of her employment. (PX10) Dr. Habel testified that he was not provided with any information regarding Mrs. Crowder's working environment or her household's environment and preventative measures. (RX47, p.41-44) Dr. Weinstein testified he knew nothing of Mrs. Crowder's risk outside of her employment. (RX48, p.67) Both Dr. Habel and Dr. Weinstein admitted, however, that it was entirely possible for Mrs. Crowder to have contracted her illness at work. (RX47, p.47; RX48, p.) After considering all of the evidence of her risk, including evidence which neither Dr. Habel nor Dr. Weinstein possessed, Dr. Shen credibly concluded that more likely than not, Mrs. Crowder contracted COVID-19 as a result of her employment. (PX10, p.48-49) Consequently, regardless of the operation of the presumption, the Arbitrator finds that the evidence supports a finding of accidental illness and causal connection in favor of Petitioner.

Based on the foregoing, Petitioner has established that Mrs. Crowder was exposed to an occupational disease which manifested on November 5, 2020, that arose out of and in the course of her employment with Respondent, and that her current condition of ill-being is causally related to the exposure that manifested on that date.

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

A claimant who suffers a compensable illness under the Occupational Diseases Act is entitled to the same rights and remedies as those who suffer injury under the Workers' Compensation Act. 820 Ill. Comp. Stat. Ann. 310/7. Upon establishing causal connection under the Workers' Compensation Act, employers must provide recovery for all reasonable and

necessary expenses incurred in 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). All experts agree that the care Mrs. Crowder received was reasonable and necessary. (RX47; RX48; PX10) Respondent shall pay the reasonable and necessary medical services, as outlined in Mrs. Crowder's group exhibit, as provided in § 8(a) and § 8.2 of the Act. Respondent shall have credit for benefits paid through arrangements permissible under § 8(j) of the Act

Issue (L): What compensation for permanent disability, if any, is due?

Mrs. Crowder is survived by her husband, David Crowder, and her daughter enrolled in full-time education, Jolena Crowder, born December 28, 2003. Under § 7(a) of the Act, if the employee leaves a widowed spouse and/or dependent(s), Respondent is obligated to pay weekly compensation computed in accordance with § 8(b)2 of the Act. 820 ILCS 305/7(a).

Based upon the foregoing, Respondent shall pay death benefits, commencing January 3, 2021, of $1,066.67/week to the surviving spouse, David Crowder, on his or her own behalf and on behalf of the child: Jolena Crowder, born December 28, 2003, until $500,000.00 has been paid or 25 years, whichever is greater, have been paid, because the injury caused the employee's death, as provided in Section 7 of the Act. In the event of remarriage of Mr. Crowder, where the decedent did not leave surviving eligible dependent, the surviving spouse is entitled to a lump sum equal to two years of compensation. If Mr. Crowder's spouse dies before the maximum benefit level has been reached, and Jolena still survives, since Jolena is enrolled as a full-time student in an accredited educational institution, payments shall continue until she reaches 25 years of age. *Id.* If any child is physically or mentally incapacitated, payments shall continue for the duration of the incapacity. *Id.* If no children named herein are alive upon the death of the surviving spouse, payments shall cease. *Id.*

Respondent shall pay $8,000.00 for burial expenses to the surviving spouse or the person(s) incurring the burial expenses, as provided in Section 7(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.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC001471
Case Name	David Skwierczynski v. Emcor Services Team Mechanical, Inc.
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0057
Number of Pages of Decision	13
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Mark Wilson
Respondent Attorney	Andrew Makauskas

DATE FILED: 1/26/2024

/s/Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DAVID SKWIERCZYNSKI,

Petitioner,

vs. NO: 22 WC 1471

EMCOR SERVICES TEAM MECHANICAL,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed under Section 19(b) of the Act by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, prospective medical care and temporary total disability (TTD) 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 also remands this case to the Arbitrator for further proceedings and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Indus. Comm'n*, 78 Ill. 2d 327 (1980).

Respondent herein had accepted Petitioner's injury related to the FCR [flexor carpi radialis] tendon rupture, but disputed that the work accident of August 4, 2021 had also affected Petitioner's underlying osteoarthritis in the right hand. Respondent argued, *inter alia*, that the initial treating records were silent with respect to symptoms, complaints or issues related to osteoarthritis. Notwithstanding, the Commission finds ample evidence that Petitioner had been symptomatic in the area of his osteoarthritis in the right hand within a short period following the work accident even though his initial treatment primarily focused on the FCR tendon rupture.

The Commission notes that the August 4, 2021 visit note from Northwestern Medicine Immediate Care documented tenderness to palpation at the snuffbox in the right hand and x-rays of the right wrist revealed severe osteoarthritis of the STT [scaphoid-trapezium-trapezoid] articulation and mild osteoarthritis of the first CMC [carpometacarpal]. Chondrocalcinosis was also noted in the triangular fibrocartilage and adjacent to the STT articulation. Petitioner's

diagnoses on this date included right wrist osteoarthritis. He was also given a thumb spica wrist splint to wear.

Petitioner next saw Dr. Kadow at Northwestern Medicine's Orthopaedic Surgery of the Hand, Wrist and Elbow department on August 5, 2021. The visit note documented symptoms in the wrist, hand and fingers. Dr. Kadow also noted that Petitioner did not demonstrate any pain at the levels of his baseline osteoarthritic changes involving the STT joint and first thumb CMC joint.

On August 12, 2021, Dr. Kadow reviewed the MRI films of the right wrist that Petitioner completed on August 6, 2021. She found that Petitioner had advanced STT joint osteoarthritis with a possible spontaneous rupture due to an osteophyte in the STT joint. Dr. Kadow indicated that the incidental findings on the MRI were unrelated to Petitioner's current discomfort of the FCR tendon. She later documented on August 17, 2021, that Petitioner had an FCR tendon rupture likely at the level of the STT joint where Petitioner had significant osteoarthritis.

Petitioner's therapy records from Northwestern further noted on September 10, 2021 that Petitioner felt pins and needles at the base of his thumb/wrist. The therapy records additionally documented symptoms in Petitioner's fingers, including his thumb, hand, whole arm and up to his shoulder. Petitioner received instructions on exercises specific to his shoulder, wrist, hand and thumb.

Dr. Kadow's treatment thereafter continued to focus on Petitioner's FCR tendon rupture through February 24, 2022, but the medical records from her office consistently documented that Petitioner had significant STT joint osteoarthritis on x-ray, that the MRI demonstrated some degenerative changes through the radiocarpal joint and that Petitioner had difficulty with light gripping activities. Petitioner also continued to report symptoms of pins-and-needles and interval swelling in the hand, as well as pain, discomfort and tenderness in the area of his osteoarthritis. Petitioner further reported minimal to no relief with injections into his arthritic joints.

By February 24, 2022, Dr. Kadow noted that Petitioner's FCR tendon rupture had improved but that Petitioner's osteoarthritic conditions remained problematic. Petitioner proceeded with surgery to address the osteoarthritic conditions on May 3, 2022. He underwent a right carpometacarpal arthroplasty, right trapezoid partial excision and right wrist AIN and PIN [anterior and posterior interosseous nerve] resection. The operative report stated that Petitioner had suffered with longstanding right thumb CMC and STT joint osteoarthritis and wrist arthritis and that his symptoms initially were aggravated by the FCR tendon rupture.

Dr. Kadow testified on July 7, 2022 that Petitioner's initial discomfort and pain were more associated with the FCR tendon rupture rather than the arthritis or degenerative conditions noted on the MRI. She explained, however, that the FCR tendon essentially traveled right around the trapezium just below. "That's part of the STT joint and so it's not directly over those areas but close." (PX5, pg. 12). Dr. Kadow additionally testified that patients with advanced STT joint arthritis could get FCR tendon ruptures and due to the close proximity, there could be associated inflammation from one area to the other.

Dr. Kadow believed Petitioner's discomfort and pain in the wrist joint, palm side of the wrist and the base of the thumb were all tied to the work accident. She explained that Petitioner had not been experiencing any pain prior to the work injury, had continued pain in the same original location and now had pain developing around the surrounding areas. Dr. Kadow opined that Petitioner's work accident could have aggravated a pre-existing asymptomatic arthritic condition and she therefore believed Petitioner's current condition of ill-being was causally related to the work accident.

On the contrary, Respondent's Section 12 examiner, Dr. Schmidt, opined that Petitioner's findings did not support an aggravation of the underlying arthritis as a result of the August 4, 2021 work accident. Similar to Dr. Kadow's testimony, Dr. Schmidt correlated the FCR tendon rupture to the pre-existing significant degree of osteoarthritis of the STT joint but testified that Petitioner's examination on October 27, 2021 revealed that he was non-tender on palpation over the STT joint and the thumb CMC. He explained that the two joints involved the articulation between the base of the thumb, or the first metacarpal, and the two bones, the trapezium and the trapezoid, and that the joints were in close proximity. Dr. Schmidt acknowledged that Petitioner had denied having any prior wrist complaints or problems and that trauma could cause a previous asymptomatic arthritic condition to become symptomatic if there was an acute structural change such as a fracture or dislocation. However, Dr. Schmidt believed that if Petitioner had aggravated his arthritis, he would have expected Petitioner to have pain on palpation, tenderness and swelling over those joints.

The Commission finds Dr. Kadow's testimony regarding causation more persuasive than Dr. Schmidt's testimony. Both physicians noted that Petitioner never had any problems or treatment related to the right thumb, right wrist or right hand prior to the work accident. Both physicians also testified similarly regarding the proximity of the FCR tendon rupture to the area of his osteoarthritis and how one condition could affect the other. Notwithstanding, Dr. Schmidt maintained his opinion regarding causation but offered no explanation as to why or how Petitioner's asymptomatic osteoarthritis was subsequently rendered symptomatic after the work accident. Petitioner also did not sustain any intervening accident or trauma that would have broken the chain of causation from the initial work accident. Therefore, the Commission finds that as a result of the undisputed August 4, 2021 work accident, Petitioner sustained an FCR tendon rupture as well as an aggravation of his underlying osteoarthritis in the right wrist, right thumb CMC joint and STT joint. The Arbitrator's Decision is modified accordingly.

With respect to worker's compensation benefits, Respondent disputed liability based on its position related to causal connection. Respondent did not dispute the reasonableness or necessity of the medical treatment nor the duration of the TTD period. Having determined the issue of causal connection in Petitioner's favor, the Commission awards the medical bills detailed in Petitioner's Exhibit 1 totaling $129,285.73 to be paid pursuant to Sections 8(a) and 8.2 of the Act. The Commission finds that the charges incurred were for reasonable and necessary medical treatment related to Petitioner's work injuries.

The Commission, however, denies an award for credit claimed under Section 8(j) of the Act. The right to credits, which operates as an exception to liability created under the Act, is narrowly construed. *World Color Press v. Indus. Comm'n*, 125 Ill. App. 3d 469, 471 (1984).

Moreover, it is the burden of the employer to establish its entitlement to a credit under Section 8(j) of the Act. *Hill Freight Lines, Inc. v. Indus. Comm'n*, 36 Ill. 2d 419, 424 (1967); cited by *Elgin Bd. of Educ. Sch. Dist. U-46 v. Ill. Workers' Comp. Comm'n*, 409 Ill. App. 3d 943, 953 (2011).

Here, the parties stipulated on the Request for Hearing form that Respondent paid zero dollars in medical bills through its group medical plan and that Respondent was not claiming other benefits for which credit may be allowed under Section 8(j) of the Act. (Arb. Ex. 1). Respondent further provided no evidence that it contributed in whole or in part to the group medical plan as required under Section 8(j) of the Act. As such, the Commission finds that Respondent is not entitled to any credit pursuant to Section 8(j) and as a result, has no obligation under the Act to keep Petitioner harmless from any and all claims or liabilities that may be made against him by the group carrier. Moreover, the parties are bound by their stipulations on the Request for Hearing form. *Walker v. Indus. Comm'n*, 345 Ill. App. 3d 1084, 1088 (2004).

The Commission next finds that Petitioner is entitled to prospective medical care. At Petitioner's last visit with Dr. Kadow on December 7, 2022, Dr. Kadow recommended that Petitioner follow-up with her if he continued to have persistent intolerable discomfort as secondary procedures could be warranted. Petitioner testified that given his current symptoms, he wanted to undergo another surgical procedure. The Commission awards the follow-up appointment with Dr. Kadow.

Finally, the Commission awards TTD benefits from August 5, 2021 through October 10, 2022. The Commission finds that Petitioner was either off work or on light duty work restrictions which Respondent was not able to accommodate. The Commission further finds that Respondent is entitled to a credit of $33,558.84 in TTD benefits previously paid to Petitioner and as stipulated by the parties on the Request for Hearing form. (Arb. Ex. 1).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 23, 2023 is hereby modified as stated and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the reasonable, necessary, and related medical bills in the amount of $129,285.73, as evidenced in Petitioner's Exhibit 1 and pursuant to Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is not entitled to a credit pursuant to Section 8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner is entitled to the follow-up appointment with Dr. Kadow.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner temporary total disability benefits of $1,266.67 per week for 61 6/7 weeks, from August 5, 2021 through October 10, 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 is entitled to a credit of $33,558.84 in TTD benefits previously paid to Petitioner.

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

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

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

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

January 26, 2024

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

CAH/pm
O: 12/21/23
052

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

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC001471
Case Name	David Skwierczynski v. Emcor Services Team Mechanical, Inc.
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	7
Decision Issued By	Gerald Granada, Arbitrator

Petitioner Attorney	Mark Wilson
Respondent Attorney	Andrew Makauskas

DATE FILED: 2/23/2023

THE INTEREST RATE FOR THE WEEK OF FEBRUARY 22, 2023 4.91%

/s/Gerald Granada, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF KANE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

DAVID SKWIERCZYNSKI
Employee/Petitioner

v.

EMCOR SERVICES TEAM MECHANICAL, INC.
Employer/Respondent

Case # **22WC001471**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Geneva**, on **January 19, 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, **8/4/2021**, 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 in his right thumb ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**98,800.00**; the average weekly wage was $**1,900.00**.

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

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

Respondent shall be given a credit of $**5,692.32** for TTD, $**n/a** for TPD, $**n/a** for maintenance, and $**n/a** for other benefits, for a total credit of $**5,692.32**.

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

ORDER

Petitioner's current condition is not causally related to the accident.

As Petitioner's current condition is not causally related to the accident, prospective medical treatment is denied.

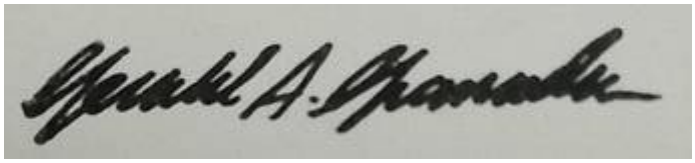
As Petitioner's current condition is not causally related to the accident, Respondent is not responsible for medical bills for treatment after 1/5/22.

As Petitioner's current condition is not causally related to the accident, Respondent is entitled to a credit of $5,692.32, for TTD paid after 1/5/22.

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

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

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



FEBRUARY 23, 2023

Signature of **Arbitrator Gerald Granada**

FINDINGS OF FACT

This case involves Petitioner David Skwierczynski who alleges to have sustained injuries while working for the Respondent Emcor Services Team Mechanical on August 4, 2021. Respondent disputes Petitioner's claim with the issues being: 1) causation; 2) medical expenses; 3) TTD; and 4) prospective medical.

On August 4, 2021, Petitioner was working for Petitioner as a union sheet metal mechanic. On that day he was working on a ladder by himself and installing a fitting onto a fan power box. As he was attempting to connect the cleat to the power box, he felt a pop in his right wrist. He reported the matter to his foreman.

He sought treatment August 4, 2021, at Northwestern Immediate Care, where x-rays were taken of his wrist. At trial, Petitioner said he reported thumb pain at the time of this visit. The report from Northwestern Immediate Care does not reference thumb pain (Px 2, p. 179).

On August 5, 2021, Petitioner saw Dr. Kadow, who noted the x-rays from August 4, 2021, showed no fractures or dislocations, advanced STT joint osteoarthritis, and CMC joint osteoarthritis in the first thumb. Her diagnosis was sudden onset severe wrist discomfort with pain over the FCR tendon pain along the tunnel the FCR extending into the wrist. Dr. Kadow suspected an FCR rupture. Petitioner testified at trial that he reported pain in his thumb during this visit. Tthe August 5, 2021, medical report, which states "He does not demonstrate any pain at the levels of his baseline osteoarthritis changes like his STT joint and first thumb CMC joint". Dr. Kadow wrote that surgical intervention likely will not be required. An MRI was ordered (Px 2, p. 166).

An MRI of the left wrist was taken on August 6, 2021.

Petitioner returned to Dr. Kadow on August 12, 2021. At trial, Petitioner said that he reported pain in his left thumb. Dr. Kadow's August 12, 2021 medical report states that Petitioner continued to have pain along the volar radial aspect of the wrist overlying FCR sheath and especially at the wrist crease, with notes progressive bruising along the palmar side of his hand and forearm. Dr. Kadow suspected the FCR tendon was ruptured and wrote "I believe the incidental findings on his MRI otherwise are unrelated to his current discomfort." (Px 2, pp. 153-154)

He was seen again on August 17, 2021, by Dr. Kadow. She reviewed an addendum to the August 6, 2021, MRI report, which supported her suspicion of an FCR rupture at the level of the proximal carpal row. She stated "Given this has been the location of the patient's primary discomfort as well as palmar sided bruising and discomfort over the FCR sheath, I would not recommend any additional treatment for the findings mentioned on the MRI at this time. My clinical suspicion is for FCR rupture which matches his imaging as well as physical findings.". There is no indication of thumb pain complaints reflected in the report. (Px 2, p. 145)

Petitioner returned September 2, 2021. According to Dr. Kadow's report, he had significant worsening of symptoms on August 20, 2021. There was no thumb pain noted in the medical record. An injection was administered. (Px 2, p. 130)

On September 16, 2021, Dr. Kadow noted that there was no change in his current symptoms but that he noted some deviating of the fingers and intermittent electrical shooting discomfort extending through his hand and wrist. EMG/NCV testing was ordered. (Px 2, pp. 83-84) On October 7, 2021, Petitioner returned to Dr. Kadow. She noted that the pins-and-needles sensation that he was reporting is not supported by the EMG/NCV test results. This testing revealed normal functioning of the wrist extensor muscles and normal ulnar nerve. She noted that Petitioner was seeking a second opinion and was also scheduled for an IME. (Px 2, pp. 2-4)

On October 18, 2021 Petitioner saw Dr. Michael Bednar for a second opinion. An injection was administered. (Px 3, pp. 4-5) He returned to Dr. Bednar on November 18, 2021 and at that time, Dr. Bednar recommended a wrist fusion. (Px. 3, pp. 55-56).

On October 27, 2021, Petitioner underwent an IME with Dr. Richard Schmidt. Dr. Schmidt noted that on examination, Petitioner had no tenderness over his STT joint or thumb CMC joint. If his underlying arthritis in either area had been aggravated by the August 4, 2021, work incident, Dr. Schmidt would've expected reports of pain during this testing. He also would have expected swelling, which was not present. (Rx. 1, p. 16) Dr. Schmidt found the FCR tendon rupture to be related to the work incident. As of the date of the examination, he found Petitioner to be at MMI and able to return to full duty work without restrictions. (Rx 1, pp. 16-18) Dr. Schmidt issued an addendum report on January 5, 2022, after reviewing the records of Dr. Bednar. He disagreed with Dr. Bednar's recommendation of surgery. The fusion procedures suggested by Dr. Bednar are for instability. During his examination of October 27, 2021, Dr. Schmidt performed the Watson test, which specifically assesses instability in the area. The test was negative, meaning he had no instability in the area. Thus, there was no need for fusion surgery. (Rx 1, pp. 19-23)

On February 24, 2021, Petitioner returned to Dr. Kadow, who noted Petitioner was reporting pain in his wrist joint as well at the volar wrist and base of his thumb. She administered a CMC joint injection. (Px 2, pp. 9-10) She indicated that this was the first day that she treated Petitioner for CMC joint arthritis or underlying arthritis. She further indicated that the FCR tendon injury had resolved and would not prevent Petitioner from returning to work in a full duty capacity. (Px 5, p. 37)

On April 7, 2022, Dr. Kadow noted Petitioner complained of rated pain of 7/10, aching in nature, radiating from the thumb CMC joint into the wrist and hand. She noted the FCR rupture had improved. She noted that Petitioner has advanced STT joint arthritis as well as degenerative wrist arthritis with carpal instability. She further noted that he has pain in multiple locations, however, complicating the chance of full relief of symptoms with surgery in any one area. Surgery was planned in the form of the right CMC arthroplasty with right trapezoid partial excision as well as a wrist denervation with AIN and PIN neurectomies. (Px 2, pp. 257-259) On May 3, 2022, Dr. Kadow performed the planned surgery. The preoperative and postoperative diagnoses were primary osteoarthritis of right wrist, right thumb CMC and STT joint arthritis. (Px 2, pp. 154-156) Dr. Kadow testified via evidence deposition on July 7, 2022 and her testimony was mostly consistent with her medical reports.

On July 7, 2022, Dr. Schmidt issued an addendum report after reviewing additional medical records. He opined that the surgery performed by Dr. Kadow was not related to the August 4, 2021, work incident.

On August 26, 2022, after Dr. Kadow had been deposed, Petitioner was seen, at the request of his attorney, by Dr. Joseph Newcomer. In his report, he found the underlying condition related to the work incident but acknowledged that it was somewhat confusing the migratory nature of his pain complaints and that he did not have the CMC pain initially. (Px 6, p. 24). Dr. Newcomer testified via evidence deposition on November 4, 2022 consistently with his medical report.

On October 10, 2022, Petitioner was released to return to full duty work without restrictions. (Px 2, pp. 2-3).

On December 27, 2022, Dr. Schmidt issued another addendum report after reviewing additional medical records, including the IME report of Dr. Newcomer, and surveillance video. The surveillance video showed Petitioner walking back and forth on his lawn fertilizing it with a spreader fertilizer. It can be seen at times that Petitioner is also squeezing with his right hand to release the fertilizer. The activities Dr. Schmidt saw on the surveillance of October 22, 2022, would be consistent with the note of October 10, 2022, from Dr. Tiffany Kadow, indicating he can return to work without restrictions. (Rx 2).

At trial, Petitioner testified that he did return to full duty work in October and has been working up to the date of trial.

CONCLUSIONS OF LAW

1. Regarding the issue of causation, the Arbitrator finds that the Petitioner's current condition of ill-being, particularly in his right thumb, is not causally connected to his August 4, 2021 work accident. In support of this finding, the Arbitrator relies on the testimony and the medical evidence presented at trial. It is undisputed that the Petitioner's FCR tendon rupture is related to this incident. However, both Dr. Kadow and Dr. Schmidt have testified that this injury has resolved, does not require additional treatment, and that it does not prevent Petitioner from performing full duty work. (Px 5, pp. 35-37, Rx 1, p. 43) The FCR tendon was not addressed during the May 3, 2022, surgery performed by Dr. Kadow. (Px 5, p. 42)

The surgery performed by Dr. Kadow was to address Petitioner's underlying osteoarthritis of right wrist, right thumb CMC and STT joint arthritis. (Px 2, pp. 154-156) These areas were not affected by the underlying work accident. From a pain standpoint, Petitioner was not experiencing pain in the areas of the underlying arthritis during the period immediately after the accident. During her initial August 5, 2021, examination of Petitioner, Dr. Kadow specifically tested for pain in these areas. The report states "He does not demonstrate any pain at the levels of his baseline osteoarthritis changes like his STT joint and first thumb CMC joint." (Px 2, p. 166) These are the areas where the surgery was ultimately performed. (Px 5, p. 41) After reviewing the MRI images, Dr. Kadow noted that the imaging, in addition to showing the FCR tendon rupture, showed osteoarthritis in the STT joint. She indicated in her August 12, 2021, report that beyond the FCR tendon rupture, the other incidental findings on the MRI were unrelated to his discomfort at the time (Px 2, p. 154) Dr. Kadow testified at her deposition that as of August 12, 2021, it was her opinion that only the FCR tendon rupture was related to the work incident, as he didn't demonstrate any discomfort in any other areas. (Px 5, pp. 39-40) Dr. Kadow notably testified that nowhere in her medical records had she attributed an aggravation of the Petitioner's underlying osteoarthritis or the need for surgery to the work incident. (Px 5, p. 41)

Petitioner testified at trial that he complained of thumb pain to Dr. Kadow during all the visits in August and September of 2021. However, there were no complaints of thumb pain noted in the records for those dates. (Px 2, pp 179, 166, 153-154, 145, 130, 83-84) All three of the doctors who testified in this case acknowledge that Petitioner did not initially have pain in his right thumb. Dr. Kadow did not begin treating the underlying arthritic condition until February 24, 2022 (Px 5, p. 35).

The Arbitrator finds persuasive the opinions of Dr. Schmidt, who opined that the Petitioner's right thumb condition was not causally related to his work injury. He explained that Petitioner's underlying, pre-existing osteoarthritis was severe; and had the underlying arthritis been aggravated because of the incident, pain and swelling would have been expected after it occurred. This was not present during the initial treatment by Dr. Kadow, nor when Dr. Schmidt examined Petitioner on October 27, 2021. (Rx 1, p. 30) Dr. Schmidt further testified that there was no evidence, either in the review of the diagnostic imaging or during his examination, of any aggravation of the underlying arthritis because of physical therapy. (Rx 1, pp. 42-43) The Arbitrator notes that Dr. Newcomer – who was retained by Petitioner after Dr. Kadow was deposed - after discussing the possibility of the condition having been aggravated in physical therapy, acknowledged on cross-examination that Petitioner admitted to no change in symptoms after physical therapy started. (Px 6, pp. 23-24)

Based on the above, the Arbitrator concludes that the Petitioner's current condition of ill-being as it relates to his right thumb is not causally connected to his August 4, 2021 work accident. Therefore, any benefits relating to this condition are denied.

2. Consistent with the Arbitrator's findings regarding the issue of accident, all other issues are rendered moot.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	23WC000394
Case Name	Frank Wilson v. Chester Mental Health Center
Consolidated Cases	
Proceeding Type	Petition for Review Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0058
Number of Pages of Decision	9
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Jason Coffey
Respondent Attorney	Kenton Owens

DATE FILED: 1/29/2024

/s/Carolyn Doherty, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

FRANK WILSON,
Petitioner,

vs. NO: 23 WC 0394

CHESTER MENTAL HEALTH CENTER/SOI,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, future (prospective) medical 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 hereof.

While affirming and adopting the Decision of the Arbitrator, the Commission writes to provide additional analysis pursuant to the *McAllister* case, which instructs that "[t]he first step in risk analysis is to determine whether the claimant's injuries arose out of an employment-related risk—a risk distinctly associated with the claimant's employment. [A] risk is distinctly associated with an employee's employment if, at the time of the occurrence, the employee was performing (1) acts he or she was instructed to perform by the employer, (2) acts that he or she had a common-law or statutory duty to perform, or (3) acts that the employee might reasonably be expected to perform incident to his or her assigned duties." McAllister v. Ill. Workers' Comp. Comm'n, 2020 IL 124848, ¶46, 181 N.E.3d 656, 667-68 (2020)(*citations omitted*).

In this case, the evidence overwhelmingly supports the conclusion that Petitioner's injury arose out of a risk distinctly associated with his employment. The Petitioner's testimony that he felt a pop in his right knee while "tossing keys" in the control room of a maximum-security prison is unrefuted. Petitioner explained that during shift changes, staff members come to the control room window and hand Petitioner their personal keys. Petitioner takes the personal keys, turns, and pivots from the window and walks to the wall located behind him where there is a board. Petitioner then hangs up the personal keys on the board, retrieves the staff member's facility keys, and hands the facility keys to the staff member at the window. In order for Petitioner to perform the job activity of "tossing keys" during shift changes, he must walk back and forth between the control room window and the wall with the key board, which incidentally requires him to turn and pivot. As such, the Commission concludes Petitioner's injury arose out of his employment because Petitioner was performing an act he was instructed to perform by his employer and/or was

performing acts the employee might be reasonably expected to perform incident to his assigned duties.

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 April 17, 2023 is hereby modified as stated 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 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.

January 29, 2024
o: 01/11/23
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	23WC000394
Case Name	Frank Wilson v. Chester Mental Health Center
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	6
Decision Issued By	Edward Lee, Arbitrator

Petitioner Attorney	Jason Coffey
Respondent Attorney	Kenton Owens

DATE FILED: 4/17/2023

THE INTEREST RATE FOR THE WEEK OF APRIL 11, 2023 4.79%

/s/ Edward Lee, Arbitrator
Signature

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

April 17, 2023

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF **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

Frank Wilson
Employee/Petitioner

v.

Chester Mental Health Center
Employer/Respondent

Case # **23** WC **000394**

Consolidated cases: **None**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **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. ☒ 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 **12/15/2022**, 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 $**71,231.1853**; the average weekly wage was $**1,369.83**.

On the date of accident, Petitioner was **53** years of age, ***married*** with **2** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

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

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

Respondent is entitled to a credit for any medical bills paid to date by Petitioner's group health insurance under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services as provided in Petitioner's Group Exhibit #5, as provided in Sections 8(a) and 8.2 of the Act directly to the medical providers.

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

Respondent shall pay Petitioner temporary total disability benefits of $904.09/week for 14 6/7 weeks, commencing 12/16/2023 through 03/29/2023, as provided in Section 8(b) of the Act.

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

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

Edward Lee **APRIL 17, 2023**

Signature of Arbitrator

FINDINGS OF FACT

The parties presented for arbitration pursuant to Section 19(b) of the Act. The Petitioner alleges to have suffered a work injury on December 15, 2023. The Respondent disputes liability for benefits herein based upon accident. The Respondent placed causation in dispute at trial but indicated on the record the causation dispute was related to accident. Accordingly, if the Arbitrator concluded the Petitioner sustained his burden regarding the issue of accident, the Respondent would be liable for TTD benefits and medical bills incurred to date.

The Petitioner testified at arbitration. The Petitioner is a fifty-four year old employee of Chester Mental Health Center. He has worked for Respondent for approximately nineteen years. Chester Mental Health Center is a maximum security hospital for males who have committed violent crimes but are legally unfit to stand trial. Patients at the facility are not freely allowed to come and go and the hospital is secured at all times.

The Petitioner works in the control room. Employees assigned to the control room control custody of the keys for the security staff along with hand radios, badges and handcuffs. They also monitor the building with cameras and can remotely unlock security doors throughout the facility when requested by staff. The control room is located at the front door of the building. An employee entering the building would have to walk by the control room and request their keys in order to enter the building. No employee is allowed to enter the building without their key or badge located in the control room.

The Petitioner worked third shift from 11:00 p.m. to 7:00 a.m. The busiest times for the control room are shift changes. There would be employees leaving the facility after their shift and employees entering the building to begin their shift. The employees leaving the facility have to return their keys and badges while those entering the facility are obtaining their keys and badges all at the control room window. This process is known as "tossing keys." Tossing keys is done as staff members come to the control room window. The employee would hand the Petitioner their personal keys through the window. The personal keys have a chip with a number on it. The Petitioner would take the keys with the numbered chip and walk across the control room to the wall opposite the window to a board with numbered hooks and badges hanging from them and grab a badge with the corresponding number from the hook, hang up the employee's personal keys and walk back to the window to give the employee their badge.

At a shift change, the Petitioner is walking back and forth over and over until every employee has either entered or exited for a new shift. The Petitioner approximated he would walk back and forth 150 times per shift tossing keys. In the course of performing this job duty on December 15, 2023, the Petitioner took an employee's personal keys and turned to his right to walk across the control room to the board, and in doing so his right leg sort of staggered on a piece of carpet in the room, and he heard a pop in his right knee. The Petitioner had the employee's keys in his hand while making this turn when he heard the pop.

The employee who handed the Petitioner their keys could not have entered the facility until the Petitioner returned their badge to them. Further, the general public is not allowed to gain access to the control room.

The Petitioner did not report the injury immediately. It was at the end of his daily shift at approximately 6:45 a.m.. He was going to be heading home soon and had a four-day weekend and figured it might be fine. However, over the weekend, the right knee began to swell and grew painful. When the Petitioner returned to work he told his shift supervisor what had happened and was sent to the doctor.

The Petitioner went to the emergency room at Chester Memorial Hospital. He followed-up with his primary-care physician. He eventually underwent MRI examination and following MRI, was referred to an orthopedic surgeon. The Petitioner is currently under doctor care and undergoing physical therapy. He has not been able to return to work since his date of injury.

On cross examination, the Petitioner thought he was seen at the emergency department at Chester Memorial Hospital on December 21, 2022. He told the emergency department he hurt his knee at work and twisted his knee and felt something pop. The Petitioner did not notice any defect in the carpet in the control room at the time of his injury.

On re-direct examination, the Petitioner testified that at the time of his injury he was working fast because of all the employees wanting to enter and exit the facility.

The Respondent offered into evidence several reporting documents the Petitioner completed following his injury. The Workers' Compensation Employee's Notice of Injury indicated the Petitioner was injured while "passing out keys in the key room and felt a pop in my right knee" (RX1). It also noted the Petitioner did not report the injury when it happened because he "was hoping to better over time off" (RX1). An Extended Benefits Request form was also completed by the Petitioner which stated "on Dec. 15, 2022, I working in control room, I was in key room throwing keys, I felt a pop in my right knee, that happened around 6:45 am" (RX1).

The Petitioner offered into evidence several medical records documenting the treatment of Petitioner following his injury. On December 21, 2022, the Petitioner presented to the emergency department at Chester Memorial Hospital with complaints that he hurt his knee at work when he twisted his knee and heard a pop (PX1). The Petitioner underwent X-ray examination which showed no dislocation or fracture but did reveal small right knee joint effusion (PX1). The Petitioner was to continue ibuprofen and ice as needed and follow up with his primary-care physician, Dr. Joseph Molnar (PX1).

The Petitioner saw Dr. Molnar on December 27, 2022 reporting he twisted his right knee at work while "tossing keys" (PX1). He reported his foot got caught on the carpet and head an audible pop in his right knee (PX1 and 4). Dr. Molnar performed a physical examination of the right knee and recommended MRI evaluation (PX1 and 4).

The Petitioner was then seen by Dr. Kevin McCarthy on February 22, 2023 with a consistent history of injury (PX2). Dr. McCarthy read the MRI which showed signal abnormality throughout the ACL but especially at the femoral insertion (PX2). There also appeared to be fibers extending all the way to the femur (PX2). Dr. McCarthy discussed both operative and non-operative treatments for Petitioner's injury, and ultimately referred the Petitioner for physical therapy at this time (PX2). The Petitioner is actively engaged in physical therapy at this time at Apex Physical Therapy in Chester, Illinois (PX3).

CONCLUSIONS OF LAW

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

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

The Arbitrator concludes the Petitioner suffered a work accident which arose out of and in the course of his employment by Respondent. For an injury to "arise out of" employment, the injury must have occurred from some risk connected with, or incidental to, the employment, in order to create a causal connection between the employment and accidental injury (*Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill.2d 52). If the injury occurs when the employee was performing acts he was instructed to perform by his employer, acts he had a common-law or statutory duty to perform, or acts he might reasonable be expected to perform incident to his assigned duties, then the injury arose out of his employment (*Id.*).

The Petitioner credibly testified he was "tossing keys" in the control room when he pivoted and twisted his right knee when his foot got caught up on some carpet. In order to perform this job duty, it was essential the Petitioner walked back and forth from the control room window to the board with badges and keys on the wall opposite the window. Petitioner's fellow employees cannot enter or leave the building until the Petitioner performs this job duty. Assuming *arguendo,* it was concluded the Petitioner was injured due to a neutral risk, the general public is not exposed to walking back and forth over and over again approximately 150 times in a fifteen minute span. The Petitioner testified he would "toss keys" at a fast pace to ensure his fellow employees entered the building and exited the building on time to ensure security was in place at this maximum-security mental health hospital. This type of activity is not a risk to which the general public is exposed.

The Arbitrator concludes the Petitioner was performing a risk incidental to his employment when he suffered a work injury.

The Respondent conceded on the record that, if the Arbitrator concluded the Petitioner sustained his burden regarding accident, causation and liability for benefits would follow. Accordingly, the Arbitrator concludes the Petitioner's current condition of ill-being is causally related to the work injury.

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

K. ☒ What temporary benefits are in dispute?

☐ TPD ☐ Maintenance ☒ TTD

The Respondent stated on the record they would be liable for TTD and medical benefits if the Arbitrator concluded the Petitioner sustained his burden regarding accident. Accordingly, the Respondent shall pay all reasonable and necessary medical bills as contained in Petitioner's Group Exhibit # 5 and make payments directly to the providers as stipulated on the record.

Furthermore, the Respondent shall pay Petitioner TTD benefits of $904.09 per week for a period of 14 6/7 weeks beginning on December 16, 2022 through March 29, 2023.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC014627
Case Name	Jesus Zumaya-Valdez v. J & M Building Maintenance Inc.
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0059
Number of Pages of Decision	22
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Christopher Bassmaji
Respondent Attorney	Lloyd McCumber

DATE FILED: 1/30/2024

/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

JESUS ZUMAYA-VALDEZ,

Petitioner,

vs. NO: 19 WC 14627

J & M BUILDING MAINTENANCE, 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, and temporary total disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 21, 2023 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 his employment with Respondent on March 18, 2019.

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

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

The bond requirement in Section 19(f)(2) is applicable only when "the Commission shall have entered an award for the payment of money." *820 ILCS 305/19(f)(2)*. 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.

January 30, 2024

/s/ *Marc Parker*

MP/wde

O: 1/24/24

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/s/ *Maria E. Portela*

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC014627
Case Name	Jesus Zumaya-Valdez v. J & M Building Maintenance Inc.
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	19
Decision Issued By	Charles Watts, Arbitrator

Petitioner Attorney	Christopher Bassmaji
Respondent Attorney	Lloyd McCumber

DATE FILED: 2/21/2023

THE INTEREST RATE FOR THE WEEK OF FEBRUARY 15, 2023 4.84%

/s/Charles Watts, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Jesus Zumaya-Valdez
Employee/Petitioner

v.

J & M Building Maintenance Inc.
Employer/Respondent

Case # **19 WC 14627**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Charles Watts**, Arbitrator of the Commission, in the city of **Chicago**, on **10/21/2022**. 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 _____

FINDINGS

On **03/18/2019**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

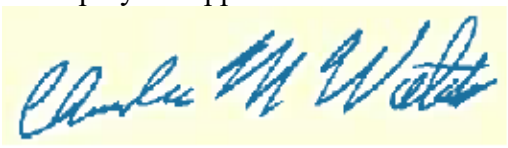
On this date, the Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

ORDER

Insert appropriate order text here. You may use and modify the appropriate text from the list of boilerplate paragraphs at http://www.iwcc.ilgov/arbordertext.doc

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

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



FEBRUARY 21, 2023

Signature of Arbitrator

CONCLUSIONS OF LAW

Petitioner, Jesus Zumaya Valdez, testified that he currently resides in Chicago, Illinois with his wife and children and that he is currently employed, working for certain people who help. (T.8). Petitioner testified that at the time of the alleged occurrence in question, he was married with three children under the age of 18. (T.10). Petitioner testified that in 2019, he became employed by the Respondent, which is a business that is involved in the installation of word flooring. Petitioner testified that he did a bit of everything for the Respondent Employer, but primarily was involved in sanding floors. Petitioner testified that in his employment for Respondent, he used various tools including wood cutters, compressors, guns to nail wood, and sanders. (T.12). Tools used would depend on the type of work being done at the given time, whether it was an installation job or whether there was sanding required.

Petitioner testified that for Respondent, he would ordinarily work from 8:00 or 8:30 a.m. until 5:00 p.m. He was paid by the hour and testified that his hourly pay was $20.00. (T.13). Petitioner testified that his checks usually were not less than $900.00 or $1,000.00, and also testified that he was paid in cash. (T.14).

Petitioner testified that although he cannot recall when he stopped working for Respondent, that it was one day before he was hospitalized and that he was working for the Respondent on March 18, 2019. (T.15). Petitioner testified that he was working in a house on which certain repairs were to be done to damaged wood and that they needed to use a nail gun on some new wood boards. (T.16). Petitioner testified that when doing so, one of the nail guns that he was using shot him in his leg. Petitioner pointed to his left knee indicating the location where the leg was injured. (T.16). Petitioner testified that there was damage to his pants and he was surprised. He did not

think he had a nail because he kept working and kept walking. Petitioner testified that he felt pain. Petitioner further testified that he continued working during the following two months. He controlled his pain with pills and ice. (T.17).

Petitioner testified that he notified his boss on the day after that there had been an accident with the gun. Petitioner testified that he continued to work and it never passed through his mind that he had a nail in his leg. Petitioner identified his boss and the individual to whom he provided notice as Michael Miskawitz, President of the Respondent company. (T.18).

Petitioner testified that his first medical treatment was at Cook County Hospital on May 8, 2019, on which date he received treatment in the form of surgery to remove a nail embedded in his left leg. Petitioner's sutures were removed and he was released from treatment at Cook County Hospital on May 29, 2019, which was his last date of treatment for the occurrence in question. (T.19). Petitioner testified that he delayed treatment for two months because he was able to continue working with the pain and that he eventually sought treatment because there had been a bump on the back of his leg that ruptured and he woke up with his leg completely wet. (T.20).

Petitioner testified that since March 18, 2019, he has had no new accidents or incidents involving the left leg and that prior to that date, he had no symptoms or treatment relative to the left leg or left knee. (T.20). Petitioner testified that presently, he has left knee pain when he exerts too much force and that he lacked endurance relative to his pre-accident condition. (T.21).

On cross examination, Petitioner agreed that he would have begun working for the Respondent on or about February 25, 2019 and that he continued working for Respondent until May 7, 2019. (T. 22). Before working for the Respondent, Petitioner had worked for an individual by the name of Damian Kot and that thanks to Damian, Petitioner had been referred to the

Respondent because Damian was no longer able to provide a sufficient amount of work to Petitioner. (T.23).

Petitioner testified that at no time prior to March 18, 2019 did he have any problems with his left knee, swelling, pain or otherwise. Petitioner further testified that he never made a statement of any kind to Damian Kot or to Respondent prior to March 18, 2019, regarding knee pain, knee symptoms or swelling. (T.23).

Petitioner testified that he had done the same type of work for Damian Kot as he did for the Respondent and that he has been employed in the hardwood flooring installation and repair business for approximately 20 years. (T.24). Over the course of those years, Petitioner testified that he has used many nailers and compressors as are used routinely in the hardwood flooring business. (T.24).

Petitioner denied having given a history on May 8, 2019 at Cook County Hospital to the effect that he was not certain as to when or how his injury had occurred. (T.24). Petitioner further testified that he does not speak English fluently but denied having had any problems communicating with either Damian Kot or Respondent. (T.24-25).

With regard to the history provides on presentment for initial treatment, Petitioner further denied that he had stated on May 8, 2019 in the hospital, that he had shot himself in the leg with a compressor nail gun three months earlier.

Petitioner testified that from the hospital, he made a call to the Respondent, Mr. Miskawitz, and told him that he could not go to work because he had an emergency. Petitioner further testified that a person who was attending him at the hospital communicated with Respondent on this phone call that he would not be able to work because there was a nail in his leg and that he was to be admitted.

Petitioner agreed that when he was working for Respondent, all tools and equipment that he used were provided by the Respondent. (T.30).

Petitioner was shown Respondent's Exhibit 3 and agreed that Respondent's Exhibit 3 is a copy of a text message that he sent to Respondent, Mr. Miskawitz at 4:40 p.m. on the date of the alleged occurrence, March 18, 2019. Petitioner agreed that the text includes pictures of the work in progress and a text statement to the effect of "I will see you tomorrow. I am here at like 8:30 anyway. I will call you when I'm here in the morning." (T.30-31).

Petitioner testified that the hallway area reflected in the photograph which is part of the text shows an area where there was damaged wood that needed to be replaced. Petitioner testified that it was in the process of replacing boards in this area when he injured himself with a nailer. (T. 31-32). Petitioner testified that the accident had occurred between 4:30pm and 5:00 pm.

Petitioner testified that the wood flooring was of a type that can be installed with staples or finish nails. Petitioner testified that he did not remember the measurement but believed that the nailer in question would use nails of about 2½ inches. (T.33). He did not know whether any of Respondent's nail guns could accommodate a 2½ inch nail and when asked whether it is common or appropriate in the industry to use a 2½ inch nail for the process he was describing, Petitioner testified that he simply worked with the tools that were provided for the jobs. Petitioner testified that he did not recall the brand name of the nail gun. When asked whether it was straight or angle nailer, Petitioner testified that he remembers clearly that it was an angled nailer. (T.34).

Petitioner agreed that the majority of the work that he did on behalf of Respondent could be characterized as sanding jobs and that sanding jobs represented the "majority of times" working for Respondent. The last job he had with Respondent was sanding a house, which he did not finish

prior to going to the hospital. (T.36). Petitioner testified that presently, he continues to be employed in the flooring installation business. (T.35).

On redirect, Petitioner denied having ever injured himself while in the employment of Damian Kot and again denied having ever told either Damian Kot or Respondent that he had any sort of knee pain or knee injury prior to March 18, 2019.

Respondent called Damian Kot. Damian Kot testified that he is a carpenter in the business of hardwood flooring. He has been in the business, self-employed in that capacity for 15 years. The name of his business of his business is DK Hardwood Flooring. (T.41-42). Mr. Kot testified that he his familiar with Petitioner and that Petitioner worked for him in the fall and winter of 2017. He further testified that when his work was slow, he suggested to Jesus that there was another flooring installer whom he would recommend and that this was Mike Miskawitz of the Respondent company. (T.42-43).

Damian Kot testified that while Petitioner was working for him, he complained about issues with his knee and he had offered such complaints even before he began work for Mr. Kot. (T.43). Mr. Kot further testified that Petitioner also complained about his issues with pain in his knee during the time that Petitioner was employed with him, and that Petitioner had showed him a swollen knee in the late fall or early winter of 2017. (T.43-44). Mr. Kot testified, however, that Petitioner never reported any specific accidents or injuries occurring while Petitioner was working for him. He did, however, complain of pain and problems with his knee. Mr. Kot recalls that when Petitioner showed him his knee, and he admitted that he did not recall specifically which knee it was, that he was shown a knee which was puffy and swollen. (T.44). On cross examination, Damian Kot testified that he had actually met Petitioner some time before he began working for Kot and that Petitioner was offering complaints relative to his knee at that time. Mr. Kot again

conceded that he was not able to testify at trial as to the question of which knee was specifically involved. (T.46). He recalled and testified, however, that the knee was swollen and "really puffy". (T.47).

Michael Miskawitz testified on behalf of Respondent. He testified that he is owner of J & M Building Maintenance d/b/a Elite Wood Floor Renewal. His business involves mostly wood floor refinishing, gym floor refinishing and that approximately 10% of the business is involved with installation. Miskawitz testified that he has been involved in this line of work for approximately 20 years and in business for himself for 12 years. (T.51-52).

Mr. Miskawitz testified that he met Petitioner in the winter of 2019. There was a job that he invited Petitioner to come to on referral through Damian Kot. Petitioner was present on that job for approximately one hour and then had to leave for some reason. The first job Petitioner worked for Mr. Miskawitz where he completed a full day of work was at a basketball court in North Aurora on or about February 25, 2019. This job involved removal of an old gym floor which was buckling, installation of new plywood and a new maple basketball court, sanding and painting the lines on the court. (T.52). Miskawitz testified that on this particular job, Petitioner would have been involved in the actual installation of flooring, using staple guns. These were tools which are placed on the flooring and struck with a hammer. When reaching the edges of the floor, at the very end, they used straight, not angled, straight 18-gage two inch nails shot with straight finish nail guns to secure the edge boards to the plywood. (T.53).

Mr. Miskawitz testified that the agreement with petitioner was that there would be a probationary period of approximately three months, during which Petitioner would be paid cash per the job. Several jobs were performed during this time frame, perhaps five or six, for which Petitioner was paid by the job. (T.54). Mr. Miskawitz identified Respondent's Exhibit 5 as a

document he prepared at the request of his insurer, sourced from his business records. (T.54). His time records were based on text messages which were provided to him by Petitioner at the end of each business day and that time and payment records were based on information relayed by Petitioner to Respondent. Referring back to those records, Mr. Miskawitz prepared Exhibit 5, which accurately reflects the payments made to Petitioner for each job. Mr. Miskawitz further testified that at no time did he ever pay Petitioner $1,000.00 in a given week. (T.55). Respondent's Exhibit 5 shows seven weeks of earnings, six of which document $300.00 per week and one at $200.00. It further documents the number of days worked during these weeks varying from 2-4 days per week. (RX5).

Mr. Miskawitz testified that the job Petitioner would have been working on March 18, 2019, was on Wrightwood Avenue. The nature of the job was refinishing. There was a small staircase in the front of the house, living room, hallway and master bedroom. Mr. Miskawitz testified that this job involved sanding an old finish, putting down stain samples, new stain and three coats of finish. According to Miskawitz, Petitioner was neither assigned nor directed to perform any sort of flooring installation or repair on that job. (T.56-57). Miskawitz testified that following the first job which involved the basketball floor, Petitioner, to his recollection, was not involved in any job involving installation or repair. Mr. Miskawitz further testified that there was no reason or purpose on the Wrightwood job on March 18, 2019, for Petitioner to be operating a nail gun or compressor for any reason. (T.57).

Mr. Miskawitz was present for Petitioner's testimony and heard Petitioner testify regarding his description of the nailer with which he shot himself. (T.58). This was described by Petitioner as an angle nailer and Miskawitz testified that he knows what this means and that it is a familiar term and description. (T.58). Mr. Miskawitz testified that angle nailers come in 15.5 or 16 gage

and are used for framing with 2x4s when houses are being framed out. Miskawitz further testified that there is no reason in the hardwood flooring industry, and it would not be consistent or appropriate given industry standards, to use an angle nailer for any reason whatsoever in the work of his company. Mr. Miskawitz further testified that not only was there no such nailer on the job in question, but that he has never owned one or held one for that matter. (T.58-59).

Mr. Miskawitz testified that he had become aware of the content of a medical record or pathology report that describes the nail that was removed from Petitioner's knee in the hospital. He testified that the significance of the pathology report pertained to the size of the nail. He had learned that the pathology report identifies a 6.2 cm nail and that he learned through discussion with the insurance representative that 6.2 cm equals 2½ inches. Mr. Miskawitz testified that he felt that was "a funny thing" given that all of his nail guns are straight nailers, 18-gage, none of which will even accept a 2½ inch nail. They all have stickers on them that say 2 inch max. He owns four DeWalts and two Porter Cables, all of which limit capacity at 2 inch maximum, 18-gage. A 2½ inch nailer would have to be a 16-gage. (T.59-60).

Mr. Miskawitz identified Respondent's Exhibit 1 as containing photographs of the job on which Petitioner was engaged on March 18, 2019. Mr. Miskawitz testified that it can be seen what kind of work was being done because of the pictures that have been sent to him by Petitioner. Petitioner sent him photographs of the stain samples that he had put down for the customer, consistent with sanding and putting down stain samples on that day. (T.61). Miskawitz testified that Petitioner and his co-worker were assigned and did in fact spend the day sanding and refinishing. (T.68).

Mr. Miskawitz identified Respondent's Exhibit 2 as an email communication from himself to his workers' compensation insurer dated June 16, 2019. The email shows Mr. Miskawitz

providing the photographs in question and advising Michele Suits back on June 16, 2019, that this was a sanding and finishing job and that there was no use of a nail gun. He identified the first photo "Mar 18" as a picture Petitioner had sent him of the stain samples he had put down for the customer. "He was sanding and putting down samples that day." He advised Ms. Suits that "You can see he sent the photo at 4:37 that day". The second photograph "Mar 18 end of day", regarding which Miskawitz said that Petitioner sent a couple of pictures, notifying him that he was leaving the customer's house, and that he would call when he got there the following morning. He further provided two pictures from March 20th, which he described to Ms. Suits as photographs showing that Petitioner continued working during the days following his claimed accident. The final photograph is described as a picture of the job Petitioner was working on May 7, his last day of work, provided to Ms. Suits as showing Petitioner continued to work with his alleged injury. This email further contains a statement by Mr. Miskawitz to Ms. Suits to the effect that 50 days had passed from the day of the claimed injury to his last day of work. (RX2).

Mr. Miskawitz testified that on the date of the occurrence in question, he received a text message that said "I am leaving now at 4:40. I will see you tomorrow. I am here like 8:30 anyways. I will call you when I am here in the morning." (T.62). Mr. Miskawitz testified that he visited the job the following morning and that Petitioner did not report any accident to him either on March 18, 2019 or when they were both present on the site on March 19, 2019. Mr. Miskawitz further testified that Petitioner reported no accident at any time prior to the phone call from the hospital stating that Petitioner was to have surgery. Miskawitz further testified that petitioner had complained to him of existing knee problems as early as the first day on the job. (T. 68-69).

Mr. Miskawitz testified that he prepared Respondent's Exhibit 4, a Form 45 First Report of Injury, after he was aware that a claim was being made and after he became aware of the

hospitalization. Miskawitz reviewed the Form 45 and testified that by his review, everything that he reported to the insurance company was consistent with his testimony at trial relative to the questions of whether he had any knowledge of an accident or any reporting of an accident prior to the hospitalization. (T.64). Mr. Miskawitz testified that he carries workers' compensation insurance and that if he were to be aware that one of his employees was injured on the job, he would be happy to take care of it through workers' compensation. Miskawitz further testified that if Petitioner had told him that he shot himself with a nail gun at work, he would have called his insurance company right away and that he would instruct his employee to go to a doctor, hospital or nearest emergency room. (T.65-66).

Petitioner was called as a rebuttal witness. He again denied having made statements relative to knee pain prior to the occurrence in question. Petitioner was asked about testimony from Respondent to the effect that Petitioner told Respondent that he had a problem with his knee and that sometime during the latter part of the week to bear with him because if he had pain, he would tend to slow down. Petitioner denied having ever said any such thing and went on to state that he would never have done this type of work if he had such a problem with his knee. (T.78).

Petitioner further asserted on direct examination rebuttal, that on March 18, 2019, he was using an air compressor nail gun that did carry a 2½ inch nail. (T.80). Petitioner agreed that although he had previously testified that he was not certain as to the size of nails accommodated by the guns in questions and he simply used the tools that was provided, that he now knows that he was using a gun with a 2½ inch nail at the time of the occurrence. (T.82-83). He then agreed that his testimony to the effect that he knew he was using a 2½ inch nail on the date of the occurrence is based on testimony that he heard at trial and on the content of the medical records that show it was a 2½ inch nail. (T.83).

The records of Cook County Health, John H. Stroger Hospital, were introduced as Petitioner's Exhibit 1 and Respondent's Exhibit 6. These records show Petitioner initially presenting on May 8, 2019 with a chief complaint of leg abscess for three days. According to the history, he reported working, placing wood flooring, and initially denied injury or trauma, but subsequently remembered that about three months before, he was shot by an air compressor gun, which he said did not have nails in it. He reported that his thigh was red and swollen for about one week, but then all seemed to have resolved. He reported recently noticing a small bump that had gotten bigger and had begun draining with redness, beginning three days prior to presentment at the emergency room. Evaluation in the emergency room recorded normal range of motion and normal strength. There was a left posterior popliteal blister that had mild drainage and surrounding swelling with tenderness to palpation and cellulitis of the thigh. (PX1).

Vascular evaluation was completed with x-rays of the left knee as well as CT angiogram, demonstrating a large linear foreign body within the posterior soft tissues at the level of the adductor hiatus. There was concern for traumatic vascular injury adjacent to the distal portion of the retained missile fragment. Petitioner was taken emergently to the operating room for popliteal artery exploration and repair if necessary. General surgery consultation was provided as well as orthopedic consultation on May 8, 2019. Surgery was performed on May 8, 2019 with a postoperative diagnosis of left popliteal fossa retained foreign body. Surgical specimens included posterior knee skin, subcutaneous tissue as well as a foreign body, which was a nail. There was no evidence of infection deep into the fascia or in the popliteal fossa. There was also no evidence of arterial injury. The pathology report regarding the specimen in question described a 6.2 cm in length gray-brown rusted metallic nail, which was consistent with the results of the pre-operative CT. (PX1). Follow up on May 29, 2019 noted signs of healing at the surgical site. There was

ulceration and some indication of infection. Sutures were removed. Hydrocodone and antibiotic prescriptions were issued and Petitioner was to return for follow up in two weeks. There is no record of any further treatment. (PX1, RX6).

CONCLUSIONS OF LAW

It is Petitioner's burden to prove each element of his case by a preponderance of the credible evidence. It is not the burden of Respondent to disprove any issue. Rather, the burden lies with Petitioner, his testimony, character and evidence entered into the record at the time of trial. *Rambert v. IWCC 133 Ill. App. 3d 895 (1985)*. In resolving questions of fact, it is the function of the Commission to assess the credibility of witnesses, resolve conflicts in the evidence, assign wait to be a corded to the evidence, and draw reasonable inferences from the evidence. *Hosteny v. IWCC, 397 Ill. App. 3d 665 (2009).*

Central to the determination of liability in this case is the fact that the medical records are clear, and from the testimony of the parties, it is clear that there is no dispute as to the question of whether the object removed from Petitioner's knee was a 6.2 cm nail, which would correspond with a 2½ inch nail under the English system of measurement. Petitioner testified on direct examination without any specific description of the nail gun in question, stating that "he was installing wood boards and the nail gun he was using shot in his leg". This testimony is without reference to the type, brand of nailer or size of nail used. Petitioner's description of the nailer was the one which was used when sealing the last borders, presumably intended to be "the last boards".

On cross examination, Petitioner testified that he did not know the measurement of the nail, but that it was "something like" 2½ inches, going on to testify that he had no knowledge of whether Respondent's nailer accommodated a 2½ inch nail.

When asked if he could comment on whether the use of a 2½ inch nail was common or appropriate for the process he was describing and in which he was engaged at the time of the accident, Petitioner responded that he simply worked with the tools that were provided. In the absence of such knowledge on Petitioner's part, the testimony of Michael Miskawitz as to the nature of such tools and their capacity to accommodate a nail of the size extracted from Petitioner's knee is effectively uncontradicted.

On rebuttal, Petitioner then specifically testified that he was using a nailer that carried a 2½ inch nail, after previously testifying that he did not know the measurement, nor did he know whether any of Respondent's nailers accommodated such a nail. On cross examination of Petitioner's rebuttal testimony to the effect that he was in fact using a gun with a 2½ inch nail, Petitioner agreed that this testimony was based on testimony he heard at trial and on the content of the medical records which show that it was a 2½ inch nail.

By his testimony, Petitioner had been engaged in labor in the wood flooring business for 20 years as of the date of arbitration, such that he would have been so engaged for many years prior to his involvement with Respondent, performing work which involves the use of compressors and nailers. While Petitioner asserted that he had no symptoms, problems or injuries involving his knees prior to March 18, 2019, this testimony was not only contradicted by Respondent, who testified that Petitioner told him he had knee problems as of the first day on the job, but also by a former employer. When asked about the testimony of Miskawitz and Kot, as it relates to the question of a pre-existing condition, Petitioner testified that if he had such knee problems, he

would not have been working in the flooring installation and maintenance trade. This statement would appear to be contradicted by the fact that Petitioner continues to work in the same trade as of the date of arbitration.

Petitioner testified with certainty that he recalled specifically that the nail gun he shot himself with was an angle type nailer. It is apparent from the medical that such an accident did most likely occur at some point in time. The question presented, however, is whether Petitioner has proven by a preponderance of credible evidence that he shot himself with an angle type nailer on March 18, 2019 while in the employee of the Respondent. On this point, the testimony of Mr. Miskawitz is uncontradicted on multiple points. First, the testimony of Miskawitz is uncontradicted as to the fact that he provided all tools. The testimony of Miskawitz is further uncontradicted as to the fact that he neither owned nor provided a nailer capable of accommodating a nail greater than 2 inches in length. The testimony of Miskawitz is uncontradicted as to the fact that angle nailers equipped with 2½ inch nails are for framing carpentry. The testimony of Miskawitz is uncontradicted as to the fact that the business of Respondent and the work in which Petitioner was engaged on March 18, 2019 bear no relationship to framing carpentry. The testimony of Miskawitz is uncontradicted as to the fact that he did not own, nor had he ever owned or even held an angle nailer which could accommodate a 2½ inch nail. Finally, the testimony of Miskawitz is uncontradicted as to the fact that he did not provide for the use of Petitioner an angle nailer of any kind, and specifically one which could accommodate a 2½ inch nail.

It is also difficult to reconcile the timeline created by Petitioner's testimony with the text messages introduced by Respondent, which Petitioner agreed were authentic. By Petitioner's testimony, the accident happened between 4:30 and 5:00 p.m. At 4:37 p.m., Petitioner was texting pictures of

the work completed on that day, receiving thanks and approval from the Respondent. At 4:40 p.m., Petitioner reported to Respondent that he was leaving the job for the day. Petitioner's testimony in conjunction with the documentary evidence create a seven minute window during which time the accident is to have occurred, followed immediately by text messages which were clearly of a routine nature and which would seem to be inconsistent with Petitioner having, immediately prior to this exchange, shot himself in the knee with a 2½ inch nail, driven by a nail gun and powered by an air compressor.

For all of the reasons set forth herein, the Arbitrator finds that Petitioner has failed to prove by a preponderance of the evidence that he sustained accidental injury while in the course and scope of his employment by Respondent as alleged. Having found in Respondent's favor on the issue of accident, there is no cause to address any remaining disputed issues. Compensation denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC002053
Case Name	Keith Yarmer v. City of Chicago, Department of Water Management
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0060
Number of Pages of Decision	32
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Kevin Veugeler
Respondent Attorney	Michael Manseau

DATE FILED: 1/31/2024

/s/Deborah Simpson, Commissioner

Signature

24IWCC0060

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 benefits maintenance nature and extent	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KEITH YARMER,

Petitioner,

vs. NO: 17 WC 2053

CITY OF CHICAGO,

Respondent.

DECISION AND OPINION ON REVIEW

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

I. Findings of Fact

A prior §19(b) Decision was issued in this matter on June 28, 2019, in which the Commission found that Petitioner, a journeyman plumber, had sustained an accident arising out of and in the course of his employment on March 25, 2016 and that the current condition of his right shoulder was causally related to said accident. The Commission awarded temporary total disability benefits from April 8, 2016 through April 10, 2018. The Circuit Court affirmed the Commission Decision on January 7, 2021 with no subsequent appeals made by either party.

Following the prior §19(b) arbitration hearing, which occurred on April 10, 2018, Petitioner presented to Dr. Gregory Nicholson of Midwest Orthopaedics at Rush on September 4, 2018 with complaints of ongoing right shoulder pain despite having undergone a right shoulder total arthroplasty a year prior on September 14, 2017. Dr. Nicholson recommended home strengthening exercises and filled out FMLA paperwork keeping Petitioner off work. When Petitioner returned on March 5, 2019, Dr. Nicholson suspected that he might have subscapularis insufficiency. Dr. Nicholson indicated that Petitioner was unable to return to work and lift, push, or pull with his right upper extremity. Upon Dr. Nicholson's further orders, a right shoulder CT arthrogram was obtained on May 30, 2019 and revealed: 1) a humeral prosthesis in good position;

2) an intact glenohumeral joint and a glenoid labrum that demonstrated articulating irregularity likely osteoarthritic in nature; 3) a joint capsule that appeared distended with probable chronic synovitis and some small loose bodies; and 4) no evidence of a full-thickness rotator cuff tear.

Petitioner next presented for a telemedicine visit with Dr. Nicholson on October 6, 2020, at which point Dr. Nicholson recommended a reverse total shoulder surgery in response to Petitioner's ongoing subluxation issues. Shortly thereafter, on October 29, 2020, Dr. Nicholson provided a "To Whom It May Concern" letter stating that Petitioner should remain off work until further notice. On January 4, 2022, Dr. Nicholson found that Petitioner had subscapularis insufficiency and dynamic instability that had gradually progressed over time. He continued to recommend a revision surgery, which Petitioner ultimately declined. In a corresponding work status note, Dr. Nicholson stated that Petitioner would not be able to return to work as a plumber as a result of his disability. Dr. Nicholson classified Petitioner's restrictions as permanent and instructed Petitioner to return to his office as needed. Also at this visit, Petitioner filled out a form indicating that he was not fully vaccinated for Covid-19.

Thereafter, on January 21, 2022, the parties deposed Dr. Guido Marra, a board certified orthopedic surgeon who had performed two §12 examinations of Petitioner at Respondent's request on June 13, 2019 and April 29, 2021. Following his first §12 examination, Dr. Marra determined that Petitioner's right shoulder condition was causally related to his work accident and recommended a CT arthrogram. Dr. Marra further opined that Petitioner required five-pound lifting restrictions and had not yet achieved MMI. Shortly after his §12 examination, Dr. Marra was provided with imaging from the CT arthrogram that was obtained on June 21, 2019 and asked to prepare an addendum report. Dr. Marra's impression based on the CT arthrogram was that Petitioner had a rupture of the subscapularis tendon. Dr. Marra recommended surgery to repair the tendon, and if not repairable, a reverse shoulder replacement. His work restrictions for Petitioner at the time of the addendum included a five-pound weight limit with nothing overhead.

When Dr. Marra performed his second §12 examination on April 29, 2021, he again opined that Petitioner's right shoulder condition was causally related to the work accident and maintained his same treatment recommendations. However, at this time, he increased Petitioner's lifting restrictions to 15 pounds with no overhead work. Dr. Marra testified that these restrictions were now permanent and that Petitioner had reached MMI as of September 2018. Nevertheless, he suggested that a five-pound lifting restriction would still be reasonable, as Petitioner was capable of lifting between five and 15 pounds.

Dr. Marra further opined that whether Petitioner pursued surgery or not, he was not going to be able to return to work as a plumber. He explained that Petitioner would be compromised if he had to defend himself against being accosted and attacked, since he had a deficit with internal rotation and less strength secondary to his shoulder replacement. Dr. Marra believed that Petitioner would probably not be able to defend himself against someone bigger. Nevertheless, he indicated that Petitioner did not possess any significant risk of reinjuring his shoulder if he was just sitting at a desk and watching a monitor screen for the majority of his workday.

Regarding his background, after obtaining his GED, Petitioner joined the plumbers union and participated in a four-year apprentice program, beginning around 1976. Petitioner had a

plumber's card from the United Association, Local 130 that showed an initiation date of March 11, 1980. After becoming a journeyman plumber, Petitioner was employed by Solar Plumbing & Heating performing welding apprentice work, Promax Systems working on pumping stations, and Schiller Mechanical completing work for the Westin Hotel. Petitioner then worked for Cecchin Plumbing & Heating for 11 years rehabbing and putting on additions for a hospital. After this, Petitioner began working for Respondent on October 2, 1995. His job duties for Respondent involved all heavy construction work, including repairing leaks and laying water mains. Since 1980, Petitioner has been a member of the Local 130 Union and has held no other jobs outside of being a plumber. He testified that the payrate for plumbers with Respondent was $52.80 per hour.

In August of 2021, Petitioner received a letter from Ashley Pak, an associate human resources business partner for Respondent's Department of Water Management, asking him to apply for a job in the watchman position, which performed security and monitoring duties for Respondent's Water Department facilities. Ms. Pak was involved with placing injured tradesmen, such as Petitioner, into the watchman positions, since Respondent favored hiring employees who were on MMI duty disability status. Ms. Pak sent Petitioner, along with 30 to 35 other individuals on the MMI list, a letter dated August 12, 2021, stating that the watchman position was available. This letter, which was identified as Rx 8, enclosed a Willingness and Ability Questionnaire for Petitioner to fill out (Rx 12), a job description for the watchman position (Rx 5), and the bid announcement for the watchman position dated March 1, 2021 (Rx 7). Both Ms. Pak and Petitioner confirmed that Rx 7's bid announcement stated that the applications for this position would be accepted until 11:59 p.m. on March 31, 2021 with no exceptions and that only employees of Respondent who were members of the Local 1092 Union, Bargaining Unit No. 53 were eligible to bid. Petitioner testified he had been asked to apply for this position several months after the March 31, 2021 deadline and he had never been a member of the Local 1092 Union. As such, Petitioner did not believe that he was qualified to bid on the watchman position.

On August 24, 2021, Petitioner's counsel wrote to Respondent indicating that Petitioner had received the communication from Ms. Pak regarding the potential job opportunity. Petitioner's counsel asked for confirmation that Ms. Pak was a licensed vocational counselor and that Respondent would be initiating vocational retraining. That same day, Lucy Huang, Assistant Corporation Counsel for Respondent, responded by e-mail to Petitioner's counsel clarifying that Ms. Pak was not a vocational rehabilitation counselor. Ms. Huang explained that Ms. Pak worked for the Department of Water Management and had contacted Petitioner regarding a watchman job position, for which Ms. Huang attached a job description. Subsequently, on September 2, 2021, Petitioner's counsel e-mailed Ms. Huang again requesting that vocational rehabilitation services be initiated.

Ms. Pak then sent Petitioner another letter dated September 21, 2021, stating that if Petitioner did not accept Respondent's job offer for the watchman position, his workers' compensation benefits may be terminated. This second letter, which was identified as Rx 9, enclosed another Willingness and Ability Questionnaire and a job description for the watchman position. In response, Petitioner answered the Willingness and Ability Questionnaire indicating that he was not able to fulfill the job requirements, and Petitioner's attorney signed and sent the questionnaire back to Respondent. Petitioner testified that he completed the questionnaire based upon what he believed he was physically able to do. Petitioner testified that considering the job

duties outlined for the watchman position, he could not protect the Department of Water facilities from unauthorized entry, vandalism, or unauthorized visitors given the condition of his shoulder. He also did not believe that his shoulder would allow him to protect the facilities from fire or other security and safety threats. Petitioner testified that his workers' compensation benefits were terminated in September 2021, after his completed Willingness and Ability Questionnaire had been submitted to Respondent. A letter dated November 2, 2021, from Jacqueline Toledo, Deputy Commissioner of the Department of Water Management, documented that Petitioner's indemnity benefits had actually been suspended effective October 6, 2021.

Ms. Pak testified that Respondent was accommodating of restrictions when hiring individuals off the MMI list; however, she did not know if Petitioner was capable of performing the job duties listed in the watchman's job description or the Willingness and Ability Questionnaire. Ms. Pak conceded that she herself did not know about Petitioner's medical condition or injury, nor if he was medically qualified to apply for the watchman position. She did not review any medical records from Dr. Nicholson and did not know if Petitioner was still treating with Dr. Nicholson. Instead, Ms. Pak testified that the Department of Finance, Workers' Compensation Division had made the determination that Petitioner was qualified to apply for the watchman position and she received the list of candidates from a return-to-work project coordinator from the Department of Finance named Anna Deringer. Ms. Pak did not know what Ms. Deringer's background entailed, and Ms. Deringer was not called to testify at the hearing.

Ms. Pak also identified Px 12 as Respondent's current employee vaccination policy, which said that all employees had to be fully vaccinated as a condition of employment. Ms. Pak did not inquire into Petitioner's vaccination status. She conceded that pursuant to Respondent's current policy, Petitioner would not be eligible for employment if he chose not to get vaccinated. However, Ms. Pak was not sure whether the vaccination policy was in effect when she had contacted Petitioner in August and September of 2021.

In order to contemplate his vocational prospects, Petitioner was evaluated by two certified vocational rehabilitation counselors, Lisa Byrne and Julie Bose. Ms. Byrne's testimony at the hearing was consistent with her vocational report dated January 24, 2022, which was admitted into evidence as Px 3. Ms. Byrne considered Petitioner's five-pound restriction implemented by Dr. Marra to be limiting, because it fell below sedentary restrictions as well as the requirements of Petitioner's prior job as a plumber. She also viewed Petitioner's singular work history of plumbing as a potential liability that could negatively impact his vocational outcome, since he had only worked with specific materials in one field. Ms. Byrne further identified Petitioner's lack of computer skills as a limitation, especially in combination with the five-pound restriction, because a lot of sedentary jobs were in office settings that involved computers. She testified that Petitioner's age made him eligible for retirement in two months, but it would take much longer than two months of training to get him to reach any kind of competitive level computer skills, if he could even get there.

In addition to missing the application deadline and not being in the correct bargaining unit, Ms. Byrne opined that the watchman position was not appropriate for Petitioner for the following reasons: Petitioner had no security experience or knowledge; Petitioner had very limited computer experience; the watchman position required continuous walking that would bump the position up

from sedentary to light duty; the watchman position involved multiple shift changes and Petitioner had always worked on the first shift as a plumber; Petitioner was concerned about driving and the watchman position required driving to multiple locations within five to 26 miles from Petitioner's home; Petitioner's medication and lack of sleep could result in drowsiness and sleeplessness; Petitioner's five-pound lifting restriction would need to be accommodated; and Petitioner did not have any training in standard office equipment. Ms. Byrne further opined that, from a physical standpoint, Petitioner could not perform some of the tasks outlined in the bid information for the watchman position, including protecting the premises from unauthorized entry, vandalism, fire, and other potential security and safety threats.

With the results of her transferrable skills analysis and Dr. Marra's weight restriction in mind, Ms. Byrne found that Petitioner did not possess transferrable skills and was not employable. She based her opinion on Petitioner's singular work history that limited him to only having experience in the plumbing field as well as his lack of computer skills. As such, Ms. Byrne opined that Petitioner was permanently and totally disabled.

Ms. Bose was also asked, upon Respondent's referral, to perform a vocational rehabilitation assessment of Petitioner. Ms. Bose testified at the hearing consistent with her vocational report dated January 17, 2022, which was admitted as Rx 13. Ms. Bose opined that Petitioner could not return to his work as a plumber for Respondent, because his functional capabilities fell below the heavy physical demand level of the position. Nevertheless, she believed that Petitioner had transferrable skills, including a knowledge of plumbing and the construction trade, that would allow him to work in such positions as a plumbing supply clerk, a subcontracting clerk in a home improvement center, or a building supply clerk.

Based on the transferrable skills, Ms. Bose performed two labor market surveys, the first of which was completed in January 2022 and targeted the positions of plumbing supply clerk, order clerk, building supply sales/clerk, and subcontracting clerk in home improvement centers within a 30-mile radius of Petitioner's home. For this survey, Ms. Bose used the restrictions set forth by Dr. Marra, which she identified as no lifting over 15 pounds and no overhead reaching with the right upper extremity. Ms. Bose testified that of the 16 potential employers that answered her labor market survey, 15 said that they would consider someone with Petitioner's work history, restrictions, and background. Of those 15 employers, eight were hiring. Ms. Bose testified that the wage range for these potential employers was $15.00 to $23.00 an hour with $18.93 being the mean entry level wage. Following her first labor market survey, Ms. Bose concluded that a stable labor market existed for Petitioner. As such, she opined that although Petitioner had lost access to his usual and customary occupation as a plumber, he could return to work in a lighter duty position within the parameters of his restrictions. To do so, Ms. Bose believed that vocational rehabilitation services would be beneficial for Petitioner and prepared an IWCC rehabilitation plan for him.

After the initial labor market survey, Ms. Bose reviewed Ms. Byrne's vocational report and completed a second updated labor market survey using the restrictions used by Ms. Byrne, which were no lifting more than five pounds and no overhead reaching with the right upper extremity. Ms. Bose's second labor market survey report, which was dated March 17, 2022, was confined to the same geographic region and targeted the same types of jobs as her first labor market survey. In addition to using the five-pound lifting restriction, this labor market survey was different from

the first in that it added questions as to whether the job involved computer use and whether the employer would provide computer training for the job. Ms. Bose had 16 prospective employers respond to this second labor market survey, of which 15 said that they would consider someone with Petitioner's age, work history, five-pound restrictions, and lack of computer skills. Of the 15 potential employers, 12 were hiring. Ms. Bose testified that the overall wage range for these employers was $15.00 to $23.00 per hour with a mean hourly wage of $18.80, which was $0.13 less than the first labor market survey. Therefore, Ms. Bose determined that the lower five-pound restriction and Petitioner's lack of computer skills did not ultimately impact his expected wages. After completing the updated labor market survey, Ms. Bose again concluded that a stable labor market existed when considering Petitioner's age, work history, education, training, lack of computer skills, and more stringent five-pound restriction.

Ms. Bose disagreed with several of Ms. Byrne's opinions, including the notion that Petitioner was permanently and totally disabled. Instead, Ms. Bose did not interpret Petitioner's age, education level, lack of computer skills, or singular work history as deterrents to his employability. Moreover, Ms. Bose found that Petitioner possessed transferrable skills within the parameters of his work restrictions and that he was ultimately an appropriate candidate for the watchman position. Ms. Bose was familiar with the watchman position from reviewing job descriptions, conducting her own job analysis on March 30, 2021, and previously placing injured workers into that position. She took issue with the watchman job duties detailed in Rx 7's bid announcement from March 2021, stating that the job description was old and inconsistent with her own job analysis. Ms. Bose testified that Petitioner had the physical capabilities to protect the premises as stated in Rx 7, because protection as a watchman meant simply calling a supervisor or the police once unauthorized activity was detected and not engaging in any physical altercations. She testified that based on her experience placing workers in the position, the watchman job was a monitoring position and not an armed security position. After completing her own job analysis and receiving input from Respondent's Assistant Commissioner of Security, Ms. Bose determined that the watchman job fell within the sedentary physical demand level. Although she felt Petitioner was physically able to be a watchman, Ms. Bose acknowledged that all of Respondent's employees had to be fully vaccinated from Covid-19 as a condition of employment and conceded that Petitioner might not be eligible for the watchman position given his vaccination status.

Ms. Bose further testified that whether vocational testing was necessary depended on the background of the person being evaluated, including their age and education level. Ms. Bose testified that she did not perform any vocational testing on Petitioner, because she was not recommending retraining and Petitioner was a 66-year-old with a skilled work background and transferrable skills. Instead, Ms. Bose reviewed the vocational testing that was performed by Ms. Byrne on January 6, 2022. Noting Ms. Bose's absence of vocational testing, Ms. Byrne explained that vocational testing provided additional information beyond the work history alone and gave insight into whether or not a job would be appropriate. Ms. Byrne testified that it depended on the situation whether such vocational testing was necessary, but in this case, where Petitioner had been a plumber for his whole life and now had a limitation that would only offer him sedentary jobs, it was necessary to see if Petitioner had clerical/sedentary options.

At the time of the hearing, Petitioner testified that he continued to have right shoulder pain and stiffness, as well as difficulty sleeping. He testified that whenever he moved his right shoulder

beyond a certain point upward or backward, it would pop out of the socket. Any movement past shoulder-level was very difficult for him. For his pain, Petitioner took tramadol and Motrin. Petitioner further indicated that he was the primary caregiver for his wife who has had multiple sclerosis and used a wheelchair. Petitioner lived alone with his wife and took care of both his wife and their household, although he received some help from his children. Petitioner testified that his decision to not proceed with the recommended reverse total shoulder replacement surgery was not influenced by his wife's condition, because if he wanted to pursue the surgery, he had other people, including his five children, who could take care of his wife as he healed.

Two investigators, David Aguilar and Joshua Nowak, conducted surveillance of Petitioner on behalf of Respondent. Mr. Aguilar, who was a field investigator for Allied Universal Investigations, testified that during his surveillance of Petitioner that was performed on April 28, 2021 and April 29, 2021, he did not observe Petitioner working for any employer or performing any plumbing or overhead work. Mr. Nowak, who was also employed by Allied Universal Investigations, performed further surveillance of Petitioner on January 22, 2022, January 23, 2022, and January 28, 2022. Mr. Nowak testified that he never observed Petitioner working any job, including as a plumber, or lifting anything over five pounds.

II. Conclusions of Law

Following a careful review of the entire record, the Commission vacates the award of §8(d)1 wage differential benefits and finds that Petitioner has instead established permanent and total disability based upon the persuasive testimony of Ms. Byrne.

Both Dr. Nicholson, Petitioner's treating doctor, and Dr. Marra, Respondent's §12 examiner, agreed that Petitioner's right shoulder condition prevented him from returning to his pre-accident job as a journeyman plumber. Petitioner was first given the permanent restrictions of no plumbing work by Dr. Nicholson on January 4, 2022. The Commission finds that Petitioner was at MMI with those permanent restrictions as of January 4, 2022, as Petitioner declined to pursue further right shoulder surgery and Dr. Nicholson released him to return as needed.

With those permanent restrictions in mind, the Commission finds that Ms. Byrne's vocational opinions were more credible than those of Ms. Bose, especially as it pertains to the offered watchman position. Ms. Byrne opined that Petitioner was permanently and totally disabled, was not qualified for the watchman position, and lacked transferable skills. Contrary to Ms. Bose's opinion that Petitioner was an appropriate candidate for the watchman position, the evidence fails to establish that Petitioner would have even been eligible for the position.

In the August 12, 2021 letter that Ms. Pak wrote to Petitioner requesting that he apply for the watchman position, she enclosed a copy of Rx 7's job bid announcement from March 2021. On its face, the job bid announcement immediately disqualifies Petitioner from applying for the watchman position, because it states that only members of Local Union 1092, Bargaining Unit No. 53 can bid on the position and that all applications for the position close at 11:59 p.m. on March 31, 2021 with no exceptions. As Ms. Byrne recognized, this would make Petitioner ineligible for the watchman position, because he was never a member of Local Union 1092 and did not receive notice to apply for the position until several months after it had already closed. Ms. Bose's opinion

that Petitioner nevertheless remained eligible for the watchman position contradicts the deadline and requirements specified on the job bid itself.

As for whether Petitioner would be physically capable of performing the watchman job duties, Ms. Bose freely admitted that her analysis of the watchman job was inconsistent with Respondent's description of the watchman job duties provided in the job bid, which was sent to Petitioner by Respondent to describe the job. No other evidence was presented to corroborate Ms. Bose's claim that her job analysis, which claimed the position was a sedentary monitoring position only, was a more accurate picture of the watchman job than the description provided by Respondent itself. With Respondent's own description in mind, both Petitioner and Ms. Byrne doubted whether Petitioner possessed the requisite physical capabilities. Petitioner testified that he did not believe he could protect the facilities from unauthorized entry, vandalism, or unauthorized visitors given the condition of his shoulder. Likewise, Ms. Byrne opined that Petitioner could not physically perform some tasks outlined in the bid information for the job, including protecting the premises from unauthorized entry, vandalism, fire, and other security threats. Although Ms. Pak testified that Respondent was accommodating when trying to place injured candidates in the watchman role, she acknowledged that the job had certain physical requirements that she did not personally know whether Petitioner was capable of performing.

Respondent's vaccination policy presents yet another question as to Petitioner's eligibility for the watchman position. Ms. Pak testified that Respondent's vaccination policy required all current and new employees to be fully vaccinated as a condition of their employment. However, per Dr. Nicholson's records, Petitioner had not been fully vaccinated against Covid-19. Given Respondent's policy, even Ms. Bose conceded that it could be true that Petitioner was not actually eligible for the watchman position based on his vaccination status.

Based on the above, the Commission finds that, consistent with Ms. Byrne's opinion, the watchman position was not a viable employment option for Petitioner. Ms. Bose's opinion is further weakened by her failure to perform her own vocational testing of Petitioner, which would be helpful in evaluating how Petitioner's capabilities and background align or fail to align with any potential jobs.

An employee is permanently and totally disabled when he cannot perform any services except those for which no reasonably stable labor market exists. *E.R. Moore Co. v. Industrial Comm'n*, 71 Ill.2d 353, 361-362 (1978). An employee need not be reduced to a state of total physical or mental incapacity or helplessness before total and permanent disability can be awarded, and the ability to earn occasional wages or perform certain useful services does not preclude a finding of total disability. *Id.* at 360-361. However, when the services which the employee can reasonably provide are so limited in quality, dependability, and quantity that no reasonably stable market exists for them, then the employee is permanently totally disabled. *Niles Police Department v. Industrial Comm'n*., 83 Ill.2d 528, 534 (1981).

Based on the more persuasive opinion of Ms. Byrne, the Commission finds that Petitioner has proven by a preponderance of credible evidence that he is permanently and totally disabled pursuant to §8(f) of the Illinois Workers' Compensation Act. The Commission thus vacates the §8(d)1 wage differential award and awards permanent total disability benefits in the sum of

$1,255.32 per week for life, commencing June 17, 2022, as provided in §8(f) of the Act. The commencement date of June 17, 2022 was established based on the last hearing date of June 16, 2022 in this bifurcated matter, which proceeded to hearing over the course of three days on March 24, 2022, April 29, 2022, and June 16, 2022.

The Commission further modifies the award of temporary total disability benefits and maintenance benefits as follows. As discussed previously, the Commission finds that Petitioner reached MMI with permanent restrictions for his right shoulder injury on January 4, 2022, as consistent with Dr. Nicholson's treatment notes. The Commission modifies the award of temporary total disability benefits to reflect this MMI date and awards temporary total disability benefits of $1,255.32 per week for 194 6/7 weeks, commencing April 11, 2018 through January 4, 2022, as provided by §8(b) of the Act. In support of this award, the Commission notes that the prior §19(b) Decision issued in this matter awarded temporary total disability benefits from April 8, 2016 through April 10, 2018, the date of the prior hearing. Following that §19(b) hearing, Petitioner remained on off-work restrictions from Dr. Nicholson through January 4, 2022, at which time Dr. Nicholson indicated that Petitioner was permanently restricted from returning to work as a plumber. The Commission finds Petitioner is entitled to maintenance benefits from January 5, 2022, the date after which Petitioner was placed at MMI with permanent restrictions, through June 16, 2022, the last hearing date before the commencement of the permanent and total disability benefits. The Commission thus awards maintenance benefits of $1,255.32 per week for 23 1/7 weeks, commencing January 5, 2022 through June 16, 2022, as provided in §8(a) of the Act.

Lastly, the Commission notes that the Decision of the Arbitrator incorrectly lists Petitioner's accident date as December 27, 2007, in its Findings section on page two. The Commission corrects this typographical error to reflect the correct accident date of March 25, 2016.

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 January 19, 2023 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 the Arbitrator's award of §8(d)1 wage differential benefits is hereby vacated.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner the sum of $1,255.32 per week for life, commencing June 17, 2022, as provided in §8(f) of the Act, because the injuries caused the permanent and total disability of Petitioner. 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 §8(g) of the Act.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner temporary total disability benefits of $1,255.32 per week for 194 6/7 weeks, commencing April 11, 2018 through January 4, 2022, as provided by §8(b) of the Act.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner maintenance benefits of $1,255.32 per week for 23 weeks 1/7 weeks, commencing January 5, 2022 through June 16, 2022, as provided in §8(a) of the Act.

IT IS FURTHER ORDERED that the typographical error on page two of the Decision of the Arbitrator's Findings section that lists the accident date as December 27, 2007 is corrected to reflect the proper accident date of March 25, 2016.

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

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

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.

January 31, 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	17WC002053
Case Name	Keith Yarmer v. City of Chicago
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	21
Decision Issued By	Jeffrey Huebsch, Arbitrator

Petitioner Attorney	Kevin Veugeler
Respondent Attorney	Michael Manseau

DATE FILED: 1/19/2023

THE INTEREST RATE FOR THE WEEK OF JANUARY 18, 2023 4.68%

/s/ Jeffrey Huebsch, Arbitrator

Signature

K. Yarmer v. City of Chicago, 17 WC 002053

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

Keith Yarmer
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **17** WC **002053**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeffrey Huebsch**, Arbitrator of the Commission, in the city of **Chicago**, on **June 16, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **12/27/07**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $***97,915.45***; the average weekly wage was $***1,882.98***.

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

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

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

Respondent shall be given a credit of $**266,947.04** for TTD and other indemnity benefits paid after April 10, 2018, as is explained below.

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

ORDER

Respondent shall pay reasonable and necessary medical expenses of $1,653.50, pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act, and as is set forth below.

Respondent shall pay Petitioner temporary total disability benefits of $1,255.32/week for 211-2/7 weeks, commencing April 11, 2018 through April 28, 2022, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits, commencing April 29, 2022, of $906.67 per week for the duration of the disability, until the later of when Petitioner reaches age 67 or 5 years from the date this award becomes final, because the injuries sustained caused a loss of earnings, as provided in Section 8(d)1 of the Act.

Petitioner's claim for §19(k) and (l) penalties and §16 attorney's fees is denied.

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

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

JANUARY 19, 2023

Signature of Arbitrator

INTRODUCTION/PROCEDURAL BACKGROUND

This case was previously tried as a Section 19(b) proceeding on April 10, 2018. On June 28, 2019, the Commission affirmed the Arbitrator's finding that Petitioner had established that his right shoulder injury and resultant total right shoulder arthroplasty procedure on September 14, 2017 was causally connected to his March 25, 2016 accident in Case N0. 19 IWCC 00333. (Arb. Ex. 2). Prior to March 25, 2016, Petitioner did not have any problems with his right shoulder, nor had he ever received any medical treatment for right shoulder problems. (Arb. X 2). The Commission ordered Respondent to pay temporary total disability benefits from April 8, 2016 through the time of the §19(b) Hearing, April 10, 2018, as well as pay the sum of $79,527.78 for medical expenses. Finally, the Commission struck the award of a §8(j) credit. On January 7, 2021, the Circuit Court of Cook County confirmed the Commission's findings. (3/24/22 TR. P. 10). There was no further appeal and the Commission's Decision is final.

The present trial in this case took place on three days, March 24, 2022, April 29, 2022, and June 16, 2022. The testimony of Petitioner, Petitioner's vocational expert and an HR employee of Respondent testified on March 24, 2022. Respondent's vocational expert and 2 investigators retained by Respondent testified on April 29, 2022. Exhibits were tendered on April 29, 2022 and proofs were closed. Respondent's Motion to Reopen Proofs was granted on June 16, 2022 and RX 34 was admitted into evidence.

FINDINGS OF FACT

At the second trial of this case, Petitioner confirmed he underwent a total arthroplasty of his dominant right shoulder on September 14, 2017. (3/24/22 TR. P. 13, 20, 47). After the shoulder replacement surgery, Petitioner continued treating with an orthopedic surgeon, Dr. Gregory Nicholson. (3/24/22 TR. P. 13, PX1, PX1a). Petitioner had been referred to Dr. Nicholson for a second opinion by Respondent's NCM. (Arb. X 2).

Petitioner's date of birth is May 23, 1955. He was 66 when the second trial began and was 67 when proofs were closed. (PX 1).

On May 18, 2018, Dr. Nicholson provided Respondent an off work slip for Petitioner. (PX 1). On September 4, 2018, Petitioner returned to Dr Nicholson complaining of popping of the shoulder and pain while pushing down. Dr. Nicholson prescribed a home exercise program, instructed Petitioner to remain off work until March, 2019, and to return to the clinic. Petitioner returned as instructed on March 5, 2019 complaining of popping and clicking of the shoulder with weakness. (PX1). Dr. Nicholson prescribed an arthrogram CT to evaluate the shoulder implant and the subscapularis tendon. (PX 1). The CT arthrogram was done on May 30, 2019 and showed the prosthesis was in good position and findings consistent with osteoarthritis and degenerative changes. There was no rotator cuff tear appreciated. (PX 2).

On June 3, 2019, Dr. Nicholson provided Respondent with an off work slip for Petitioner. (PX 1, 3/24/22 TR. P. 140-141).

On June 13, 2019, after the Commission's Decision became final, Respondent sent Petitioner to a §12 examination with Dr. Guido Marra. (RX 4, 3/24/22 TR. P. 26, 47-48). Dr. Marra opined that the shoulder instability was related to the work accident, Petitioner could not return to work as a plumber, and placed a five lbs. lifting restriction. (RX4, 3/24/22 Tr. P. 26-27). Dr. Marra recommended a repeat CT arthrogram. (RX 4).

On June 21, 2019, a CT arthrogram revealed a full thickness tear of the rotator cuff, specifically, the supraspinatus tendon. (PX 1).

After reviewing the CT arthrogram, Dr. Marra issued an addendum report recommending a revision surgery to repair the rotator cuff or a conversion to a reverse total shoulder arthroplasty, along with a recommendation of no lifting greater than 5 lbs. (RX 4).

On October 6, 2020, at a telehealth visit due to the global pandemic, Dr. Nicholson noted the subluxation issues Petitioner was experiencing were worsening, and recommended a reverse total shoulder replacement. (PX 1, 3/24/22 TR. P. 13, 50-52). On October 29, 2020, Petitioner saw Dr. Nicholson, who authored a note instructing Petitioner to remain off work until further notice. (PX 6, RX 33, 3/24/22 TR. P. 17).

Petitioner's last visit with Dr. Nicholson was on January 4, 2022. (PX 1, RX 33, 3/24/22 TR. P. 17, 58). It was noted that Petitioner had weakness and dynamic instability of the right shoulder with a revision surgery recommended. (PX 1). A repeat CT arthrogram was prescribed. (PX 1). Petitioner was to remain off work until further notice. (RX 33, (3/24/22 TR. P. 137)

Ultimately, Petitioner declined to undergo the proposed reverse total shoulder arthroplasty on his right shoulder. (PX 1, 3/24/22 TR. P. 14, 57-58). Petitioner has not been released back to work by Dr. Nicholson and he has remained off work. (3/24/22 TR. P. 17, 19, 60).

Petitioner testified he continues to have pain and stiffness in the shoulder, with a popping out feeling. The shoulder pops out of the socket and he shakes it back into place. (3/24/22 TR. P. 14-15). Petitioner testified that he tries to do things when he can and that when he attempts to do so, he ends up paying for it for the next 2 weeks. (3/24/22 TR. P. 14, 73-74, 76, 114). Anything past the shoulder level is very difficult to do. (3/24/22 TR. P. 15). Petitioner currently takes the prescription Tramadol three times a day for pain, along with over the counter medications. (3/24/22 TR. P. 16, 118).

For over twenty years, Petitioner's wife has had MS. (3/24/22 TR. P. 66, 131). She is wheelchair bound. Petitioner uses a Hoyer lift to assist her. (3/24/22 TR. P. 67). Petitioner's five adult children help with household chores. (3/24/22 TR. P. 68-76, 134). Petitioner has problems driving long distances, and his brother drives him. (3/24/22 TR. P. 116-117, 169, RX 22).

Petitioner testified concerning his education and work background. Petitioner's highest level of education completed was 8th grade. (3/24/22 TR. P. 20). Petitioner subsequently obtained a GED. (3/24/22 TR. P. 20). Petitioner began his career with the Plumbers' Union Local 130 in 1976 as an apprentice. (3/24/22 TR. P. 21-23). Petitioner became a journeyman plumber on March 11, 1980. (3/24/22 TR. P. 22). After working for several plumbing contractors, Petitioner began working for Respondent as a plumber in October of 1995. (3/24/22 TR. P. 23-24). Throughout his career with Respondent, Petitioner has performed heavy construction repairing leaks and laying heavy water main. (3/24/22 TR. P. 24-25, 4/29/2022 Tr. P. 394). Since 1980, Petitioner has worked exclusively as a plumber with Plumbers Union Local 130. (3/24/22 TR. P. 25-26). Petitioner has never been a member of Laborers' Local 1092. (3/24/22 TR. P. 26).

On August 24, 2021, Petitioner's attorney requested that Respondent initiate vocational rehabilitation. (3/24/22 TR. P. 28, PX 7). On August 24, 2021, Petitioner received a response to his request for vocational rehabilitation in a letter from an attorney for the City of Chicago. (3/22/2022 TR. P. 29-31, PX 8). Petitioner was requested to apply for a position as a watchman that was posted on March 17, 2021. (3/22/2022 TR. P. 31, PX 8). The bid announcement indicated that only City employees that were members of Laborers' Local 1092 were eligible to bid for the position. All applications were to be submitted by March 31, 2021. (3/22/2022 TR. P. 33-34, PX 8). According to the document submitted by Respondent, Petitioner was not eligible to bid for the watchman position. (3/22/2022 TR. P. 34-35, PX 8). In addition, Petitioner was instructed to fill out a Willingness and Ability Questionnaire. (3/22/2022 TR. P. 34, RX 8).

Petitioner testified that he was not a member of Laborers' Local 1092, that he was not qualified to apply for the watchman position, and that the period for applying for the position had expired when he was requested to apply. (3/22/2022 TR. P. 34-37, PX 8). The job description submitted by Respondent indicated that the watchman job is to ensure that the premises are safe and secure from unauthorized entry, vandalism, and

security risks. (3/22/2022 TR. P. 38, PX 8). In addition, the duties of the watchman position require employees to patrol the interior and exterior facilities during working and non-working hours to protect the premises from unauthorized entry, vandalism, fire, and other potential security threats. (3/22/2022 TR. P. 39, PX 8). Petitioner filled out a Willingness and Ability form requested by the City of Chicago. (3/22/2022 TR. P. 40). Despite applying for a position that had been closed, and filling out a Willingness and Ability form, Petitioner's benefits were terminated effective October 6, 2021. (3/22/2022 TR. P. 40, RX 20). Petitioner testified that given his shoulder condition, he did not believe that he would be able to protect the Department of Water facilities from unauthorized entry, vandalism, or unauthorized visitors, nor would he be able to protect the Department of Water facilities from fire or other potential safety threats. (3/22/2022 TR. P. 41).

Petitioner's wife's medical condition has had no bearing on Petitioner's ability to return to work or have a revision/reverse TSA surgery. (3/24/22 TR. P. 133-134).

Petitioner testified that the current hourly pay rate for plumbers within the City of Chicago is $52.80 an hour. (3/22/2022 TR. P. 41). The current hourly pay rate for a watchman is $23.91. (PX 8)

Petitioner began vocational rehabilitation with Lisa Byrne of the Eval Center in December of 2021. (PX 3, 3/24/22 TR. P. 107-110).

Petitioner presented the testimony of Lisa Byrne, MA, CRC, CVE, LCPC, PVE, a nationally certified rehabilitation counselor and vocational evaluator. (PX 9, 3/22/2022 Tr. P. 151-152, 156-158). She is well-credentialed and has extensive vocational rehabilitation experience.

Ms. Byrne performed a vocational assessment of Petitioner beginning December 31, 2021 with a telephone interview. (PX 3). She then performed vocational testing, reviewed medical records, took an

education and employment history, did a transferable skills analysis, and reviewed the proposed offer to apply for a watchman position. (PX 3, 3/22/2022 Tr. P. 164-167, 175). As identified by Ms. Byrne, Petitioner's vocational challenges include the injury to his dominant right shoulder, post shoulder replacement with a recommendation for a revision, the 5 lbs. lifting restriction placed on Petitioner by Dr. Marra, which is below sedentary level (notwithstanding Dr. Nicholson's off work status) and his Tramodol prescription. (PX 3, 3/22/2022 Tr. P. 166-169). Other vocational challenges include: Petitioner did not obtain a high school diploma (albeit he did obtain a GED) and Petitioner did not have any familiarity with computers or typing. (PX 3, 3/22/2022 Tr. P. 170-176). Finally, Petitioner's age, vocational testing results, and lack of broad work experience contributed to his employment challenges. (PX 3, 3/22/2022 Tr. P. 174-183, 211-212).

Ms. Byrne testified that the watchman position Petitioner was invited to apply for was not appropriate from a vocational rehabilitation standpoint. (PX 3, 3/22/2022 Tr. P. 183-193). Petitioner is not qualified for the position, not eligible to apply for the position, nor is the position appropriate given Petitioner's vocational challenges. (PX 3, 3/22/2022 Tr. P. 183-193).

Ms. Byrne opined that there was not a stable labor market for Petitioner's transferable skills. (PX 3, 3/22/2022 Tr. P. 193-194). As a result, according to Byrne, Petitioner is permanently disabled. (PX 3, 3/22/2022 Tr. P. 194-195).

Ms. Byrne also reviewed the vocational efforts of Respondent's vocational expert, Julie Bose. (PX 3, 3/22/2022 Tr. P. 198). Ms. Bose did not perform vocational testing nor a transferable skills analysis on Petitioner. (PX 3, 3/22/2022 Tr. P. 199-201). As a result, her vocational assessment fails to accurately document Petitioner's vocational abilities. (PX 3, 3/22/2022 Tr. P. 201, 213-214).

Ashley Pak, an Associate Human Resources Business Partner at Respondent testified on behalf of Respondent. (3/22/2022 Tr. P. 250-251). Her job duties include hiring and job placement within the Department of Water. (3/22/2022 Tr. P. 251). Ms. Pak identified the job duties of a watchman position within the Water Department. (RX 5, 3/22/2022 Tr. P. 254). She testified that she sent a letter to 30-35 injured City workers inviting them to apply for a watchman position for which there were nine openings. (3/22/2022 Tr. P. 264, 283).

Ms. Pak acknowledged that even though she is tasked with placing injured City employees in alternate jobs, she does not have any vocational or medical training. (3/22/2022 Tr. P. 300-301). She does not have any certifications in rehabilitation or vocational placement. (3/22/2022 Tr. P. 301). In fact, her area of secondary school study was early education. (3/22/2022 Tr. P. 300). She did not know what injury Petitioner sustained, nor did she know his work status. (3/22/2022 Tr. P. 313). She conceded that she sent Petitioner a letter dated August 12, 2021 inviting him to apply for a watchman position, but the time for applying for that position expired March 31, 2001. (RX 8, 3/22/2022 Tr. P. 250-251). Furthermore, only City of Chicago employees that were members of Labors' Local Union 1092 were eligible to apply for that watchman position. (3/22/2022 Tr. P. 312).

Ms. Pak identified PX 11, the Collective Bargaining Agreement between Respondent and the Plumbers' Local Union 130. (PX 11, 3/22/2022 Tr. P. 326). The current rate of pay for a plumber employed by Respondent is $52.80/hr. (PX 11, 3/22/2022 Tr. P. 327). Ms. Pak also identified the City of Chicago Vaccination policy requiring all City employees to be fully vaccinated from Covid 19. (PX 12, 3/22/2022 Tr. P. 326-331). An unvaccinated worker is not eligible to apply for the watchman position. (3/22/2022 Tr. P. 334).

Julie Bose, MS, CRC, testified on behalf of Respondent. (4/29/2022 Tr. P. 360, 381). She is a vocational rehabilitation counselor. (4/29/2022 Tr. P. 360). She is well-credentialed and well-experienced in

vocational rehabilitation. She testified she was retained by Respondent's counsel on December 30, 2021, almost six years after Petitioner's injury. (4/29/2022 Tr. P. 379, 463-464). Ms. Bose conducted an interview of Petitioner on January 14, 2022. (4/29/2022 Tr. P. 380-381).

Ms. Bose confirmed that Petitioner did not own a home computer and had little familiarity with computers. (4/29/2022 Tr. P. 385). Ms. Bose testified that she had performed a job analysis for a watchman position at the Jardine Water Filtration Plant for the City of Chicago. (4/29/2022 Tr. P. 398-399). The job analysis was not done in connection with Petitioner or this case. (4/29/2022 Tr. P. 399). Ms. Bose confirmed that the duties outlined in her job analysis and Respondent's job description which was tendered to Petitioner for the watchman job were inconsistent. (4/29/2022 Tr. P. 401-402, 474-475, 479-483). In fact, the job duties set forth by Respondent that Petitioner was invited to apply for were more extensive that Ms. Bose's understanding of the position. (RX 7, 4/29/2022 Tr. P. 474-483).

Ms. Bose thought that the watchman job was an appropriate one for Petitioner. Petitioner also had transferable skills which could allow him to work as a plumbing supply clerk/sales associate and she thought that the median wage for such a position was $18.80 per hour. (4/29/2022 Tr. P. 454, 424, 442).

Ms. Bose agreed that Petitioner could not return to work as a plumber. (4/29/2022 Tr. P. 414). She also agreed that Petitioner would need vocational services prior to returning to light duty work, including computer training. (4/29/2022 Tr. P. 427, 430-431, 489-491). No computer training has been authorized by the Respondent. (4/29/2022 Tr. P. 491-492). There was no other evidence of Respondent offering Petitioner any vocational service to assist in obtaining job placement.

Ms. Bose confirmed that applications for the watchman positions closed March 31, 2021, some five months prior to Respondent's August 12, 2021 letter to Petitioner requesting that he bid for the position.. (RX

7, 4/29/2022 Tr. P. 471-472). She did not know if Petitioner was qualified to, and had the ability to, apply for a position with Local Union 1092. (4/29/2022 Tr. P. 485-486). She also did not know of Dr. Nicholson's off work restrictions for Petitioner. (4/29/2022 Tr. P. 490). Ms. Bose confirmed Petitioner's vaccination status would preclude him from working as a watchman for Respondent. (4/29/2022 Tr. P. 506-511).

Respondent presented the testimony of two surveillance investigators. David Aguilar testified he conducted surveillance of Petitioner for three days. (4/29/2022 Tr. P. 550). Mr. Aguilar observed Petitioner being driven by his brother to a doctor's appointment, walking around and pulling weeds (for an hour!). (4/29/2022 Tr. P. 564-565, 567). He never observed Petitioner working for an employer, performing plumbing work, or working overhead. (4/29/2022 Tr. P. 587-588). Joshua Nowak testified he conducted surveillance of Petitioner for six days. (4/29/2022 Tr. P. 598). Mr. Nowak observed Petitioner taking out the garbage, using a snowblower and knocking down icicles. (4/29/2022 Tr. P. 601-602). He never observed Petitioner working for an employer, performing plumbing work, or lifting anything over five lbs. (4/29/2022 Tr. P. 614-615).

The admitted video exhibits were RX 22, RX 24 A, RX 24 B, and RX 26.

RX 22 is taken on April 29, 2021 and shows Petitioner being driven to the doctor's office and walking in a forest preserve. He then pulls weeds for an hour. He bends at the waist and is able to pulls weeds with his right hand, using a weed puller or screwdriver with a long handle. He picks up sticks in his yard. He does use two hands on the weed puller, at one point pulling pretty hard backwards with his right arm. He does not exceed any restrictions and is not seen using his arm above the right shoulder plane.

RX 24 A shows Petitioner on January 22, 2022 carrying a garbage bag and throwing it in a trash can. His right arm is not seen to rise above shoulder plane.

RX 24 B shows Petitioner on January 23, 2022. He is seen to sweep snow, using his right hand to guide the broom and his left hand to pull the broom. He pulls the starter cord on a snowblower several times with his right arm (bent at the elbow, not rising above plane) and pushes a snowblower for more than ½ hour. He pushes snow off a garbage can and shovels snow. His right arm does not go beyond the right shoulder plane.

RX 26 is video taken on January 28, 2022. Petitioner is seen using a snowblower, again (starting it and pushing it). He shovels his stoop. He knocks icicles off gutters, with his left shoulder above plane and his right shoulder below plane. He throws salt down. Petitioner's right arm is not seen to rise above the shoulder plane.

Respondent presented the evidence deposition testimony of Dr. Guido Marra, a Board Certified orthopedic surgeon. (RX 4). Dr. Marra authored three reports regarding Petitioner. Dr. Marra agreed that all of Petitioner's medical treatment was reasonable and necessary to treat his work related condition, including the total shoulder replacement surgery. (RX 4, P. 28, 35-36). Dr. Marra noted that Petitioner has a ruptured subscapularis tendon, that was a complication of the original shoulder replacement, that eventually will need repair. (RX 4, P. 16, 32-33, 35, 54, 58-60). Dr. Marra testified that Petitioner's subjective complaints of pain were consistent with the objective findings. (RX 4, P. 38). Dr. Marra thought that Petitioner was truthful and honest and there were no issues of symptom magnification or exaggeration. (RX 4, P. 27, 38). Dr. Marra testified that a 5 lbs. lifting restriction would be appropriate, and that Petitioner could not return back to work as a plumber. (RX 4, P. 16, 44). Dr. Marra testified that given his injury, Petitioner's ability to defend himself if attacked would be compromised. (RX 4, P. 46). Dr. Marra was not provided a job description of the watchman position, nor was he asked by Respondent to comment on the appropriateness of that job for Petitioner. Dr. Marra also was not provided the surveillance videos, and was not asked to comment whether the activities depicted on the video suggest Petitioner's restrictions are not necessary. Perhaps a 15 pound lifting restriction with limited overhead work would be appropriate if Petitioner was not going to have the reverse TSA

procedure. These would be permanent restrictions. (RX 4, P. 36). Petitioner would have reached MMI in approximately September of 2018. (RX 4, P. 37).

Petitioner submitted the following vocational rehabilitation and medical expenses without objection:

PX 4 The Eval Center - $1,487.50
PX 5 Midwest Orthopaedics at Rush - $509.00

It is noted that Respondent indicated that PX 5 had been paid at the time of tender and on the Request For Hearing Form (RFH) and disputed reasonableness, necessity and causation as to PX 4 on the RFH. (Arb. X 1)

Respondent submitted copies of indemnity checks cashed by Petitioner as RX 29 and RX 34, as the Parties could not agree on the amount of indemnity benefits paid and Petitioner demanded strict proof regarding that issue.

CONCLUSIONS OF LAW

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

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

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

The Arbitrator observed Petitioner's demeanor during direct and cross examination and finds his testimony credible, as he did in the prior §19(b) hearing. (Arb. X 2)

(F) Is Petitioner's present condition of ill-being causally related to the injury?

Petitioner's present condition of ill-being, to wit: status post right shoulder replacement with a surgical recommendation, is causally connected to his work injury of March 25, 2016. As a result of his work injury, Petitioner is unable to return back to work as a plumber. Both Dr. Nicholson and Dr. Marra note severe limitations due to the work injury. This finding is based on the testimony of Petitioner, the medical records and the opinion of Dr. Marra.

(J) Were the medical services that were provided to Petitioner reasonable and necessary?

Petitioner submitted the following vocational rehabilitation and medical expenses related to his right shoulder.

PX 4 The Eval Center - $1,487.50
PX 5 Midwest Orthopaedics at Rush - $509.00

Respondent indicated that PX 5 had been paid at the time of tender and on the Request For Hearing Form (RFH) and disputed reasonableness, necessity and causation as to PX 4 on the RFH. (Arb. X 1)

The Arbitrator finds that the Eval Center bill is for services that were causally related to the injury, and the services are reasonable and necessary. Respondent did not retain a provider of rehabilitation services for Petitioner after the same was requested in August of 2021 and failed to comply with Rule 9110.10 by filing a Voc Rehab Plan after Petitioner had been off work more than 365 days and it was apparent that he was not going to return to his trade as a plumber. Accordingly, the Eval Center bill is awarded ($1,487.50).

As to the Midwest Orthopaedics bill, RX 33 shows that the bill for the date of service of January 4, 2022 was paid by Respondent. The bill for the services of October 6, 2020 was paid by Blue Cross and Petitioner's co-pay of $30.00, per RX 33. Thus the $166.00 MOR bill for date of service of October 6, 2020 is awarded.

Accordingly, Respondent shall pay medical expenses of $1,653.50, in accordance with the Medical Fee Schedule and pursuant to §§ 8(a) and 8.2 of the Act.

(K) What amount of compensation is due for Temporary Total Disability?

The issue of TTD up through April 10, 2018 has been resolved by the law of the case and is not considered at this time.

Since the April 10, 2018 hearing, Petitioner has continued to treat with Dr. Nicholson. Petitioner was instructed to return for evaluation in June of 2022, and has not been discharged from care. As Petitioner has chosen to pursue a PPD award as of April 29, 2022; that is the day that he is found to be at MMI.

Respondent terminated Temporary Total Disability benefits on October 6, 2021. (RX 20).

Respondent claims Petitioner was offered a watchman position. In fact, Petitioner was offered to apply for the position. A plain reading of the bid announcement shows Petitioner was not eligible to bid for the position, given the fact that he was not a member of Local Union 1092. Also, Petitioner the bidding process for the job had closed some 5 months prior. Additionally, Respondent's Vaccination policy precludes Petitioner's employment with the City of Chicago. It is Respondent that failed to follow its vocational counselor's recommendations for computer training and vocational assistance, so that Petitioner could be assisted in being placed in some suitable employment.

Any suggestion that Petitioner failed to cooperate with job placement efforts is without merit. Respondent's tender of the watchman job was inept, at best. Petitioner should have been told that the job was still open for him and that Respondent would make accommodations, if necessary, if that was in fact the case. Instead, Respondent offered a position that had been closed out to a person who could not apply for the job.

Petitioner continued treatment with Dr. Nicholson and was excused off work by him through the date of the Arbitration hearings.

As to the amount of indemnity benefits paid by Respondent for which it is entitled to a credit against TTD awarded, after considering RX 29 and RX 34, the Arbitrator finds that Respondent is entitled to a credit of $266,947.04. RX 29 contains 128 pages of check copies. Pages 1 – 46 are checks from 5/31/2019 through 12/23/2020 and total $83,582.44, which should be credited to this award. Pages 47 – 48 are award payment checks from the prior §19(b) trial and are not properly credited to the award herein. Pages 49 – 79 are checks paid prior to the 19(b) proceeding and are not properly credited to the award herein. Pages 80 – 128 are checks from 12/11/2020 through 2/23/2022, totaling $158,077.67 and are properly credited to the award. RX 34 is checks from 10/29/2019 through March 21, 2022, totaling $25,286.93 and is properly credited against the award herein.

Thus, the total amount of Respondent's credit for indemnity benefits paid related to the current matters in dispute in this case is $266,947.04.

Considering all of the evidence adduced regarding the current matters in dispute in this case, Respondent shall pay Petitioner TTD benefits of $1,255.32/week for 211-2/7 weeks, commencing April 11, 2018 through April 28, 2022.

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

At trial, Petitioner claimed he is permanently and totally disabled from work. He did not make an alternative election to make a claim under §8(d)2 of the Act.

Petitioner relies upon the testimony of Lisa Byrne, the medical records reflecting shoulder arthroplasty and the need for a reverse shoulder replacement, his work restrictions, Petitioner's advanced age of 66, his lack of high school diploma, lack of computer training, and limited work experience, in claiming a PTD award.

An employee is permanently and totally disabled when he is unable to make some contribution to the work force sufficient to justify the payment of wages. Federal Marine Terminals, Inc. v. Illinois Workers' Comp. Comm., No. 1-06-1738WC, 2007 WL 675300 (1st Dist. 2007). An employee need not be reduced to total physical incapacity. Instead, he need only show that he is incapable of performing services except those for which there is no reasonable stable market. Age, training, education and experience are all relevant to determine employment potential. Additionally, medical opinions and the results of a diligent but unsuccessful job search are relevant to the determination. Once an employee initially established that he is so handicapped that he will not be employed regularly in any well-known branch of the labor market, then the burden shifts to the employer to show that some kind of suitable work is regularly and continuously available to him. Id.

In this case, after considering the testimony of the vocational experts, the medical records and opinions of Drs. Nicholson and Marra and the surveillance video, the Arbitrator believes that Petitioner should have attempted the watchman job if Respondent had competently offered it to him. See: Patrick A. Wilkison v. City of Chicago, Dept. of Water, 18 IWCC 0053. The Arbitrator finds the opinions of Julie Bose as to the availability of some position for Petitioner to work at and meaningfully contribute to society as a plumbing supply clerk or sales associate to be persuasive. His 20 plus years experience as a plumber for Respondent and almost 50 years experience as a Union Plumber qualify him for such a job. The median wage for such a position is $18.80 per hour, per Ms. Bose. There are jobs available for Petitioner given his age, education, injury and work experience. The video evidence shows that Petitioner is capable of using his right arm for yard tasks. He is not permanently disabled from a medical standpoint or from a vocational standpoint.

The current wage for a Journeyman Plumber working for Respondent is $52.80 per hour.

In the absence of an election to pursue a PPD claim under §8(d)2 of the Act, if Petitioner proves that he has suffered an injury which incapacitates him from performing his usual and customary occupation and has suffered an impairment of earning capacity, the Commission shall award a §8(d)1 wage loss. Gallianetti v. Industrial Comm'n, 315 Ill. App. 3d 721, 728-729 (2000).

The Arbitrator will use the median wage in some suitable employment ($18.80 per hour, per Bose) in calculating a wage loss award. The wage for a watchman is not used because Respondent did not persuade the Arbitrator that the job existed for Petitioner.

The Arbitrator calculates the §8(d)1 benefit to be $906.67, as follows: Journeyman wage: $2,112.00 less median wage ($752.00) = $1,360.00 wage differential, times 66-2/3% = $906.67.

Accordingly, Respondent shall pay Petitioner permanent partial disability benefits, commencing April 29, 2022 of $906.67 per week for the duration of the disability, until the later of when Petitioner reaches age 67 or 5 years from the date this award becomes final, because the injuries sustained caused a loss of earnings, as provided in Section 8(d)1 of the Act.

(M) Should penalties or fees be imposed upon Respondent?

Section 19(k) of the Illinois Workers' Compensation Act states that "(i)n cases where there has been any unreasonable or intentional underpayment of compensation, or proceedings have been instituted or carried on by the one liable to pay the compensation, which do not present a real controversy, but are merely frivolous or for delay, then the Commission may award compensation additional to that otherwise payable under this Act equal to 50% of the amount payable at the time of such award.

Section 19(l) of the Act states that "(i)f the employee has made written demand for payment of benefits under Section 8(a) or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay. In case the employer or his or her insurance carrier shall without good and just cause fail, neglect, refuse or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30.00 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed $10,000.00. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay.

Section 16 of the Act states that "(w)henever the Commission shall find that the employer, his or her agent, service company or insurance carrier has been guilty of delay or unfairness towards an employee in the adjustment, settlement or payment of benefits due such employee within the purview of paragraph (c) of Section 4 of this Act; or has been guilty of unreasonable or vexatious delay, intentional under-payment of compensation benefits, or has engaged in frivolous defenses which do not present a real controversy, within the purview of the provisions of paragraph (k) of Section 19 of this Act, the Commission may assess all or any part of the attorney's fees and costs against such employer and his or her insurance carrier.

Respondent's termination of benefits after the patently defective tender of the watchman job is found to not be in good faith. The evidence adduced regarding the payment of indemnity benefits shows that none are owed at the time of trial. Accordingly, the Arbitrator declines to award §19(k) and §16 penalties and fees.

Petitioner's claim for §19(l) penalties is denied. The Record does not contain a written demand for payment of benefits under Section 8(a) or Section 8(b).

(O) Vocational Rehabilitation

Given the award herein pursuant to §8(d)1, there is no need for further vocational services for Petitioner.